REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 4101 OF 1986

DA GAMA ROSE GROUP OF COMPANIES LIMITED ….....PLAINTIFF

VERSUS

DESANUO & 13 OTHERS……DEFENDANT

RULING

The plaintiff The Da Gama Rose Group of Companies Limited, has made an application by way of Chamber Summons under order XXXIX rules 2 and 3 of the Civil Procedure Rules for a temporary injunction to be issued restraining the defendants whether by themselves individually or collectively or by their servants or agents from selling and transferring any of their shares in a company known as Umoja Enterprises Limited pending the hearing and final disposal of this suit. It has also asked that the costs of this application be provided for.

Order XXXIX rule 2(1) under which the application is made provides *inter alia* –

(1) In any suit for restraining the defendant from committing a breach of contract ..... some property or right.

(2) The court may by order ..... as the court thinks fit.

Thus the power of the court to order the injunction prayed for flows from the authority of this rule. This jurisdiction is one which, as the Court of Appeal for East Africa observed in *Giella vs Cassman Brown Ltd* [1975] EA 358 must be exercised judicially and in accordance with the well known principles.

These principles to which I was referred by counsel for the plaintiff are:-

1. The plaintiff must show that he has a *prima facie* case with a probability of success.

2. The plaintiff must show that if the injunction is not issued and thus the status quo maintained the plaintiff would suffer irreparable loss which has been defined as loss which cannot adequately be compensated by damages.

3. That in case of doubt the court is to decide the issue on the balance of convenience.

Meaning that the court is to decide which is the lesser of two evils to grant the injunction and hurt the defendant or to decline to do so and hurt the plaintiff. I understand this last principle to call upon the court to examine all the circumstances surrounding the matter and upon such examination to decide whether it

were better to maintain the status quo – by granting the injunction or to leave things to happen as they will and risk the commission by the defendant of a breach of the contract or the injury complained of.

Thus when the acts of the defendant would result in a breach of contract the court must ask itself, where there is some doubt with regard to the first two requirements, whether it is better to stop the acts of the defendant or to suffer them and leave the plaintiff to hope to obtain recompense when the suit is eventually determined. At this stage the court is not called to decide finally on the merits of the suit. Indeed the court must act cautiously and avoid giving the impression that it has made up its mind on the rights of the parties on the basis of the affidavits sworn in support and in opposition to the application. It is better therefore if the court at this stage says as little as possible about the merits of the suit. The court must, however, make a positive finding as to the existence of a cause of action. Once the court identifies a probable cause of action a *prima facie* case is established. It is not necessary for the court to think or even to feel that the plaintiff will succeed at the trial. It is enough for the court to hold that the plaintiff might well succeed. If the court holds that no cause of action is disclosed by the pleadings or that such cause of action as is pleaded is far too doubtful for it to rely on, the court must refuse the injunction. If it is satisfied that although a cause of action is established and a clear *prima facie* case is shown any damages that can be suffered will be readily compensatable in damages. In other words the court must not maintain the status quo to the detriment of the defendant unless it can be shown that not doing so would greatly prejudice the plaintiff.

Applying these principles to the present application and upon a full examination of the pleadings, the affidavits filed in support and in opposition and the annexures thereto and after hearing the *viva voce* testimony of the one witness who has testified I come to the conclusion that a legally binding and enforcible contract for the sale of all the shares in Umoja Enterprises Limited was made by the plaintiff and the defendants. Some of the defendants acted personally and others by agency. Without saying more about this at this stage, I find that the plaintiff has established a *prima facie* case with a probability of success. I also find that such contract was made and concluded prior to the 13th October 1986 and before the shares in Umoja Enterprises Limited had been sold or transferred to any party.

It remains for me to consider whether if the threatened breach of contract were not restrained by injunction the plaintiff would suffer irreparable loss ie loss which it would not be possible to compensate in damages. In support of this ground the Managing Director of the plaintiff one Horatius Da Gama Rose has sworn a supplementary affidavit on 6th November 1986. In it he states that in the event that specific performance can not be given damages would be in the sum of about Shs 5,000,000/= five million and he does not consider that some of the defendants would be in a position to pay such sum. Damages he implies would be illusionary. The inability of a defendant to pay damages would not of itself be sufficient ground for holding that the plaintiffs remedy might be illusionary or might be irreparable. It is necessary to show that all things considered the plaintiff cannot realistically hope to be able to recoup himself for any loss that may be caused by the acts of the defendant. One way of showing that such is the case is to show that by reason of the nature of the transaction or the breach it would be difficult or even impossible to assess the time loss that the plaintiff would suffer. In such a case the court might be inclined to grant the injunction rather than risk creating a position where the plaintiff might suffer loss which cannot be effectively assessed. In the present suit it is clear from the dealings of the parties that although the sale price is indicated to be shillings 5.2 million to either of the disclosed purchasers the defendants are prepared to take the risk of breaching a contract to sell the shares to a different purchaser. It can be gathered from the manner in which the transaction was sought to be hurried and the attempts by the defendants through their lawyer to resile from the agreement that there is some advantage other than the declared purchase price in having the transaction completed with one rather than the other of the declared purchases. The purchasers clearly appear to think they have made some valuable bargain and are each prepared to rush the transaction. This advantage may not be easy to quantify. I am left therefore to decide whether

I should rather stop the intended breach of contract than risk prejudice to the plaintiff. The defendants have already attempted to transfer the shares to a third party and in view of what I stated below I find that clearly favours maintaining the status quo.

