



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 28 OF 2014**

**BLASOVILLA HOLDINGS KENYA LIMITED ..... PLAINTIFF**

**VERSUS**

**FOTON EAST AFRICA LIMITED .....DEFENDANT**

**RULING**

1. The Plaintiff, by a plaint dated 6<sup>th</sup> May, 2014, sued the Defendant seeking specific performance together with loss of profit and business. It also sought general damages for breach of contract and costs and interest.
2. Simultaneously, the Plaintiff filed a Notice of Motion of even date seeking the following orders:
  - i. That service of this application be dispensed with at first instance and for reasons to be recorded, the application be certified as urgent and heard ex-parte at the first instance.
  - ii. That this Honorable Court be pleased to issue a mandatory injunction directing the Defendants either by themselves, their agents, servants, employees or otherwise howsoever to sign the buy back guarantee in the format given by Equatorial Commercial Bank pending the hearing and final determination of this application.
  - iii. That this Honorable Court be pleased to issue a mandatory injunction directing the Defendants either by themselves, their agents, servants, employees or otherwise howsoever to sign the buy back guarantee in the format given by Equatorial Commercial Bank pending the hearing and final determination of this suit.
  - iv. That the Costs of this Application be provided for.
3. The Defendant filed a Replying affidavit dated 16<sup>th</sup> May 2014 and a Notice of Motion of even date. The application seeks to have the Plaint dated 6<sup>th</sup> May, 2014 stuck out and the suit dismissed with costs. It also seeks the costs of the application.
4. The application is premised on the grounds that Plaintiff discloses no reasonable cause of action in law; that this court has no jurisdiction to determine the matter and that the Plaintiff has contradictions of fact with the pleadings filed by the Plaintiff.
5. According to the Plaintiff, the cause of action arose from an agreement entered sometime in July 2013 through which the Plaintiff contracted to purchase a Foton Tipper Truck from the Defendant in the sum of Kshs. 8,172,000/=. The Plaintiff paid a deposit in cash and issued post dated cheques. The Plaintiff obtained financing for the balance of purchase price from Equatorial Commercial bank and the Defendant was to sign a buy back guarantee before release of funds by the bank. However the Defendant refused to sign the said buy back guarantee and has caused the Plaintiff to suffer loss for failure to perform successful bids for the supply of 250 tonnes of ballast

