REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO 404 OF 1995

L U INTERNATIONAL LTD…….....……APPLICANT

VERSUS

KENYA NATIONAL TRADING CORPORATION …….1ST RESPONDENT

COMBINED WAREHOUSE/ALLIED WHARFAGE……..2ND RESPONDENT

RULING

This application by way of chamber summons is brought under Order 39 of the Civil Procedure Rules but the actual rules are not specified therein. I presume the counsel for the Applicants intended to ground this application under rules 1 and 2 of Order 39 and would proceed in that basis to consider the application.

The Applicant Company is and always has been an exporter of sugar and associated products. It is a company incorporated in Kenya as a limited liability company. He has moved the court in this application for orders restraining 1st and 2nd Respondents/Defendants by themselves, and/or servants from transferring, releasing and/or giving up some 5000 metric tonnes of Brazilian sugar now held in the Bonded Warehouse No. 8 belonging to the 2nd Respondent pending the determination o this suit.

The 1st Respondent, the Kenya National Trading Corporation is described in this suit as a public body duly incorporated under the Public Corporation Act of Kenya. The 2nd Respondent on the other hand, is described as a Private Enterprise operating in Mombasa in the business of offering bonded warehousing services.

The facts giving rise to the application now before the court are largely not in dispute. A reading of the affidavit of Jaffer Sharrif, a director of the Plaintiff/Applicant company swore on the 22nd of May, 1995, and the elaborate affidavit of Kemory O. Omondi, the Regional Manager of the 1st Respondent/Defendant company based in Mombasa; together with all the annexed documents by each of the deponents clearly sets out the facts of the case. It appears to me that even the substantive suit may very easily be disposed of on affidavit evidence but that does not concern the court now.

The basic facts are that during the month of January 1995, the 1st Defendant company, the Kenya National Trading Corporation bought a large consignment of Brazilian grade 1 sugar weighing 14,000metric tonnes from the importers thereof, the ABS FOODS (1977) Ltd for approximately Kshs. 220,000,000/- on C & F basis solely for export purposes. Money to purchase the consignment was provided by the Kenya Commercial Bank on local credit (overdraft facilities). The 1st Defendant company then executed a bond with Kshs. 220,286,136/- in favour of the Commissioner of Customs & excise and the consignment was accordingly deposited at the Customs Ex-bonded Warehouse No. 9,

Changamwe belonging to the 2nd Defendant.

The Kenya National Trading Corporation then set to sell the sugar in question to its customers on C & F basis and for export only. This meant that upon the sale of the said consignment or part thereof, the 1st Defendant had to issue the buyer with a transfer of Ownership of Warehoused Goods namely. Form C. 25, so as to enable the Customs and Excise Department to issue the buyer with the Ex-Warehouse Export Entry, namely, Form C.21 upon the buyer executing a Bond for Exportation namely Form CB. $, in favour of the Commissioner of Customs & Excise in respect of the goods and quantity therein authorised and/or approved for release to the buyer by the 1st Defendant.

Mr. Omondi admits in paragraph 11 of his affidavit that sometimes towards the end of April 1995, the Kenya National Trading Corporation entered a contract of sale with the Plaintiff company then represented by Mr. Jaffer. Under the contract agreement the Kenya National Trading Corporation agreed to sell and the Plaintiff company agreed to buy some 5000 metric tonnes of Brazilian sugar valued at Kshs. 115,000,000/-. It was understood by the parties according to their business practice and they were no strangers to each other as they had had several previous transactions that the Plaintiff company will take delivery of the said quantity of sugar upon payment. The Plaintiff's company were not the only or sole purchasers of the large quantity of Brazilian sugar which the Kenya National Trading Corporation had acquired. Apart from the Plaintiff company, the Kenya National Trading Corporation therefore entered into separate contracts with other buyers.

In order to facilitate the transaction made with the Plaintiff company, Mr. Omondi released to Mr. Jaffer upon his request Form C. 25 in respect of the said 5000 metric tonnes of sugar sold. This was to enable him to obtain the relevant bonds and approval from the Customs and Excise Department whereupon, the Plaintiff company undertook to pay to the bankers of the Kenya National Trading Corporation the said sum of Kshs. 115 million for the said 5000 metric tonnes of sugar.

Notwithstanding the fact that the Plaintiff company did not pay all at once the whole purchase price of the sugar in question and due to the fact that sugar was being released only on payments made, the Kenya National Trading Corporation accepted part payments from the Plaintiff company for the sugar in question. Thus the Plaintiff company made various payments by cheque to the Kenya National Trading Corporation for which various quantities of sugar were released to them from the 2nd Defendant's warehouse upon release letters duly signed on behalf of the Kenya National Trading Corporation . A bundle of such release letters made on behalf fo the Plaintiff company were annexed)Ex. KO. 4 to KO. 6). So far the Plaintiff company paid for and duly received some 2,351.44 metric tonnes of Brazilian sugar for which payment had been made (see paragraph 10 of the affidavit of Mr. Omondi).

