REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 565 OF 2010

KENYA PLANTERS' CO-OPERATIVE UNION LIMITED (IN RECEIVERSHIP).....PLAINTIFF/APPLICANT

VERSUS

KWA MATINGI FARMERS CO-OPERATIVE SOCIETY LIMITED.....1ST DEFENDANT/RESPONDENT

TROPICAL FARM MANAGEMENT (KENYA) LTD.....2ND DEFENDANT/RESPONDENT

RULING

The Applicant in the Chamber Summons dated 18th August 2010, seeks orders against the Respondent *inter alia*, as follows:

1. That a temporary injunction do issue restraining the 2nd Respondent from releasing the sum of Kenya Shillings 19,341,152.25 to the 1st Respondent pending the hearing and determination of this application.

2. That a mandatory injunction do issue directing that the 2nd Respondent do pay the Applicant the sum of Kenya Shillings 19,341,152.25 together with costs arising from the suit being approximately Kenya Shillings 500,000/= within seven (7) days of the order hereto (*sic*).

3. That in the event that any sums have been paid by the 2nd Respondent to the 1st Respondent,

then the 2nd Respondent to file an account in this court clearly highlighting the amounts and dates of payment, within seven (7) days of the order hereto (*sic*).

The application is based on the grounds that the 1st Respondent, in breach of an agreement entered with the Applicant on 25th July 2006, to the effect that the 1st Respondent would deliver its coffee for milling and marketing solely to the Applicant, the 1st Respondent delivered its coffee to the 2nd Respondent for marketing and that the 2nd Respondent holds on behalf of the 1st Respondent a sum of Kshs. 19,341,152.25 as proceeds of such deliveries. The Applicant claims that the said proceeds ought to be paid over to them, maintaining that the 1st Respondent has admitted the claim and has authorized the Applicant to recover 40% of all proceeds of coffee delivered to it by the 1st Respondent from time to time and to apply the same towards clearing the outstandings. The Applicant contends that failure to grant the orders sought would occassion the Applicant irreparable loss not capable of being compensated in damages, particularly because (as stated by the Applicant) the 1st Respondent has no known material assets. The Applicant argues that the orders sought will in no way prejudice the Respondents and that the balance of convenience tilts in favour of granting the orders sought, to settle the debt and/or to prevent the 1st Respondent from releasing stated funds to the 2nd Respondent.

The application is supported by the affidavit of Harveen Gadhoke, the Receiver-Manager of the Applicant to which is annexed various documents, including a copy of the agreement of 25th July 2006, correspondence exchanged between the Applicant and the 1st Respondent in respect of the debt allegedly owed to the Applicant and minutes of a meeting held between the officials of the Applicant, the those of the 1st Respondent on 18th June 2010, at which parties discussed, *inter alia*, the option of the Respondent repaying the debts due to the Applicants in kind, that is, by way of coffee deliveries and the recovery of 40% of the proceeds, as well as a tabulation/analysis of the 1st Respondent's transactions conducted during the period 25th July 2006 and 8th July 2010.

The application is opposed on the basis of two replying affidavits sworn and filed on behalf of the 1st and 2nd Respondents as follows:-

1. The 1st Respondent's replying affidavit sworn by its chairman, Joseph Mbathi Luusa on 26th August, 2011

2. The 2nd Respondent's replying affidavit sworn by Maina Ruo, the Agronomy Manager of the 2nd Respondent, on 26th August, 2010.

In reply to the said replying affidavits, the Applicant filed a Further Affidavit sworn by its Receiver-Manager on 17th September 2010. Parties filed written submissions to ventilate their respective arguments in the matter. In their submissions the Applicants have sought to prove that:-

1. The purported contracts for marketing and sale of coffee entered into between the 1st Respondent and the 2nd Respondent in the absence of any authority from the Applicant, are void.

2. The 1st Respondent has at all times and in numerous correspondence admitted owing the said amounts

3. The 1st Respondent was in breach of its contract with the Applicant dated 25th July 2006, granting sole rights to the Applicant to market and sell the 1st Respondent's coffee until debt owing to the Applicant was paid up

4. The 1st Respondent was also in breach of the conditions of advances (*sic*) made by the Applicant to the 1st Respondent, which required the 1st Respondent not to appoint any other commission or milling agent or receive financial assistance from another entity without the Applicant's consent for as long as any monies remained outstanding and payable to the Applicant.

