



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 271 OF 2017**

**GAZEBO INDUSTRIES LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**RIFT VALLEY RAILWAYS (K) LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**EAST AFRICAN RAIL AND HANDLING**

**LOGISTICS LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**KENYA RAILWAYS CORPORATION.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This Ruling relates to the Notice of Motion Application dated 19<sup>th</sup> September 2017, brought under the provisions of Article 159 of the Constitution of Kenya, 2010, Section 80 of the Civil Procedure Act, Order 45 Rule 1, Order 40 Rule 1, Order 36, Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 and all other enabling provisions of law and supported by the grounds thereon and the Affidavit of the same date sworn by Sushil Kapoor.

2. The Applicant is seeking for orders as here below reproduced;-

*a) A temporary injunction do issue restraining the Defendants whether by their servants or agents or employees or Advocates or otherwise from removing, transferring, disposing, charging or any dealing with the 50 Traction Motors Armature with shaft and 12000 sleepers supplied to the 1<sup>st</sup> Defendant pursuant to purchase orders Nos. 5500001771, 5500001806, 5500001801 and 5500001799 on diverse dates between the years 2015 and 2017 pending the hearing and determination of this Application;*

*b) That this court review the Ruling and order it delivered on 16<sup>th</sup> August 2017 and allow summary judgment against the 1<sup>st</sup> Defendant for the decretal sum of USD 530,307,90 and USD 120,012,34 being the principal debt amount and interest amount accrued at interest rate of 0.5% per month accrued as at 31<sup>st</sup> May, 2017 respectively plus further interest and the cost of the suit herein;*

*c) That in the alternative to prayer (c) this court grant summary judgment against the 1<sup>st</sup>*

*Defendant for the decretal sum of USD 530 307,90 and USD 120,012,34 being the principal debt amount and interest amount accrued at interest rate of 0.5% per month accrued as at 31<sup>st</sup> May 2017 respectively plus further interest and the cost of the suit herein;*

*d) That this Court allow the joinder of East African Rail and Handling Logistics Limited and Kenya Railways Corporation as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively in this suit;*

*e) That upon grant of summary judgment, the court allows for preliminary decree against the 1<sup>st</sup> Defendant and attachment before taxation of the 50 Traction Motors Armature with shaft and 12000 sleepers currently in the possession of the 1<sup>st</sup>, 2<sup>nd</sup> and/or 3<sup>rd</sup> Defendants.*

*f) That the costs of this Application be provided for.*

3. Before I delve into the merits of this Application, I wish to make reference to a ruling which the Court delivered on 9<sup>th</sup> March 2018, in relation to this subject Application. At paragraphs 6 and 7 thereof, the Court observed as follows; “

*“ (6) I have perused the Court record and I find that it is not clear as to whether the subject Application of 19<sup>th</sup> September 2017 was served upon all the parties who are and would be affected by any orders the Court may issue. Apparently, the record reveals that, when the Application was filed on 20<sup>th</sup> September 2017, the Court ordered that it be served for directions on 22<sup>nd</sup> September 2017. On the said date, the Applicants were absent. The Court then ordered they be notified to appear to show cause why the Application should not be dismissed.*

*(7) However the Applicant appeared and the 1<sup>st</sup> Defendant/Respondent sought for 14 days to respond to the Application. There was no objection thereto. By consent of the Parties, the Respondent was granted the 14 days as prayed and the Applicant 14 days within which to file and serve their submissions on the Application with a similar period given to the Respondent. The confirmation of compliance was set for 3<sup>rd</sup> November 2017.”*

4. In the said ruling, the Court observed that the Applicant had filed another Application dated 28<sup>th</sup> September 2017, seeking for similar orders as the Application herein, and that was before the current Application was determined. In order to deal with the Applications effectively, the Court made the following orders under paragraph 11 of the Ruling.

