



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

HCCC NO. 81 OF 2018

REGIONAL BARGAINS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

HUNKAR TRADING CO. LTD.....DEFENDANT/RESPONDENT

RULING

1. The ruling relates to a preliminary objection filed by the Defendant against a chamber summons application dated 19th March 2018, filed by the Plaintiff (herein "the Applicant") seeking for orders that:-

(a) The Honourable Court be pleased to issue an order of injunction directing the Defendant to deliver to the Plaintiff 936 pieces of 6 Kgs and 3,969 pieces of 13 Kgs Liquefied Gas Cylinders with valves pending reference to, hearing and final determination thereof of arbitral proceedings and dispute between the Plaintiff and the Defendant;

(b) That the costs of this application be awarded to the Plaintiffs/Applicants.

2. Upon service of the said application, the Defendant filed a Replying affidavit to the subject preliminary objection stating that,

(a) the Court has no jurisdiction under Section 7 of the Arbitration Act, Cap 49 of the Laws of Kenya, to grant the mandatory order sought in the suit and the application, in that, the order sought is final in nature. the jurisdiction of the Court under section 7 is strictly limited to granting an interim relief pending arbitration;

(b) the suit and the application are fatally defective, in that Monica Ngugi who has purported to swear the Verifying Affidavit sworn on 12th February, in support of the plaint and the supporting affidavit, sworn on 19th March 2018, in support of the application is not properly authorized by the plaintiff's company to swear the said affidavits on its behalf, which is a breach of the express provisions of Order 3 rule 2(a) and order 4 rule 1(2) and;

(c) the purported resolution and authority to swear affidavits dated February 2018, is issued by the directors of Thola Glass Limited, who is a stranger in these proceedings and not the Plaintiff.

3. The background facts of the matter, as pleaded by the Plaintiff are that, by an agreement dated 12th November 2016, the parties herein agreed that the Plaintiff would supply the Defendant with empty Liquefied Petroleum Gas Cylinders, and payments were to be made within ninety (90) days thereafter. That the Plaintiff delivered the goods and thereafter, the Defendant issued twenty one (21) weekly cheques in its favour towards payment of the goods.

4. However, the Defendant issued stop instructions to its bankers and the cheques were not honoured. At that time, the total amount owing was a sum of Kshs. 29,761,602.63, which the Defendant has neglected and/or failed to pay despite a demand for the same. It was averred that clause 10 of the agreement for procurement provides for arbitration as the mode of dispute resolution mechanism. Hence the prayers sought for herein.

5. The parties disposed of the preliminary objection by filing submissions thereto. The Defendant submitted that a preliminary objection as defined in the case of; *Mukisa Biscuit Company vs Westend Distributors Limited (1969) EA 696*, is a pure point of law, which if argued successfully has the effect of disposing the entire suit and/or an application in a summary manner, without the necessity of going on trial. That, the wording of Section 7 of the Arbitration Act No. 4 of 1995, clearly indicates that, the jurisdiction of the Court is strictly limited to granting an interim relief only, pending the hearing of the arbitration proceedings and not a final order and that the nature of such a

mandatory order would ordinarily be a restrictive injunction issued on very limited and deserving occasions only where the applicant raises very special and compelling circumstances for granting the order.

6. It was submitted that the Plaintiff herein seeks for the same mandatory order in the Plaintiff filed on 12th February 2018 as sought for in the chamber summons application dated 19th March 2018. Further, the Plaintiff has not laid any basis or special reasons and/or circumstances explaining why it deserves the mandatory order of injunction before the main arbitral proceedings have been heard and determined. That the agreement for procurement of goods dated 12th November 2016, does not state anywhere that the Plaintiff is entitled to the return of the goods.

