REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION 65 OF 2009 (UR 38/2009)

GENERAL MOTORS EAST AFRICA LIMITED.....APPLICANT

AND

QUALITY GROUP LIMITED.....RESPONDENT

(An application for stay of an order, pending the hearing and determination of the intended appeal against the ruling and order of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Lesiit, J) dated 20th February, 2009

In

H.C.C.C. No. 30 of 2009)

****

RULING OF THE COURT

By its notice of motion dated 12th March, 2009, General Motors East Africa Ltd ("**GMEA**" or "**the applicants**") seeks an order under ***rule 5 (2) (b)*** of the rules of this Court, that:-

"***(1) There be a stay of execution of the Orders of the High Court of Kenya at Nairobi dated 20th February, 2009 in High Court Civil Case No. 30 of 2009 (Milimani) ("the said order") ; and decision (sic) pending the hearing and determination of the intended appeal;"***

The orders referred to were made by the superior court (Lesiit, J) pursuant to a chamber summons taken out by M/s Quality Group Ltd ("**QGL**" or "**the respondents**") on 19th January, 2009 seeking the following:-

"***1. THAT this application be certified urgent and service thereof be dispensed (sic) in the first instance.***

2. THAT pending the inter partes hearing, this honourable court be pleased to grant an injunction restraining the defendant from breaching the Dealership Sales and Service Agreement dated 17th August 2005 (hereinafter "the agreement") by termination, discontinuation, of supply of items ordered and warranty support to the plaintiff, or otherwise engaging an alternative dealer or directly selling

Isuzu motor vehicles, parts and accessories in the Republic of Tanzania.

3. THAT pending the inter partes hearing, this honourable court be pleased to grant an interlocutory mandatory injunction compelling the defendant by itself, its servants or agents or otherwise howsoever to honour the orders received from the plaintiff for Isuzu motor vehicle, parts and accessories, warranty support and services and to comply fully and completely with the agreement aforesaid.

4. THAT pending the hearing and determination of the suit, this honourable court be pleased to grant an injunction restraining the defendant from breaching the Dealership Sales and Service Agreement dated 17th August, 2005 (hereinafter "the agreement") by termination, discontinuation, of supply of items ordered and warranty support to the plaintiff, or otherwise engaging an alternative dealer or directly selling Isuzu motor vehicles, parts and accessories in the Republic of Tanzania.

5. THAT pending the hearing and determination of the suit, this honourable court be pleased to grant an interlocutory mandatory injunction compelling the defendant by itself, its servants or agents or otherwise howsoever to honour the orders received from the plaintiff for Isuzu motor vehicle, parts and accessories, warranty support and services and to comply fully and completely with the agreement aforesaid.

6. THAT an urgent date be set for the hearing of this application inter-partes.

***7. THAT the plaintiffs be at liberty to apply for such further or other orders and/or directions as this* Honourable Court may deem fit and just to grant.**

8. THAT the cost of this Application be provided for."

As is apparent from the first three orders sought, QGL appeared *ex-parte* before court and orders number 2 and 3 were issued. When the orders were served on GMEA pending the inter-partes hearing of the chamber summons, GMEA felt aggrieved and did not wait for the hearing. They took out a notice of motion of their own on 26th January, 2009 seeking stay of the two orders. Both applications were then heard together before Lesiit , J who in a long and considered ruling made on 20th February, 2009 dismissed the motion by GMEA and granted prayers 4 and 5 as sought by QGL in their chamber summons. Further orders were issued for QGL to file an undertaking as to the costs of GMEA within 14 days and leave was given to either party to apply. QGL complied with the order but instead of filing an undertaking as to costs", filed an "undertaking as to damages" on 2nd March 2009 stating that :-

"***the Plaintiff company (QGL) undertakes to pay the Defendant (GMEA) all such sums of damages as this Honourable Court will find to be lawfully due and owing to it by the Plaintiff with regard to this suit."***

GMEA on the other hand was aggrieved and sought to appeal against the interlocutory orders, hence the motion now before us.