*“(11) I therefore order that, all parties be summoned to appear before the Court on 8<sup>th</sup> March 2017 for directions in the following matters;*

*a) Which of the Applications herein should the court consider first and whether they concur that the Application dated 28<sup>th</sup> September 2017 be stayed;*

*b) Whether the parties are prioritizing the hearing of the Application for joinder of the intended Defendants;*

*c) Whether any of the other parties filed submissions on any of the Applications.”*

5. Upon delivery of the Ruling on 9<sup>th</sup> March 2018 in the absence of the Counsel for the Plaintiff/Applicant and the 3<sup>rd</sup> Defendant/Respondent, the Court directed that the Notice of Motion Application dated 19<sup>th</sup> September 2017 will proceed for hearing and stayed the Application dated 28<sup>th</sup> September 2017. The Respondents were given three days within which to respond to the Application. The Applicant was given three days within which to file their submissions and the Respondents were given time to file their response submissions on or before 20<sup>th</sup> March 2018 and the matter was set for mention for directions.

6. On 20<sup>th</sup> March 2018, the Learned Counsel Mr. Kanjama for the Plaintiff/Applicant who was the only Counsel in court informed the Court that the Defendants had been served but were absent.
7. I have seen an Affidavit of service dated 20<sup>th</sup> March 2018 and filed on the same date, which indicates that the Defendants were notified of the hearing of the matter on 20<sup>th</sup> March 2018 but did not attend court. The Court then ordered that the matter be set down for Ruling on 8<sup>th</sup> May 2018. In the given circumstance, the Application is basically unopposed.
8. I have considered the prayers in the Application, the grounds, the Affidavit and the submissions in support of the Application and I find, as regards the prayer for a temporary injunction, the Plaintiff avers that it supplied to the 1<sup>st</sup> Defendant/Respondent 50 Traction motors and 12000 sleepers valued at USD 530,307.90 which goods have not been paid for. That on 31<sup>st</sup> July 2017, the 1<sup>st</sup> Defendant concession with the 3<sup>rd</sup> Defendant was terminated paving way for the transfer of the assets in the possession of the former to the latter, hence the need for the temporal injunction order sought.
9. The law on injunction is well settled and in particular by the principals laid down in the case of; **Giella vs Cassman Brown Company Ltd (1973) EA 358**, where it was held that the applicant must show a prima facie case with a probability of success and that if the injunction is not granted the applicant will suffer irreparable injury which cannot be adequately compensated by an Award of damages. That if the Court is in doubt, it will decide the Application on the balance of convenience.
10. I have considered the averments in the Affidavit in support of the Application and I find that, the deponent averred that at the heart of the Plaintiff's claim against the 1<sup>st</sup> Defendant is a claim for USD 650,319.34 plus interest in respect of the supply of 50 Traction Motors Armature with shaft and 12,000 sleepers. The aforesaid goods were supplied pursuant to *purchase orders Nos. 5500001771, 5500001806, 5500001801 and 5500001799*. The 1<sup>st</sup> Defendant has been in possession of the said supplies and has also admitted owing the debt amount to the tune of USD 530,307.00 excluding interest. In the absence of any rebuttal evidence, I find a prima facie case has been established.
11. I shall consider the next two prayers sought in the alternative, namely; review of the ruling delivered on 16<sup>th</sup> August 2017, and grant of summary judgment against the 1<sup>st</sup> Defendant for the decretal sum of USD 530,307,90 and USD 120,012,34 being the principal debt amount and accrued interest.
12. I have considered the submissions on the same and the provisions of section 80 of the Civil Procedure Act, and order 45 rule 1 of the Civil Procedure Rules 2010, and find that any person aggrieved by an order of the Court may apply for review thereof on discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order.
13. The Applicant has referred the Court to paragraph 53 of the ruling where the Court held that; the Plaintiff should have served the 1<sup>st</sup> Defendant with summons to enter appearance to enable it file a defence before summary judgment can be entered. The Applicant argues that, summary judgment can be granted in clear cases where there is no proper defence to raise a triable issue. That the 1<sup>st</sup> Defendant had not filed the defence at the time of the Ruling and thus the circumstances were ripe for the grant of a summary judgment order as per the provisions of Order 36 Rule 1 of the Civil Procedure Rules. Reference was made to the case of; **Commercial Bank of Africa Limited vs David Njau Nduati (2013) eKLR**, where the Court reviewed its earlier ruling dismissing the Application for summary judgment on account of having been filed before the time of filing the defence had lapsed.
14. The Applicant further made reference to Order 36 Rule 1 of the Civil Procedure Rules and argued that, the same provides for grant of summary judgment in a liquidated demand with or without interest, or

where the Defendant has appeared and not filed the defence. Reference was to the case of; Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) ECLR where the Madan JA (as then was) adopted the decision of; Gupta vs Continental Builders Ltd (1976-80) IKLR 809 and stated