- and 2500 cubic centimeters of murrum and a contract for the hire of the motor vehicle for a period of 60 days from one Kamro Enterprises.
6. In its Replying Affidavit, Calvin Guo, the Managing Director of the Defendant, while admitting there was an agreement for the purchase of the said Motor vehicle, denied that it was a term of the agreement that the Defendant would submit an acceptable buy bank guarantee. He averred that the agreement provided that payment of the motor vehicle would be by cash and post dated cheques.
  7. Further Mr. Guo avers that it was not privy to negotiations between the Plaintiff and Equatorial Commercial Bank and the terms agreed between them were not binding on the Defendant. According to him, they reviewed the terms of the proposed Buy Back Guarantee Agreement and found the same to be onerous and unacceptable from the business risk perspective of the Defendant. He denied that the Defendant caused any loss incurred by the Plaintiff and that such loss accrued from the Plaintiff's own indolence.
  8. In a further affidavit of **Herodion Nyakenyanya Machoka**, the operations Manager of the Plaintiff, he avers that the Letter of Offer required the Plaintiff to submit to the Defendant a duly filled and stamped Asset Finance Application form which the Plaintiff obliged; that the Defendant was aware that the financing by the bank was subject to the Defendant submitting an acceptable buy back guarantee.
  9. The application was argued before me on 15<sup>th</sup> July, 2014. The learned counsel **Mr. Muriithi** was present for the Plaintiff whilst Mr. **Atak** was present for the Defendant.
  10. Mr. Muriithi opposed the application by the Defendant to strike out the suit. He argued that the Letter of Offer contains the conditions for the sale of the motor vehicle. One such condition was for the Plaintiff to provide an acceptable Buy Back Guarantee to enable the financier release the funds. According to counsel there was an implied contract that the Defendant would sign the Buy Back Guarantee and as such the Defendant is estopped from denying the same.
  11. Counsel submitted that if the terms contained in the proposed Buy Back Guarantee issues were unfavourable to the Defendant as alleged, then the Defendant should have informed the Plaintiff of the same in order for the Plaintiff to re-negotiate with its financier. Contrary the Defendant did not respond to the demand letters sent by the Plaintiff.
  12. On the issue of contract, counsel reiterated that there was an implied contract to sign the Buy Back Guarantee. The Defendant was well aware that for the money to be released it had to sign the said Buy Back Guarantee from Equatorial Bank.
  13. Further counsel submitted that Plaintiff continues to suffer loss. The motor vehicle was being purchased for business and the Plaintiff was subjected to breaches of contract for failing to commence work.
  14. Finally counsel submitted that the dispute arises from the implied contract contained in the letter of offer and not the Sale Agreement. The Plaintiff cannot therefore rely on the arbitration clause contained in the Agreement in the circumstances. According to counsel this court has jurisdiction to hear and determine this matter. Furthermore, even if the court finds otherwise, this is not a reason to strike out the suit but to stay the matter and refer it to an arbitrator.
  15. In response, Mr. Atak for the Defendant submitted on the issue of jurisdiction and whether there existed an implied contract. He referred to clause 17 of the Sale Agreement that states that it supersedes and cancels all previous negotiations and agreements between the parties. Therefore by virtue of this clause in the agreement nothing can be brought before this court for adjudication. The agreement provides for arbitration of disputes. He relied on the case of **Owners of Motor Vessel Lillian S vs Caltex Oil (Kenya) Ltd** (1989) KLR 1 to submit that the court has no option but to down its tools.
  16. On whether there was an implied contract, counsel submitted that this is not supported by the pleadings. The Plaintiff refers to the Agreement for Sale and uses the word "it was a term" to mean it was expressly provided in the Agreement. However the Plaintiff relies on the Letter of Offer to construe an implied contract but the same is superseded on execution of the agreement.
  17. Counsel submitted that the suit ought to be struck out. The parties had agreed to go for arbitration and therefore unnecessary to incur further costs on litigation. He stated that a seller has no obligation to secure a buyer's financing. Moreover the Sale Agreement provides the various agreed modes of payment from which the Plaintiff elected to pay for the motor vehicle by cash and post dated cheques.
  18. Counsel contended that subsequent arrangements between the Plaintiff and Equatorial Bank were

between the two parties and the Defendant cannot be dragged into such an arrangement. This would amount to interfering with freedom of contract. Further counsel urged the court to find that these issues do not need litigation and should be referred for arbitration.

### **ISSUES FOR DETERMINATION**

19. There are two applications that have been argued simultaneously and upon hearing the submissions of the Counsels this court finds these issues for determination;
- a) Whether the Arbitration Clause contained in the Sale Agreement ousts the Court's jurisdiction?
  - b) Whether the Plaintiff ought therefore to be struck out?
  - c) Whether to grant a mandatory injunction?
  - d) Which party shall bear the costs.

### **ANALYSIS**

20. I will address the first issue which relates to the existence of an Arbitration Clause in the Sale Agreement ousts the court's jurisdiction.
21. This court has had occasion to peruse and examine the Agreement for Sale dated the 23<sup>rd</sup> December, 2013 and at Clauses 16 and 17 of the agreement provides for mediation as a first measure for dispute resolution and thereafter if no agreement is reached within 30 days then the matter be referred to an arbitrator to be chosen by the parties and whose decision shall be binding on both parties. The arbitration clause therefore exists.
22. This court notes that the Respondent herein filed its Memorandum of Appearance on the 16<sup>th</sup> May, 2014 and its Statement of Defence on the same date. The proper procedure would have been for the Respondent before or after entering an appearance to have proceeded to have filed an application as provided for by the provisions of Section 6 of the Arbitration Act 1995 for stay of the proceedings and a reference to arbitration.
23. Once a Defendant files a Memorandum of Appearance and a Statement of Defence, that Defendant has acceded to the jurisdiction of this court.
24. Reference is made to the case **Fairlane Supermarket Ltd V. Barclays Bank Ltd HCCC. No. 102/2011** where Odunga J held;

**“The option to refer the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence.....”**

**.....any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance make the application for reference to arbitration....”**