A short background to the dispute is pertinent. GMEA is a limited liability Company registered in Kenya with a significant shareholding by General Motors Corporation, the American motor vehicle giant. In Kenya, the company imports and assembles motor vehicles and motor vehicle spare parts for sale and use in Kenya and for export to other countries. QGL on the other hand is registered in the Republic of Tanzania and, through its subsidiary, Quality Motors Ltd., carries on the business of sale and distribution of motor vehicles in that country. The two companies entered into a "Dealer Sales and Service Agreement" on 17th August, 2005 whereupon GMEA was to supply Isuzu vehicles and service parts for sale by QGL in the Republic of Tanzania. All other things being equal, the agreement was to last 5 years upto 16th August, 2010, but there were elaborate clauses for termination before expiry of the term. There was also a clause on dispute resolution providing that the High Court of Kenya shall have exclusive jurisdiction to resolve all disputes arising out of or in connection with the agreement.

QGL transacts much of its business of supplying vehicles with the Government of Tanzania and had, for 4 years since the agreement, established a firm base with considerable capital, in excess of Tshs.15 billion, and human resource, over 40 employees, in Dare-es-Salaam. In December 2008, QGL had secured some lucrative tenders issued by the Government of Tanzania for supply of Isuzu Units/motor vehicles and had also received orders from individuals. Then in the same month, allegations filtered to GMEA through the print and electronic media as well as the internet, that the Chief Executive of QGL (referred to as "Dealer Principal" in the agreement) was involved in corruption scandals in Tanzania. Some Tanzanian customers also approached GMEA to seek direct dealing with them for fear of being embroiled in the alleged corruption scandals. Fearing that the allegations would be injurious to their goodwill and business interests, GMEA dispatched a letter dated 30th December, 2008, terminating the Dealer Sales and Service Agreement effective 31st December, 2008. At the expiry of the 24 hour notice, QGL was required to "strip your premises, of any signage billboards and markings linking Quality Motors to the Isuzu brand and General Motors East Africa Ltd." The letter was delivered by courier but was not received by QGL until 2nd January, 2009, and by the "Dealer Principal" on 9th January, 2009. QGL contested the notice as improper and in contravention of the agreement between the parties. The allegations of corruption scandal were also denied. When GMEA refused to budge, QGL filed suit on 19th January, 2009, seeking:-

"***(a) A declaration that the letter of termination issued by the defendant herein and dated 30th December, 2008 is illegal, null and void ab initio.***

(b) A permanent injunction restraining the defendant, whether by themselves, their servants, agents, advocates or any other person acting for or on their behalf from breaching the terms and conditions of the agreement.

(c) A permanent injunction restraining the defendant, its servants agents or howsoever otherwise from selling and or causing the service of Isuzu motor vehicles, parts and accessories to and by any person in the Republic of Tanzania other than the plaintiff during the pendency of the said agreement.

(d) A mandatory injunction compelling the defendant herein to comply forthwith with their contractual obligations under the Dealer Sales and Service Agreement dated 17th August 2005 and to supply the Isuzu motor vehicle, service parts, accessories, warranty support as ordered by the plaintiff under the Agreement.

(e) Damages for loss of business and or loss of profits as pleaded in paragraph 20 above.

(f) In the Alternative, Special Damages in the amount of USD 15,703,341.85/- (Kshs.1,256,267,348/-) as set out in paragraphs 17 and 18 above.

(g) Interest on (e) and (f) above.

(h) Any other relief that this honourable court deems fit to grant.

(i) Cost of this suit."

The suit is pending before the superior court and will be determined on merits in due course. The interlocutory relief sought in the chamber summons referred to is therefore well grounded in the main suit.

