



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 427 OF 2015

GOOD BREAD KENYA LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

AMBROSE RACHIER, CHRISPINE OMONDI

& KENNEDY OTENIO (Sued as officials of

Gor Mahia Football Club) ::::::::::::::::::::::::::::::::::: 1ST DEFENDANT

UZURI FOODS LIMITED (Training as Ellitos)::: 2ND DEFENDANT

R U L I N G

1. The **Notice of Motion** application before the court is dated **8th September 2015** and is filed by the Plaintiff/Applicant. The application seeks an order that there be a temporary injunction restraining the Defendants, their agents or employees from selling loaves of bread bearing the logo and mark of Gor Mahia Bread pending the hearing and determination of this suit.
2. The application is based on the grounds set out therein and is supported by affidavit of **V.S. Reddy** sworn on **8th September 2015**.
3. In brief, the Applicant's case is that by the contract dated 24th February 2015 the 1st Defendant granted the Plaintiff the exclusive right to sell bread bearing the logo and a mark of **Gor Mahia Bread** at a fee of Kshs.1/= for every loaf of bread sold. The contract provided that in the event of its termination either party was to give a one month notice. The 1st Defendant is alleged to have failed to give the requisite notice. The contract provided that the 1st Defendant would not allow any competitor to sell bread bearing the logo and mark of Gor Mahia. The 1st Defendant allegedly breached the contract by allowing the 2nd Defendant to sell the bread bearing the said logo and mark. The Plaintiff's case is that it invested heavily in the business in form of machinery, promotion, vehicles, advertisement and if not restrained, the Plaintiff will suffer irreparable loss and damage. The Plaintiff alleges that the 1st Defendant has failed to honour the terms and conditions of the contract, and that it is in the interest of justice that the said Applicant is allowed.
4. The application is opposed by the 1st Defendant vide a replying affidavit of **Ambrose Rachier** sworn on **23rd September 2015** and grounds of opposition filed in court on 23rd September 2015.

5. The 2nd Defendant also filed a replying affidavit sworn by **Moses Ogetoo** on **23rd September 2015**, in which they state that they were not aware of the contract between the Plaintiff and the 1st Defendant. The 2nd Defendant has since stopped any engagement with the 1st Defendant on the sale of Elliots bread, and has asked to be struck out of these proceedings as they are willing to abide by orders of this court. This leaves the 1st Defendant as the only Respondent to this application.

6. The 1st Defendant's case is that the parties had a contract that provided at clause 5.4 that either party could terminate it by giving the other one month's notice without giving any reason for the termination, and that the 1st Defendant has given less than one month's notice to terminate it. The 1st Defendant has pointed out that the contract could be terminated forthwith by either party on other grounds and in particular Clause 5.2. The affidavit of Ambrose Rachier at paragraphs 7,8,9,10,11,12 and 13 sets out breaches of the contract by the Plaintiff falling within clause 5.2 of the agreement and which according to him entitled the 1st Defendant to forthwith terminate the contract. The breaches are not denied by the Plaintiff. The Defendant's case is that the Plaintiff has framed the question of whether or not there was a breach of the subject contract but does not address its breaches which have been adequately set out by the 1st Defendant. The 1st Defendant submitted that it was entitled to terminate the contract in the manner it did and the 16 days notice given was quite magnanimous. Further, the 1st Defendant's case is that even assuming that the 1st Defendant was in breach of the contract by terminating the same the way it did an order of a temporary injunction would not issue as a matter of course. Under Order 40 Rule 2 (2) relied on by the Plaintiff, the court may by order grant such injunction. The jurisdiction of the court to grant the injunction is purely discretionary and that is why the courts in Eastern Africa evolved and have stood by the principles in the celebrated case of **GIELLA –VS- CASSMAN BROWN**. An applicant for an interlocutory temporary injunction, in this case the Plaintiff must satisfy the Court that they have a *prima facie* case capable of succeeding; that damages would not be adequate remedy and or that the balance of convenience favoured the Applicant.