25. This court is persuaded by the above authority and finds that the Respondent has therefore acceded to this court's jurisdiction. Therefore the Arbitration Clause notwithstanding this court is properly seized of jurisdiction as the Respondent waived its rights.
26. On the issue as to whether a mandatory injunction is merited? From the submissions it is apparent that the Applicant is caught in a situation where a desired outcome, that is the purchase of a Futon Tipper Truck, is made impossible to attain due to conditions set down by its financier, Equatorial Bank.
27. The Financier, Equatorial Bank is only willing to finance the balance of the purchase price if the Buy Back Guarantee is signed by the Respondent. The Respondent has declined to sign the Guarantee as it finds the same to be onerous and unacceptable.
28. The Applicant therefore seeks a mandatory injunction to compel the Respondent to sign the Buy Back Guarantee from Equatorial Bank.

29. The conditions for a grant of an injunction are set down in the renowned case of **Giella V. Cassman Brown**. The Applicant must make out a *prima facie* case with probability of success; there must be the likelihood of irreparable harm which cannot be adequately compensated by way of damages and lastly the court may consider the balance of convenience if in doubt.
30. But, this court adds at this juncture that, the threshold set down for obtaining a mandatory injunction is higher than that of an ordinary interlocutory injunction. The Applicant must demonstrate exceptional and special circumstances so as to merit the orders sought. Refer to the case of **Muchuha V. Ripples Ltd [1990] EA.388**.
31. The first principle set down in *Giella (supra)* is that the Applicant must make out a *prima facie* case that it will lose ownership and possession of the subject matter that is the Futon Tipper Truck. From the court record it is noted that the Applicant has not tendered any evidence of a Log Book to support ownership and entitlement of the subject matter but has instead annexed a copy of an Application Form "A" from the Kenya Revenue Authority for the Registration of a motor vehicle. The Applicant has also not tendered any evidence that due to the Respondent's conduct the subject matter is in danger or is at risk of being damaged, alienated, disposed of, re-possessed. This court is of the view that the Applicant has not made out a *prima facie* case on the issue of ownership and loss of ownership and possession of the truck.
32. On the second principle still in the **Giella case (supra)**, this court upon perusal of the Complaint notes that the Applicant has prayed for special damages and has quantified in monetary terms the balance of the purchase price in the sum of Kshs.6,537,600/= and all the outgoings that were expended have also been enumerated. This therefore means that the loss is quantifiable and measurable and that the damages can adequately be compensated in monetary terms.
33. Addressing the last principle in **Giella (supra)** that is on a balance of convenience, the question posed by this court is which party will be greatly inconvenienced by the injunctive order, as between the Applicant, the Respondent and the Bank.
34. The bone of contention is the Buy Back Guarantee Agreement issued by Equatorial Bank which is yet to be executed by the Respondent. Taking into consideration the issue of privity of contract it is noted that the Equatorial Bank is not a party to the Agreement for Sale dated the 23<sup>rd</sup> December, 2013, which agreement is as between the Applicant and the Respondent and that the Bank is also not a party to the instant proceedings.
35. In answer to the question posed this court finds that if the injunctive order was to be granted the Respondent would be the most inconvenienced by it as it would be affected by an injunctive order in favour of a party which is not privy to the contract nor is it a party to the suit. The balance of convenience therefore tilts in favour of the Respondent in that its operations will be affected by the injunction.
36. At this juncture I am satisfied that the Applicant has not made out a *prima facie* case with a probability of success; that the loss is capable of being compensated by damages; that the threshold for an ordinary interlocutory injunction has not been met and further I find no clear special and exceptional circumstances has been advanced by the Applicant to warrant the granting of an order for a mandatory injunctive.

### **FINDINGS AND DETERMINATION**

37. For the reasons set out above this court makes these findings and determinations;
38. The Arbitration Clause does not oust the jurisdiction of this court and the application dated 16<sup>th</sup> May, 2014 to have the Complaint struck out is hereby dismissed.
39. This court finds that an Order for a mandatory injunction is not merited and the application dated the 6<sup>th</sup> May, 2014 is hereby dismissed.
40. Costs on the respective applications shall be in cause.
41. The parties are advised to expedite the hearing of the main suit for early determination.

**Dated, Signed and Delivered at Nakuru this 3rd day of September, 2014.**

**A. MSHILA**

**JUDGE**