7. It was reiterated that the Verifying affidavit in support of the plaint was sworn on 12th February 2018, by one Monica Ngugi, who states under paragraph 1 thereof that, she is the Financial Manager of the Plaintiff's Company and therefore duly authorized to swear the said affidavit. She also signed the supporting affidavit sworn on 19th March 2018 in of the application, which was, yet the Plaintiff is dated 12th February 2017, a year earlier.

8. That as the authority to swear the affidavit is improper, effectively therefore, it means that Monica Juma did not have any written authority from the Plaintiff to swear both the Verifying affidavit and the supporting affidavit, as falsely purported in the said affidavits. As such, the Plaintiff has breached the express and mandatory provisions of Order 3 Rule 2(a) and Order 4 Rule 1(2) and (4) of the Civil Procedure Rules, which states as follows:-

“Order 3 Rule 2(a)

“All suits filed under rule 1(1) including suits against the government, except small claims shall be accompanied by;

(a) The Affidavit referred to under Order 4 rule 1(2) 4(2) The Plaintiff shall be accompanied by an Affidavit sworn by the Plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above 4(4) where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the Company duly authorized under the seal of the Company to do so.”

9. The Defendant relied on the cases of;

(a) Mukisa Biscuit Company vs Westend Distributors Limited (1969) EA 696;

(b) Commerce Bank Ltd vs Paradiso Court Ltd & Others HCCC No. 1735 of 2000;

(c) Josephat Kipchirchir Sigilai vs Gotab Sanik Enterprises Ltd & Others HCCC No. 146 of 2002; and

(d) Geom Holdings (K) Limited & Others vs Co-operative Merchants Bank Limited & Others HCCC No. 85 of 2004

10. However, the Plaintiff did not respond to the preliminary objection either by filing any replying affidavit or grounds of opposition or to the submissions filed by the Defendant although served with the Preliminary objection. The Plaintiff only tendered one case law, the case of; The Presbyterian Foundation vs The Presbyterian Clerk, Presbyterian Church of East Africa Limited vs East African Partnership and Another, but the Learned Counsel Mr. Maloba, appearing for the Plaintiff did not expound on the said authority.

15. I have considered the preliminary objection and the arguments in support thereof, and I find that, as it were, it is unopposed in view of the fact that, there was basically no response thereto. However, considering it on merit, I find that the prayers in the Plaintiff and in the Chamber summons application are the same, in so far as they are seeking for the order of mandatory injunction directing the Defendant to release the subject Gas Cylinders.

16. An injunction is effectively an order restraining a party to which it is directed, from taking particular act or requiring it to take a particular course of action. A mandatory injunction compels a party to which it is directed to carry out a specific obligation or perform a specified act. The Court recognized in the case of; Redland Bricks Ltd v Morris [1970] AC 652, that a mandatory injunction imposes additional degree of hardship or expense to the Defendant and observed as follows:-

“It is a jurisdiction to (be) exercised sparingly, and with caution but, in the proper case, unhesitatingly.”

16. Similarly, in the case of; AIB v. Diamond & Ors [2011] IEHC 505, the Court noted that, cases involving mandatory interlocutory injunctions require a higher level of likelihood of the Applicant succeeding at the trial.

17. In the light of these authorities, and the other authorities cited herein, I agree with the Defendant that, the grant of the prayers in the subject application will finalize the case at an interlocutory stage. All other issues raised as to the legal authority to one Monica Juma to depose the averments in the affidavits are matters to be heard during the hearing of the application or the main suit.

16. In that case, I do not even have to consider these other grounds. Similarly, the application is stated to have been brought under the provisions of Section 7 of the Arbitration Act. These provisions do not provide for grant of a mandatory injunction and therefore, the Chamber summons application dated 19th March 2018, cannot be entertained under these provisions. The Court cannot grant the prayers

sought for under Section B and C. Therefore the Preliminary objection is allowed with costs to the Defendant.

17. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 19th day of November 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Ms. Khaminwa holding brief for Maloba for the Plaintiff

No appearance for the Defendant

DennisCourt Assistant