In considering the prayers for injunctory relief, the learned Judge appreciated that there was a distinction between a prohibitory and mandatory injunction and that different principles applied in considering the grant of those reliefs at an interlocutory stage. She went into some length analyzing authorities cited before her, to satisfy herself that the inherent jurisdiction invoked under ***Section 3A*** of the Civil Procedure Act was judicially exercised. In the end she came to the following conclusion:-

"*It is very clear to me that the Defendant gave a notice of termination dated 30th December, 2008 giving one day's notice to terminate. The Plaintiff has proved through documents that the letter reached them on the 2nd of January, 2009, which was two days after the expiry of the notice. It is my view that by giving a one day notice and by making delivery of the notice to the Plaintiff after the expiry of the notice period, the Defendants were trying to steal a match (sic) against the Plaintiff. In addition, even though I do not want to go into the issue of whether the Defendant had a right to terminate the contract without notice under the Agreement of the parties on the merits of the provisions of the contract or its interpretation, it is however very clear that the Defendant was required to give reasons for the termination where it opted to terminate without notice which it did not do in this case. The letter cites article 20.2.2 as the right the Defendant was exercising in terminating the contract. That clause is provided herein above and it basically gives the Defendant power to terminate the agreement if the Dealer or any manager, officer, owner or principal shareholder or dealer is involved in any conduct which, in the opinion of the Defendant, may adversely affect the good will or interest of the Defendant or its customers. Clause 20.3 qualifies the application of Clause 20.2 which the Defendant invoked in the termination letter. This clause provides that the Defendant shall first notify the dealer the grounds of the intended termination and also requires the Defendant to give the dealer 90 days to remedy such grounds before the termination of the Agreement can be effected. Even though, as Mr. Kemboy argued, there appears to be an apparent contradiction in this clause, which as I stated is a matter for the trial court to decide, nevertheless, the clause gives the Plaintiff a right to be notified of the intention to terminate the Agreement 90 days before the Defendant exercises its right to terminate without notice.*

The Defendant has failed to give the notice of intention to terminate before exercising its right of termination as provided for in the Agreement. The Notice itself did not comply with clause 20.2 and 20.3 of the Agreement, as it did not give the reasons for which the right to terminate was being exercised nor require the Plaintiff to rectify the breach. In the circumstances, it is my view that there was no proper notice of termination of the Dealership Agreement served upon the Plaintiff as contemplated by the parties in the Agreement. The purported notice dated 30th December, 2008 was null and void. In addition to this, the manner in which the purported notice was served, in particular after the expiry of the notice period given in the notice itself, is a clear indication that the conduct of the Defendant was mala fide and that the Defendant was trying to steal a match (sic) against the Plaintiff. I do find that for these reasons, the Plaintiff is entitled to the prayer for Mandatory interlocutory Injunction it has sought in this application."

The learned Judge also considered the prayer for prohibitory injunction made under ***Order 39 r 1 & 2*** of the Civil Procedure Rules and applied the well known principles enunciated in **Giella v. Cassman Brown Ltd [1973] EA 380**. She examined the relevant clause relating to competition with QGL in the dealership agreement and concluded:-

"*I have looked at these provisions and they are very clear to me that the only right the Defendant reserved for itself under clauses in the Standard Terms of that Agreement was the right to sell products directly to the customers in the Republic of Tanzania, which was the authorized territory where, the Plaintiff was to carry out its business under the Agreement. Nothing in this clause gives the Defendant the right to appoint a new dealer whether for purposes of replacing or competing with the Plaintiff in the said territory.*

I have already found that the Agreement between the parties has not been terminated, and further that the purported letter of termination was null and void and therefore it was invalid and of no effect. Since the agreement between the parties still runs, the Defendant cannot appoint a dealer for the sale of its products within the authorized region. The Plaintiff is deserving of the Prohibitory Injunction relief it has sought in this application."