It is however not clear from the affidavit of Mr. Omondi whether the quantity of sugar already released to the Plaintiff company was 1,424.27 metric tonnes as sated in paragraph 5 of his affidavit or 2,351.44 metric tonnes as stated in paragraph 10 of his affidavit. I specifically drew the attention of counsels to these paragraphs during the hearing of this application which I thought were contradictory but I never got any satisfactory explanation. I repeated the matter several times during the course of hearing but no explanation was offered despite the fact that both Mr. Omondi and Mr. Jaffer were present in court and could with little effort have confirmed to the court what quantities of sugar had been paid for and released. This is a matter which will now be resolved outside this application.

Be it as it may, it is clear that the Plaintiff company had made part payments for the sugar which they had bought from the Kenya National Trading Corporation and collected equivalent quantities of sugar paid for. There was a time when some cheques issued by the Plaintiff company were not immediately honoured by his bankers but all cheques were subsequently made good when they were re-banked. Thus by 8th of May, 1995 according to paragraph 18 of the affidavit of Mr. Omondi, all cheques issued by the Plaintiff company were cleared by his bankers. Probably the confusion about the exact quantity of sugar already paid for by the Plaintiff arose from the fact that some of their cheques were not cleared in time by their bankers.

According to the evidence of Mr. Omondi as contained in paragraph 25 of his affidavit, the Plaintiff Company had not made payments for some 3 entries in their contract agreements for the sale of the 5000 metric tonnes of Brazilian sugar. These entries are specified as Nos. 0399, 0400, and 0401. He alleges that after the 1st of May, 1995 he never saw Mr. Jaffer again till he was served with summons in this case. His efforts to get in touch with him to press for payments for the remaining quantity of sugar represented by the 3 entries above become fruitless. As his bankers were pressing for payments and he got buyers who were ready with money, he decided to sell to them the remaining lot of sugar from which the Plaintiff Company had not paid for.

It is the contention of the Plaintiff Company that the Kenya National Trading Corporation cannot unilaterally decide to cancel the contract that they made which was already partly performed. They contend that according to their business practice, they could collect the remaining load of sugar even without payment, but I think they are not serious on this because if that were the case, there was nothing that could then have forced them to collect the said 5000 metric tonnes of sugar in piece-meal and upon specific release letters for the amount already paid for.

Mr. Ahmed Nassir, counsel for the Plaintiff argued with force that the property i.e. title in the 500 metric tonnes of sugar, the subject of the contract had passed to the Plaintiff Company upon the signing of the contract and all that remained was for the Plaintiff to collect the same. I tink Mr. Nassir is right.

This was a sale of specific goods which were described as Brazilian Grade I. The quantity was agreed upon - 5000 metric tonnes and so was te purchase price - Kshs. 115 million. Other terms were that the purchasers could not re-sell it to other buyers on C & F basis for support. Delivery was only to be made on payment and by the practice of the trade between the parties, the Plaintiff could collect the part of the sugar sold on payment against release letters, issued by the Kenya National Trading Corporation to the Warehouse Manager (2nd Defendant). Clearly this was a transaction governed by sections 19 (1) and (2) of the Sale of Goods Act, Cap. 31, Laws of Kenya) which provides:

> "S.19 (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be heard to the terms of the contract the intention of the parties and the circumstances of the case."

In the instant case, Mr. Ken Omondi, the Regional Manager of Kenya National Trading Corporation, Mombasa on the 14th of March, 1995 duly notified the Principal Collector, Customs Long Room, Mombasa on Form C. 25 ®. 68) (Ex. KO. 28) that:-

> "Please note that I have this day transferred the undermentioned good which are deposited in Bonded Warehouse No. 8 CHANGAMWE to L.U INTERNATIONAL (K) LTD of P.O. Box 82, KAJIADO."
>
> Sgd. Mr. Ken Omondi
>
> (Regional Manager)
>
> OR: K.N.T.C. LTD
>
> Owner or Agent duly authorised by the Owner"

The goods that were transferred by the Kenya National Trading Corporation by this document were shown as Brazilian White Crystal Sugar. Upon such transfer, Mr. Jaffer Shariff duly accepted the same and signed Certificate of Acceptance on behalf of L.U INTERNATIONAL (K) LTD as stated:-

> " I L.U INTERNATIONAL (K) LTD of P.O. Box 82 KAJIADO, hereby certify that as from this date I am the owner of the owner of the above-mentioned goods and I undertake to pay when called

upon to do so, all duties and charges due and accruing thereon."

The same was again dated 14th of March, 1995.

I am satisfied on the material before me that following a valid contract of sale which the parties herein entered upon, property in such goods, namely, 5000 metric tonnes of sugar duly passed on to the Plaintiff Company upon singing of the contract of sale and for transfer of such goods on the 14th of March, 1995. Although as from that date, the Plaintiff's company had fully paid for such goods, they became in law their property. They went even further and placed a bond with Kshs. 117 million covering the entire value of the said 5000 metric tonnes of sugar.