*“if a defendant is able to raise a prima facie triable issue, he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the Plaintiff, it is the duty of the Court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a Plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily.”*

15. The Applicant submitted that after filing the suit herein, the 1<sup>st</sup> Defendant admitted the indebtedness to the Plaintiff for the supplied goods. The 1<sup>st</sup> Defendant was served with summons to enter appearance on 6<sup>th</sup> September 2017, but they have neither served a defence to the Plaintiff, a clear indication that there are no proper issues that should go for trial.

16. I have considered the two issues under consideration and I find that indeed the Defendants have not filed any defence upon service of the Plaint and summons to enter appearance. When served with a Notice of Motion Application dated 28<sup>th</sup> June 2017, the Defendant stated at paragraph 11 as follows;

*“I am aware that on 22<sup>nd</sup> June 2017 the Defendant’s Advocates on record wrote to the Plaintiff’s Advocates and among others communicated the Defendant’s proposal purely on a without prejudice to settle the principal amount of USD 560,257.00 due to the Plaintiff by way of monthly installments of USD 30,000 with effect from 1<sup>st</sup> July 2017. I have seen the letter to that effect annexed to the Affidavit in reply to the said Application at pages 22 to 23.”*

17. As already stated, there is no defence to the claim herein and a perusal of the Plaintiff’s list of documents in support of the suit reveals purchase order No. 5500001771 at pages 22 to 24 and an email confirming receipt of goods for in the said purchase order No. 5500001771 at pages 27 and 28 of the documents. The purchase order No. 5500001806 is at pages 44 to 47. The purchase order No. 5500001799 is at pages 108 to 111. Invoice for 20% payment against receipt of goods for purchase order No. 5500001771 is at page 26. Invoice for 23 Traction is at page 35 to 36, and several emails forwarding proforma invoice and/or requesting for payments. Finally statements of outstanding payments are found at page 142 to 147 with a demand letter at page 208 to 209.

18. All these evidence has not been rebutted. I therefore find that the Applicant has made up a good case for entry of summary judgment in the sum of USD 530 307.90. The Applicant prays of interest of USD 120,012.34 that has accrued on the debt as at 31<sup>st</sup> May 2017. This claim is based on clause 10.1 of the Supply agreement dated 4<sup>th</sup> June 2015 executed by the parties herein where it is stated that;

*“any delay against delivery or payment as against the timeline set out herein which delay is not caused by a Force Majeure Event, will attract a penalty of 0.05% (point zero five percent) of the cost of delayed units or amounts due in delay up to the effective delivery date.”*

19. As aforesaid, a demand was made for a principal sum of USD 530,307.00 on 15<sup>th</sup> June 2017, and no payment has been received. In that regard this sum will attract a penalty of 0.05% from that date until payment in full.

20. I do find that the evidence adduced supports a case for grant of summary judgment against the 1<sup>st</sup> Defendant as prayed for under paragraph (d) of the Notice of the Application herein. In that regard prayer (c) is not granted.

21. The Applicant has sought under prayer (f) upon entry of summary judgment, upon grant of summary judgment, the court allows for preliminary decree against the 1<sup>st</sup> Defendant and attachment before

taxation of the 50 Traction Motors Armature with shaft and 12000 sleepers currently in the possession of the 1<sup>st</sup>, 2<sup>nd</sup> and/or 3<sup>rd</sup> Defendants. In view of the fact that the concession between the 1<sup>st</sup> and 3<sup>rd</sup> Defendants has been terminated, it is only in order that the orders sought hereinabove be granted, and I hereby grant the same.