7. Parties filed written submissions which I have considered. The issues I raise for determination are the following:-

1. Whether the Defendant gave a proper notice terminating the contract.

2. Whether damages would be appropriate compensation for alleged breach of contract.

8. The Applicant's claim is based on alleged breach of contract when the 1st Defendant vide its letter dated 15th August 2015 but posted on 21st August 2015, and received by the Plaintiff on 28th August 2015, gave termination notice effective 31st August 2015. It is the Plaintiff's case that the said notice was irregular and unlawful and only gave the Plaintiff 3 days notice while the Plaintiff was entitled to one month notice. It is therefore the Plaintiff's case that if it were given the proper notice it would not have any problems with the alleged termination of contract.

9. I have carefully considered the contract made on 24th February 2015 between the Plaintiff and the 1st Defendant. The contract, under Clause 5 thereof provides three regimes of circumstances under which a termination may be effected. These are Clauses 5.2, 5.3, and 5.4. Under Clause 5.2 (a) the contract can be termination by written notice if:-

(a) "any sums due to the club in accordance with Clause 4 are not paid by the due date for payment or notification of the delay has not been communicated to the club."

Under Clause 5.3 (a), the contract can be terminated if –

(a) "The other party is on material breach of this agreement. . ."

Under Clause 5.4, the agreement may be terminated -

(b) "on one month's written notice to either party"

10. In its letter of termination dated 15th August 2015, the 1st Defendant provided a reason for terminating the contract, citing material breach of contract, implying that they were relying on Clause 5.3. (a). In the replying affidavit of Mr. Ambrose Rachier, the 1st Defendant cited Clause 5.2 which enables any party to terminate the contract if there are outstanding dues unpaid pursuant to Clause 4. Indeed, Mr. Rachier in his affidavit has annexed statements of accounts which, according to him, show that the Plaintiff is in material breach of the contract for failure to pay to the 1st Defendant the dues under the contract.

11. On their part the Plaintiff submitted that the notice given to them was irregular, and unlawful and that they are entitled to one month's notice. *Prima facie*, therefore, the determination of whether the notice was regular or not is a matter which shall be determinative in the full hearing of the suit, in which the 1st Defendant will be given the opportunity to demonstrate that there are outstanding dues by the Plaintiff, which positions justified the termination of the contract under Clauses 5.2 and 5.3 (a).

12. The second issue is whether or not damages would be adequate compensation for the Plaintiff. The application is brought under the provisions of Order 40 Rule 1, 2, 3 and 63 (3) of the Civil Procedure Rules 2010 and Act of the Civil Procedure Rules 2010. The Order 40 Rule 2 (1) clearly states:-

2. (1) In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

The issue here is whether the Plaintiff has raised a prima facie case capable of succeeding. It is to be noted that even if the Plaintiff has raised a prima facie case, this alone does not entitle it to a remedy of injunction. On the prima facie case, however, looking at the Clauses under which the 1st Defendant alleges to have issued the said notice, and looking at the statements of account provided by the 1st Defendant which appear to show that the Plaintiff owes dues to the 1st Defendant pursuant to Clause 4 of the contract, I am not satisfied that the Plaintiff has raised a prima facie case capable of succeeding at the full trial. However, after giving the Plaintiff the benefit of the doubt in that regard, it is still clear that injunction can only issue in a breach of contract suit where damages would be an inadequate remedy. This principle finds support in the passage in **Halsbury's Laws of England 3rd Edition, Volume 8** paragraph 347 where it is stated:-

"A breach of contract gives the injured party a right of action for damages (m). In certain cases where damages would be an inadequate remedy application may be made for a decree of specific performance (o) or, where the contract is a negative one for an injunction to restrain the breach of contract (g)."

Paragraphs 7, 8, 9, 10, 11, 12 and 13 of the affidavit of Ambrose Rachier shows that the termination has not been shown to be invalid. Even if this court was in doubt, which is not the case, the balance of convenience would not favour the Applicant. This is a trade dispute. In any trade dispute the ultimate objective is money, which can be paid in damages to the innocent party. In this case, the 1st Defendant has already terminated the contract, and has engaged the 2nd Defendant in a similar contract. This court will not interfere with that arrangement.

13. In the upshot, the Plaintiffs' application dated 8th September 2015 is herewith dismissed. Interim orders of injunction issued herein on 9th September 2015 are herewith discharged and set aside.

14. Cost of this application shall be for the 1st Defendant.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 3RD DAY OF NOVEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Omwenga for the Plaintiff

M/s Otieno for the Respondent

Teresia – Court Clerk