Even though the said sugar remained in the same warehouse belonging to the 2nd Defendant where the Kenya National Trading Corporation had stored the bulk, it was no longer open to the Kenya National Trading Corporation having sold such quantity of sugar 5000 metric tonnes to deal with them the way they wanted or to re-sell them to any other party or person. To do so, in my view, would amount to unlawful conversion or theft. They could not purport to sell to other people that which they did not have. As far as the 5000 metric tonnes of sugar which they sold to the Plaintiff company was concerned, all that they could do was to follow the Plaintiff company for payment or better still, hold on to such goods till payment is made.

I hold that the second purported sale of the balance of the 5000 metric tonnes of sugar of which the Plaintiff company had not yet collected by the Kenya National Trading Corporation to other persons or companies was null and void. In my view, these goods are still the property of the Plaintiff company lawfully stored by them at the 2nd Defendant's ex Warehouse No. 8, Changamwe.

I am satisfied that the Plaintiff company has succeeded in convincing this court that they have prima facie case with overwhelming chances of success not only against the Kenya National Trading Corporation but also against the whole world including those who had purported to have bought them from Kenya National Trading Corporation.

It is no answer to the Plaintiff's complainant for the Kenya National Trading Corporation to say that: "we can pay you damages, what we have done we have done." I can never subscribe to the theory that a wrong doer can keep what he has taken because he can pay for it. The Kenya National Trading Corporation is a public corporation which cannot be allowed to flout the law. Those who flout the law by infringing the rightful title of others, and brazenly admit it, ought in my view, to be restrained by injunction. Equity will not assist rule breakers.

Expressing himself on the same point Bosire, J., stated as follows in the case of Belle Maison Ltd. -v- Yaya Towers Ltd, (Nairobi HCCC No. 2225 of 1992):-

> "...the position in law as I understand it is that a person who shows that he is entitled to a mandatory injunction must not be compelled to take damages in lieu. That in effect is what the respondent would like this court to say.
>
> Nor must a wrong doer be permitted to benefit, however remotely, for his wrongdoing, none so where the wrong is blatant or where the act of wrong doer is contrary to law. In cases where the conduct of the Defendant is contrary to law, the court has no discretion. By shutting its eyes to act the court will in effect be indirectly sanctioning it.
>
> The Defendant having set in within circumstances which are likely to affect third parties, the remedy of the third party is against it."

I respectfully adopt the above words of my learned brother.

I believe that I have shown that the Plaintiff Company has more than complied with the three conditions

laid down for the grant of the interlocutory injunction. See: the decisions of the Court of Appeal in E.A Industries Ltd -v-Trufoods Ltd, (1972) E.A. 420; Geilla -v- Casman Brown & Co Ltd., (1973) E.A. 358; and Nsubuga & Another -v- Mutawa, (1974) E.A. 487. These conditions are: (1) the probability of success; (2) irreparable harm which cannot be adequately compensated for by damages (3) if in doubts, then on balance of convenience.

As I have endeavoured to show; the Plaintiff has satisfied the 1st condition. I believe they have also shown that they cannot be adequately compensated by an award of damages and in any case how can the Kenya National Trading Corporation be allowed to benefit from their own wrong doing by possibly selling at a profit what they had already sold to another or selling what does not belong to them. The balance of convenience I believe, is on the side of the Plaintiff: who believing that they have already acquired a large quantity of sugar for export proceeded to enter other contracts to re-sell the said goods.

Before I conclude, I think it is right that I say a word or so as regards the 2nd Defendant in the case. As I understood counsel for the Plaintiff, they were merely brought in these proceedings because they are the one in whose premises the goods and subject matter of this suit were stored. They were brought in this matter just as a way of alerting them to be on their guards. They have done no wrong to the Plaintiff company but they were compelled to take this step because of the anticipated acts of the 1st Defendant. I agree with counsel for the Plaintiff that these proceedings were just meant to act as a notice to the 2nd Defendant of their complaint against the 1str Defendant regarding the goods that they were keeping. Of course, they have been forced now to engage counsel to incur unnecessary expenses. Perhaps it is safe to say that they need not even file defence in this suit and that their costs in this matter will have to be shared equally by the Plaintiff and the 1st Defendant following taxation by the taxing officer of this court. What is necessary, so I believe, is for them to give an undertaking that they will not release the goods in dispute contrary to the orders of this court to the prejudice of any of the parties herein. It is so ordered.

For reasons I have given, I allow this application and confirm the ex-parte orders granted by this court on the 23rd of May, 1995 to the extent that such orders are hinted against the 1st Defendant, the Kenya National Trading Corporation only. In other words, the 1st Defendant company, its servants and agents are hereby restrained by orders of this court not to release the balance of the 5000 metric tonnes of sugar held in the Warehouse No. 8 belonging to the 2nd Defendant which sugar forms part of the consignment they had sold to the Plaintiff company; but no such sugar will be released to the Plaintiff company without payment of the amount due.

As this application substantially disposes of the whole suit, it will be incumbent upon counsel for the parties once the orders already given have been fully complied with to request the court to mark the case as settled upon terms to be stated.

The Plaintiff will have the costs of this application against the 1st Defendant; while the costs of the 2nd Defendant in this application will be shared equally by the Plaintiff and the 1st Defendant. It is so ordered.

Dated and delivered at Mombasa this June 16, 1995

S.O OGUK

JUDGE