5. The 1st Respondent was in breach of the Coffee Act, the Rules thereunder and circular No. 5 issued by the industry regulator, the Coffee Board of Kenya, by entering into a marketing agency agreement with the 2nd Respondent, without first offsetting its debt obligation with the Applicant.

6. The 2nd Respondent was in breach of the Coffee Act, the Rules thereunder and circular No. 5 issued by the industry regulator, the Coffee Board of Kenya, by failing to remit the 1st Respondent all monies received by it from the coffee proceeds of the 1st Respondent, in order to settle its indebtedness with the Applicant.

7. The 1st and 2nd Respondent were in breach of receivership laws and principles by retaining the proceeds of sale of the 1st Respondent's coffee, in spite of the fact that the said proceeds were book debts properly due to the Applicant's receivers pursuant to the debentures that had crystallized.

8. The Applicant was not obliged to provide additional financing to the 1st Respondent if its conditions were not met by the 1st Respondent.

9. The 2nd Respondent has admitted receiving the sum of Kenya Shillings 21,727,147 for sale of proceeds of the 1st Respondent's coffee, more than enough to meet the Applicant's claim of Kenya Shillings 19,341,152.25.

10. This honourable court should accordingly grant order No. 3 of its Chamber Summons application dated 18th August, 2010, with costs".

The Applicant cites 19 authorities to support their arguments.

In the submissions filed on behalf of the 1st Respondents, the position taken is that the alleged breach of the contract dated 25th July 2006 has not been proved since no documentary evidence has been tendered to show the quantities of coffee milled and/or marketed pursuant thereto. The 1st Respondent also submits that the Chamber Summons application and the suit herein are bad in law in that they seek to enforce the agreement of 25th July 2006, despite the fact that the same contains an arbitral agreement which ought to be honoured before any of the parties can approach the court for any or other redress.

The 1st Respondent contends that the fact that the alleged breach occurred on 19th September 2006 and nothing was done in respect thereof until now is indicative of the fact that the Applicant's present application is brought in bad faith, particularly since the correspondence exhibited demonstrates that there

were several complaints lodged by the 1st Respondent regarding the Applicants status of affairs which were never addressed. The 1st Respondent submits further that the debt claimed herein forms part of the unliquidated claims under the debenture under which the Receiver-Manager was appointed and that it is not explained how the same has been arrived at, in any event. The agreement of 25th July 2006 is also challenged as being null and void, having been used in an attempt to confer upon the Applicants a general lien over the 1st Respondent's payments, contrary to the provisions of the **Coffee (General) Rules 2002**. The position of the 1st Respondent is that the Applicant has not made out a suitable case for any injunctive orders to issue, within the laid down principles of **GIELLA –VS- CASSMAN BROWN & CO. LTD [1973] E. A. 358**.

The 2nd Respondent has submitted that the Applicant seeks orders of the court in respect of non existent funds since the 1st Respondent has committed the proceeds of coffee sales to the 2nd Respondent under an agreement which empowers the 1st Respondent to offset the funds against payments due to the 2nd Respondent as consideration for its managing the 1st Respondent's farm, as well as marketing and selling the coffee produced therein. That at the moment, the 1st Respondent's liability to the 2nd Respondent under the arrangement stands at approximately Kshs. 54 million. The 2nd Respondent's position is that, if at all the Applicant is entitled to receive any proceeds of the 1st Respondent's coffee sales, it will have to wait for the said indebtedness to the 2nd Respondent to be cleared and also convert its alleged claim of Kshs 19,341,182.25 into a recoverable debt and then perhaps, obtain a garnishee order against the 2nd Respondent for any proceeds owed to the 1st Respondent.

