



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 127 OF 2016**

**PRIME STEEL MILLS LIMITED.....PLAINTFF**

**VERSUS -**

**KITMIN HOLDINGS LIMITED..... DEFENDANT**

**RULING**

1. The application before me is for an interim injunction to restrain the defendant from taking out Winding Up proceedings against the plaintiff.
2. The application also seeks to compel the defendant to collect the balance of the Iron Ore Fines, pursuant to the Local Purchase Order dated 18<sup>th</sup> March 2016.
3. In the alternative to collecting the Iron Ore Fines, the plaintiff asked the court to order the defendant to pay storage charges, commencing on the 7<sup>th</sup> day after this suit was instituted.
4. Thirdly, the plaintiff asked the court to strike out the Statutory Demand Notice dated 1<sup>st</sup> April 2016. The said Notice indicated that unless the plaintiff paid to the defendant the sum of Kshs. 18,275,789.81 within 21 days, the defendant would institute and advertise winding-up proceedings against the plaintiff.
5. It is the plaintiff's case that it was disputing the alleged debt. Secondly, the defendant is accused of failing to collect from the plaintiff the Iron Ore which the defendant had ordered for.
6. In my understanding of the plaintiff's case, if the defendant were to collect the balance of the Iron Ore from the plaintiff, that would account for Kshs. 13,090, 256.08, out of the claim of Kshs. 18,275,789.81.
7. Assuming that the uncollected Iron Ore accounted for the sum of Kshs. 13,090,256.08, the balance would be Kshs. 5,185,533.73, by my calculations.
8. The plaintiff also says that it paid to **TRINITY ACE LOGISTICS** the sum of Kshs. 6,438,838/-, for and on behalf of the defendant.
9. If the plaintiff's assertions were correct, it would imply that the plaintiff did not owe the defendant any money which could be a legitimate foundation for a Winding Up Notice.
10. In regard to the Mandatory Injunction to compel the defendant to collect the Iron Ore, the plaintiff submitted that the defendant's failure to collect the Iron Ore which it had ordered for, was occasioning the

plaintiff to suffer great inconvenience and expense, because the plaintiff was obliged to pay storage charges for the materials.

11. But the defendant has expressly rejected the remaining Iron Ore because they say that it is of a poor quality. Therefore, it is the defendant's case that the value of the said materials cannot be used by the plaintiff to defray any portion of the money owed to the defendant.

12. In response to that reasoning, the plaintiff says that it was illogical for the defendant to complain about the quality of the material, yet the said material was, in the first instance, supplied by the defendant.

13. For as long as the defendant rejects the remaining Iron Ore, on account of its alleged poor quality, it would not be open to the plaintiff to apply the value of the said Iron Ore in its calculations, as if the defendant was obliged to receive it.

14. But there is a serious issue to be resolved between the parties. The issue appertains to whether or not the defendant was entitled to reject the Iron Ore, which the plaintiff asserts that it was the defendant who first supplied.

15. To my mind, the dispute relating to the sum of Kshs. 13,090,256.08 is based on a substantial ground. It is certainly not a flimsy or frivolous dispute, which the court could simply ignore.

16. My said finding is informed by the fact that the material which the defendant had initially received, and which was said to have been of poor quality, was used up, so that the ascertainment of its quality was not possible.

17. I have also taken into account the fact that this case embodies a claim by the plaintiff for compensation for financial loss amounting to Kshs. 304,557.805.34.

18. At present, the defendant has not yet lodged a defence to that claim. Therefore, the court cannot tell whether or not the defendant has an arguable defence to the claim.

19. If the plaintiff's claim were to succeed, it would be the defendant who would be indebted to the plaintiff, even if the defendant's current claim were to be upheld.

20. In the circumstances, as the parties were addressing the issues between themselves, I find that the statutory demand, which is the first step towards the commencement of the winding-up proceedings against the plaintiff, is premature. Accordingly, the said demand notice is struck out, so that it is deemed not to have been issued.

21. The defendant shall be restrained from taking any further steps towards the winding-up of the plaintiff, until this case is heard and determined or until the issues concerning the indebtedness of the plaintiff is conclusively determined; whichever comes earlier.

22. The determination of the issue can be through mediation, arbitration, litigation, consensus or any other lawful process.

23. The application for a mandatory injunction is denied. I find that it would be premature to compel the defendant to collect the balance of the iron ore when there were pending issues concerning the quality of the said material.

24. Thirdly, as the court is yet to determine whether or not the defendant can be compelled to collect the balance of the iron ore, the court cannot order the defendant to pay the storage charges.

25. Finally, as only a part of the application has been successful whilst the rest has failed, I order that each party will pay its own costs of the application dated 18<sup>th</sup> April 2016.

**DATED, SIGNED and DELIVERED at NAIROBI this 4<sup>th</sup> day of October 2016.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Wawire for A. Gichuhi for the Plaintiff

Mwangi for the Defendant

Collins Odhiambo – Court clerk