The principles that apply in the superior court for consideration of interlocutory relief are different from the considerations this Court has to make in an application under ***rule 5 (2) (b).*** The applicants before us must establish that they not only have an arguable appeal, that is one which is not frivolous, but also that unless we grant to them the order of stay their proposed appeal, were it to succeed, would have been rendered nugatory. A solitary arguable issue would avail the applicant. Those principles will be applied

to the facts and circumstances of each particular case. Both learned counsel Mr. Julius Kemboy for GMEA, and Mr. Jotham Arwa for QGL, were acutely aware of the principles.

Mr. Kemboy sought to satisfy the first test by submitting that there was a real issue as to whether the termination of the dealership agreement was lawful. In his submission, it was not in the province of the superior court, in an interlocutory application, to make conclusive findings of fact as it did, that the notice of termination was null and void. In effect, the learned Judge determined the main suit leaving only the assessment of damages. He further argued that it was erroneous to stop the applicant from appointing a new dealer when the agreement between the parties provided otherwise. Furthermore, in granting a mandatory order for the applicant to supply vehicles and parts to the respondent without any conditions, the result would be a breach of the terms agreed between the parties which provided qualifications for such supply. At any rate, there were no special circumstances to warrant the grant of a mandatory injunction. Finally, Mr. Kemboy submitted that damages were a sufficient remedy and were in any event prayed for in the main suit but no consideration was made on that issue. As for the nugatory aspect, Mr. Kemboy submitted that the applicant will suffer irreparably since there is already a new dealer in place whose interests were not considered. The only security as ordered by the superior court was for costs. He also introduced an agreement between the United States Government and M/s General Motors Corporation indicating that the collapse of the applicant will affect the interest of the United States Government and other shareholders. This, of course, was not a matter placed before the superior court for consideration.

For his part, Mr. Arwa contended that the orders granted by the superior court were not capable of execution and therefore not amenable to an order of stay as sought. The intended appeal, according to him, was frivolous because the superior court merely made findings *prima facie* as required of it when considering interlocutory injunctions. There was nothing in the orders made that was contrary to the provisions of the contract between the parties which was construed in a manner that made business sense. The problem, in his view, arose because the applicant took action on the basis of baseless allegations and unfounded fears. As for the nugatory aspect, Mr. Arwa contended that any losses which the applicant may suffer were quantifiable and payable. The respondent has already filed an undertaking to pay such damages and the orders of the superior court should not be disturbed.

We have anxiously considered the material before us and the submissions of the learned counsel which we are grateful for. Our view is that the intended appeal is not frivolous as indeed various issues arise, *inter alia*: the construction of the contract between the parties; whether the superior court in construing the provisions of the contract made final or *prima facie* findings at interlocutory stage; whether the mandatory order gave rights which were outside the contract; and whether damages were a sufficient remedy to displace injunctory relief. They cannot be said to be frivolous and indeed we think they are arguable and we put it no further than that.

We think, with respect, however, that the second hurdle has not been surmounted. The refusal to grant stay as sought would mean that the agreement between the parties remains valid, and if the intended appeal succeeds, the parties' relationship will terminate. The success of the appeal would not be rendered nugatory. Similarly, if the mandatory injunction is complied with and the units referred to are supplied with resultant damage to the applicant, such damage is capable of quantification and payment. The damages may be heavy and difficult to assess, but as Madan, J.A stated in **Amritlal v. City Council of Nairobi [1981] LLR 1221**:-

"***There is a great deal of practice and experience in this field; damages are assessed for personal injuries, legs of film stars, intangible items such as shock, pain and suffering."***

It is not an impossible task. The respondent has filed an undertaking to pay such damages, which undertaking goes beyond the order of the superior court on costs only. We find nothing in the material placed before us to suggest that the respondents are incapable of discharging the undertaking.

On the contrary, we think the greater evil that we must address at this stage is the instant ruin of the respondent, even before the appeal is heard, in the event that the orders of the superior court are vacated

forthwith. The circumstances of this case require that the status quo be maintained pending determination of the respective rights of the parties on merit.

In the result the application before us fails and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 12th day of June, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.