The defendants' counsels have urged before me that the remedy of injunction is no longer available to the plaintiff because the shares forming the subject of the suit have, prior to the commencement of the suit, been transferred to a third party. In the affidavit of Robert William Fisher Armstrong sworn in opposition to the application and filed herein on the 7th November, 1986, it is deponed in paragraph 8 as follows-

"8. That as the shares of the company have been already transferred to the Diners Club Africa Limited and the matter completed the injunction sought will be of no effect and it therefore should not be granted."

In an affidavit sworn by Philip John Ransley on the 19th November, 1986 and filed herein on that date it is deponed in paragraphs 3, 4 and 5 as follows-

"That I spoke to Alnoor Kassam the Managing Director of the Diners Club for whom we also acted prior to the execution of the said agreement who requested me to make available an existing company which could hold the shares of Umoja as Diners Club's nominees" and

"4. That I knew of a company called Xzit Limited which was no longer required by its promoters and which I had proposed to Mr Kassam could be used as a nominee company for Diners Club. Mr Kassam agreed to this," and,

"5. That the shareholders of Umoja were intent on obtaining payment for their shares as soon as possible and as I knew the Da Gama Rose Group of Companies Limited had been interested in purchasing the shares and had claimed there was an existing contract, I had advised the Umoja shareholders that there was no contract, which was my opinion and is my opinion now. I was instructed by the shareholders of Umoja to complete the sale of the shares as soon as possible."

The defendants' counsel presented the position as a "*fait accompli*". He stated that the shares had been transferred to a third party not a party to these proceedings and therefore no injunction could be given. All this he argued happened before the institution of the proceedings. The plaintiffs have disputed the fact and stated that in fact no legal transfer of shares has taken place and the purported attempt to transfer them to Xzit Limited has no legal effect for either non-compliance with the articles or noncompliance with the provisions of the exchange control notice No 20 of 18th April 1974 which requires that transfers of shares to non-residents should have approval of the Central Bank. Mr Anthony Marcus Blackhall a Director of the company that performs secretarial duties for Umoja Enterprises Limited was X-examined at length on this aspect. Mr Blackhall while asserting that the shares had been transferred agreed that the Board's authority had not been obtained for part of the transfer and the Central Bank's approval had not been sought for any of the transfers. The members register had however been completed pursuant to the preparation and execution of share transfers in respect of the majority of the shares. The shares therefore appeared to be property of Xzit Ltd. This would not be the appropriate time to decide whether or not the purported transfer of shares was effective in law. However, in view of the fact that share transfers have been signed and entries made in the member's register and share certificates issued in respect thereof it is necessary for the court to take steps and to make orders necessary for the ends of justice or to prevent abuse of the process of the court. Such orders are made in exercise of the inherent powers of the court.

Order 1 rule 10(2) of the Civil Procedure Rules states-

"The Court may at any stage ..... be added."

The court therefore has power under this rule without the application of either party to order that any person "whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added."

In exercise of such power I hereby order that the name of Xzit Limited be added as the 14th defendant.

Having considered all the matters that are relevant I find, that the plaintiff is entitled to have an order issued restraining the defendants as added above from selling and transferring any of their shares in

Umoja Enterprises Limited pending the hearing and final disposal of this suit. In making the above order the court must consider that the injunction might or could operate oppressively to the defendants especially as amended.

Accordingly it is necessary to make orders to protect the position so far as the defendants are concerned.

I therefore order that the order of injunction herein granted shall be conditional upon the plaintiff depositing the purchase price for the said shares ie Shs 5.2 million in an interest earning account in the joint names of the counsels appearing for the parties to this suit and for Xzit Limited when such counsel has been appointed in a bank or financial institution to be agreed by the parties and default of agreement in the Kenya Commercial Bank Ltd. Such deposit to be made within 15 days of this order.

I further order that the plaintiff shall give to the defendants herein and to Xzit Limited a suitable undertaking as to damages. Such undertaking to be delivered within ten (10) days of this order.

I have carefully considered the evidence *viva voce* and by affidavit and the circumstances of the making of this application. Upon such examination I hold that the plaintiff is entitled to the costs of this application in any event. I so order.

Dated and Delivered at Nairobi this 4th Day of February 4, 1987

E.M.MUTHOGA

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