22. Finally the Applicant has sought to enjoin two parties, namely; East African Railway and Handling Logistics Limited and Kenya Railways Company. Reference was made to provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, which allows that a name of a party who ought to have been enjoined in a suit and who was not joined and whose presence is necessary for just determination of the issues in the suit, should be joined. Reference was also made to the case of; Lucy Nungari Ngigi & 120 Others vs National Bank of Kenya Limited (2015) eKLR and the case of; JMK vs MWM & Another (2015) eKLR.

23. It was submitted that; East African Railway and Handling Logistics Limited, is a sister and/or related Company of the 1<sup>st</sup> Defendant, and is a necessary party to this proceedings. That subsequent to the order of the Honourable Court vacating an earlier order of a Garnishee Order Nisi against the bank accounts of the 1<sup>st</sup> Defendant, a colossal sums of money allegedly was irregularly channeled to East African Rail and Handling Logistics Limited Bank account, as part of a Scheme to dissipate the assets of the 1<sup>st</sup> Defendant so that the Plaintiff finds no assets to enforce against in the likely event that it is successful in its claim. Thus the East African Rail and Handling Logistics Limited has been unjustly enriched at the expense of the Plaintiff's claim against the 1<sup>st</sup> Defendant.

24. The Plaintiff/Applicant submitted that as regards Kenya Railways Corporation, while the present suit was pending before the Court, the concession between the 1<sup>st</sup> and it was terminated therefore the Traction motors and Sleepers currently in possession of the 3<sup>rd</sup> Defendant are held in trust for the Plaintiff and should be returned to it as its true owner. Reference was made to the case of; Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri (2014) KLR where the Court relied on the dictum of Lord Denning in Hussey vs Palmer (1972) 3 All ER 744, that a constructive trust should be implied whenever:

*“The conscience of humanity dictates that constructive trust and propriety estoppel shall apply in such cases. Lord Denning in Hussey vs Palmer (1972) 3 All ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.*

25. That the Court in International Air Association & Another vs Akarim Agencies Company Limited & 2 Others (2014) EKLK in reference to tracing of assets stated as follows:-

*“Trust property or other property, or property in to which it has been converted, may so far as is capable of being identified or disentangled, be followed, traced and recovered. (see Halsbury's Laws of England Fourth Edition Vol 16(2) paragraph 861. That remedy was designed by and has its origin in equity aimed at preventing abuse of the fiduciary authority by trustee. But, properly understood, are remedies within the law of property.”*

26. In my considered opinion the Parties required to be joined as parties herein are necessary but at the stage of execution. I say so because the final judgment has been entered in this matter under Order 36 Rule 1 of the Civil Procedure Rules, basically bring the matter between the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant to an end. Therefore there are no pending issues for determination and the joining of these parties will serve no interest of justice

27. Be that as it were, the Plaintiff/Applicant will not suffer any prejudice if the joinder is denied as they can still pursue the 3<sup>rd</sup> parties to recover any assets held in trust or irregularly acquired.

28. Finally, in view of the fact that the court has granted final orders herein, the prayer seeking for a temporary injunction restraining the Defendants whether by their servants or agents or employees or Advocates or otherwise from removing, transferring, disposing, charging or any dealing with the 50 Traction Motors Armature with shaft and 12000 sleepers supplied to the 1<sup>st</sup> Defendant pursuant to

purchase orders Nos. 5500001771, 5500001806, 5500001801 and 5500001799 on diverse dates between the years 2015 and 2017 pending the hearing and determination of this Application has been overtaken by events.

29. The upshot of all this is that, I allow the Application in terms of prayers (d), (f) and (g). The Plaintiff shall also have the costs of the suit.

30. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 8<sup>th</sup> May, 2018 at Nairobi.

**G. L NZIOKA**

**JUDGE**

In the presence of:

Mr. Simiyu for Mr. Kanjama for the Plaintiff/Applicant

Mr. Kiche for the 1<sup>st</sup> Defendant/Respondent

No Appearance for the 2<sup>nd</sup> Defendant/Respondent

Mr. Kiche for Mr. Angwara for the 3<sup>rd</sup> Defendant/Respondent

Lang'at .....Court Assistant