REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 596 OF 2012

TRICON INTERNATIONAL LIMITED.....PLAINTIFF

- VERSUS -

OIL PALM UGANDA LIMITED.....DEFENDANT

RULING

1. The defendant has asked the court to order that the sum of **USD 100,000** which it had deposited in court, be released to it.

2. The court was told that the continued withholding of that sum of money from the defendant was exerting an undue burden on the defendant.

3. The defendant said that it was suffering under tremendous liquidity pressure, and that its business operations were almost crippled.

4. As the defendant had already paid to the plaintiff the sum of **USD 31,627.87,** which the defendant deems to constitute the settlement of the case, it was the defendant's contention that there was no basis for continuing to have the deposit of **USD 100,000.**

5. In response to the application, the plaintiff pointed out that the deposit in issue was made on the strength of a consent order. Therefore, by seeking a release of the funds which constitute the deposit, the defendant was actually seeking to set aside or a variation of the consent order.

6. I have verified from the court records that indeed the parties recorded a consent on 21st September 2012. Therefore, it is correct to state that the application for the release of the funds which were deposited in court, pursuant to the consent order, would be tantamount to the variation of the said consent order.

7. The relevant portion of that consent reads as follows;

> **"2. US $ 100,000.00 be deposited into court by the Defendant as part of the claim for damages by the plaintiff, to be determined".**

8. Clearly, the reason why the defendant was depositing that amount of money was that it would a part of damages claimed by the plaintiff. The parties expressly indicated that the said damages were to be determined.

9. A reading of the Plaint reveals that the plaintiff claimed the following 3 sets of payments;

i. **USD 60,311.33 being the total value of unpaid invoices;**

ii. **USD 207,000 being the total resultant losses occasioned by the unilateral and unlawful cancellation of the freight agreement; and**

iii. **USD 40,000 being the costs of recovery and transportation.**

10. In the Defence it was stated that the only sum payable to the plaintiff was **USD 30,000.** Therefore, although the sum of **USD 100,000** had been deposited in court, the defendant pointed out that that did not constitute an acknowledgement that the plaintiff was owed that amount of money.

11. In my considered view, the application by the defendant is a re-statement of the defence. The said defence was filed on 21st May 2013, which was well after the parties had recorded the consent order on 21st September 2012.

12. The parties have made attempts to try and find an amicable solution, but so far the attempts have been unsuccessful.

13. In the circumstances, it was presumptuous of the defendant to conclude that its assessment be accepted as a reflection of the correct position even though the court had not yet made the determination which the parties contemplated when they recorded the consent.

14. The parties had already taken steps to make the case ready for trial and the case was scheduled for hearing on 26th May 2016. However, on that date, the parties informed the court that they were holding negotiations.

15. By preparing for trial, the parties were indirectly sending out the message that there were issues which they believed to warrant determination after the court had received and considered evidence from them.

16. In the circumstances, one of the parties cannot abrogate to itself the authority of determining the issues in dispute.

17. By asserting that the plaintiff was only entitled to **USD 31,625.87,** the defendant was purporting to exercise an authority which it did not have.

18. I find that the defendant has not satisfied the requirements which would lead to the setting aside of the consent. Key among the said requirements is that there are reasons which could entitle a party to set aside a contract, such as fraud or material misrepresentation.

19. In the circumstances, there is no merit in the application dated 14th November 2016. It is therefore dismissed, with costs to the plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 20th **day** of February 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Ouma for Kiche for the Plaintiff

Wamae for the Defendant

Collins Odhiambo – Court clerk.