According to the 2nd Respondent, the Applicant cannot claim to have superior claim over the 1st Respondent's coffee sales simply on the basis of an agreement allegedly entered earlier than the one between the two Respondents, or pursuant to a circular issued by the Coffee Board of Kenya to the effect that Coffee Growers are *"expected"* to clear debts owed to any *"outgoing"* marketing agent as they enter into fresh agency agreements with new ones. The 2nd Respondent argues that the Applicant's reliance on the said agreement and circular is misplaced since the two documents have no force of the law, the same having not been issued under any of the provisions of the governing statute, the **Coffee Act** or the **Rules** made thereunder.

Moreover, the 2nd Respondent submits, the agreement of 25th July 2006 is not stamped under the Stamp Duty Act and is therefore not admissible in evidence. Also that **Section 95** of the **Companies Act,** which the Applicant relies upon to claim that it is a preferential creditor does not apply to the Applicant's case and is irrelevant, since the law as relates to receivership has no application when the 1st Respondent company is not the one under receivership but the Applicant.

The 2nd Respondent's case is that the Applicant has not established a prima facie case against either of the Respondents. Also that the facts, as stated in the Applicant's supporting affidavit and the documents annexed thereto clearly show that the 2nd Respondent is liquid enough to compensate the Applicant in the event that the injunctions sought are not granted and not that it has no assets as is claimed by the Applicant. In the final analysis, the 1st Respondent has submitted that the application was a panic reaction by the Applicant to try and sort out its own indebtedness to its many creditors as stated in the grounds set out in support of the application.

In its Defence and counterclaim filed on 23rd September 2010, the 1st Respondent denies any indebtedness to the Applicant and has even lodged a counterclaim against it both for special and general

damages for breach of contract. It contends also that the Applicant has no cause of action against the 1st Respondent. Likewise, the 2nd Defendant, in its defence and counterclaim filed on 17th September 2010, denies any indebtedness to the Applicant, contending that no cause of action arises against it and it fails to understand how the alleged joint and several liability of both Respondents to the Applicant arises. It considers the Applicant's suit against the 2nd Respondent as being misconceived and an abuse of the process of the court.

After considering the pleadings, the application and the submissions made herein, I am unable to see how the grounds set out in support of the application and the facts deponed in the supporting affidavit and further affidavit filed disclose a prima facie case against the Respondents in respect to the sum of Kshs. 19,341,152.25 as claimed under the Plaint and Chamber Summons. Firstly, I see no connection between this sum, as recorded in the Applicant's document referred to as **"KENYA PLANTERS CO-OPERATIVE UNION LIMITED (IN RECEIVERSHIP) KWA MATING'I F C S LIMITED (XBE 0023 & XBE 002301) ANALYSIS OF TRANSACTION BETWEEN 25TH JULY 2010",** relate to the proceeds of sale of the 1st Respondent's coffee through the 2nd Respondent as per the agreement between the two Respondents to which the Applicant is a stranger. Not only does the documentation filed in respect to the claim fail to show how the said sum has been arrived at but they also fail to demonstrate how the two Respondents' liability arises. I find that a prima facie case against either or both of Respondents has not been established. No proof has been tendered to support the contention that the Applicant would suffer any irreparable loss if the injunction application is disallowed. That being the case, I am of the considered opinion, and I have no doubt at all in this regard, that the Applicant has not fulfilled the essentials for granting an injunction, interlocutory or otherwise in the circumstances of this case.

In my view, the orders sought are in the nature of a permanent injunction which cannot issue at an interlocutory stage of proceedings. Needless to say the application has the characteristics of a summary judgment application and has no basis at all. Even if I was in doubt as to the issue of a prima facie case or irreparable loss, I would still find, based on the facts as presented before me, that the balance of convenience would favour the Respondents and not the Plaintiff/Applicant. I accept the Respondents argument that the Applicant should proceed to prove its claim.

For the reasons stated hereinabove, I find that the application fails and the same is hereby dismissed with costs to the Respondents.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **4TH** day of **MARCH, 2011**

M. G. MUGO

JUDGE

In the presence of:
Miss Kahoro holding brief for Mr. Karungo For the Applicant

Mr. Ndolo for Mr. Mwenda For the 1st Respondent

Mrs. Gikonyo For the 2nd Respondent