Case Number:	Civil Case 449 of 2010
Date Delivered:	20 Dec 2010
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Leonard Njagi
Citation:	ADRA INTERNATIONAL LIMITED v CARGOTEC FINLAND OY & 2 others [2010] eKLR
Advocates:	, Mr. Alawi For the 3rd Defendant Mr. Luseno for the 2nd Defendant Mr. Amin for the 1st Defendant
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 449 OF 2010

ADRA INTERNATIONAL LIMITED …….....…….. PLAINTIFF

VERSUS

CARGOTEC FINLAND OY …….....…….. 1ST DEFENDANT

THORNCLIFF LIMITED …….....……. 2ND DEFENDANT

KENYA PORTS AUTHORITY …….....…….. 3RD DEFENDANT

R U L I N G

The application before the Court is brought by way of a Chamber Summons dated 30th June, 2010 and taken out under **Section 1A (1) (2)** and **(3)** of the **Statute Law (Misc. Amendment) Act (Act No. 6, 2009), Order XXXIX Rules 1, 2, 3** and **9, Order V Rule 17 (1)** of the **Civil Procedure Rules,** and **Section 3A** of the **Civil Procedure Act**. By the application, the Applicant seeks from the Court the following orders –

1. That the application herein be certified as urgent and be heard ex-parte in the first instance.

2. That the first Defendant be restrained by itself, its agents or servants from appointing the second Defendant, Thorncliff Limited as its Agent in Kenya pending the hearing and determination of this application.

3. That the second Defendant be restrained by itself, its agents or servants from supplying or selling to the third Defendant, Kenya Ports Authority, any equipment, machinery or spare parts belonging to, or owned by the first Defendant commonly known as "Kalmar Products" pending hearing and determination of this application.

4. That the third Defendant be restrained by itself, its agents or servants from purchasing or receiving any equipment, machinery or spare parts commonly known as "Kalmar Products" from the first or second Defendants or their agents or servants pending the hearing and determination of this application.

5. That the first Defendant be restrained by itself, its agents or servants from appointing the second Defendant, Thorncliff Limited, as its Agent in Kenya pending hearing and determination of this suit.

6. That the second Defendant be restrained by itself, its agents or servants from supplying or selling to the third Defendant, Kenya Ports Authority, any equipment, machinery or spare parts belonging to, or owned by the first Defendant pending hearing and determination of this suit.

7. That the third Defendant be restrained by itself, its agents or servants from purchasing or receiving any equipment, machinery or spare parts from the first and second Defendants or their agents or servants pending hearing and determination of this suit.

8. That first Defendant be served by facsimile and or e-mail or as this Honourable Court may direct as the first Defendant is not within jurisdiction.

9. Any other Order that his Honourable Court may deems just to grant in interests of justice.

10. That costs of this application be provided for.

The application is supported by the annexed affidavit of Raj Harish Devani, a Director of the Plaintiff Company, sworn on 30th June, 2010; and two supplementary affidavits sworn by the said Director on 6th July, 2010 and 3rd September, 2010 respectively. It is based mainly on the grounds that –

(a) The Plaintiff has a good claim with a probability of success.

(b) The Plaintiff stands to suffer irreparable loss and damage.

(c) The Plaintiff's suit will rendered nugatory if no orders are granted as the 1st Defendant is domiciled overseas and damages will not be an adequate remedy.

(d) It is just in the circumstances of this case and in the interests of justice that the restraining orders be granted.

Opposing the application, the 1st Defendant filed grounds of opposition on 9th July, 2010 which were supplemented by the 1st Defendant's replying affidavit sworn by Jon Waïn, the 1st Defendant's Legal Counsel on 15th July, 2010. The 2nd Defendant also filed a replying affidavit sworn by one Moses Mbugua, its Chief Executive Officer on 9th June, 2010. In that affidavit, the deponent avers that by a letter dated 30th May, 2010, the 1st Defendant informed the 3rd Defendant's Managing Director that the 2nd Defendant was fully authorized to offer and supply all *Kalmar* Products to the 3rd Defendant. A copy of that letter shows that it was received by the 3rd Defendant's Managing Director on 9th June, 2010. For the 3rd Defendant, grounds of opposition were filed on 8th July, 2010, and these were accompanied by a replying affidavit sworn by Mr. Yobesh Oyaro, its Procurement and Supplies Manager, on the same date. The grounds of opposition included a contention that the Plaintiff's suit against the 3rd Defendant had no chance of succeeding in the absence of privity of contract and any reasonable cause of action. The main point made in Mr. Oyaro's affidavit is that if the alleged agency agreement between the Plaintiff and the 1st Defendant really exists, either as alleged or at all, it does not confer any rights or obligations on the 3rd Defendant. Furthermore, the Plaintiff's losses, if any, are quantifiable as they relate to profit and commission. He further deposes that if the orders sought are granted, the 3rd Defendant will be greatly inconvenienced and will suffer unquantifiable loss.

With the leave of the Court, each of the parties filed written submissions and detailed lists of authorities. Mr. Billing for the Plaintiff submitted that having obtained orders 1, 2, 3, 4 and 8 on 30th June and 6th July, 2010, the Plaintiff further prayed that orders No. 2, 3, 4, 5, 6 and 7 be confirmed pending the hearing and determination of this suit. Referring to the 1st Defendant's pleadings, he cited the case of **DAIMA BANK LTD. & ANOR. v. K.H. OSMOND (Court of Appeal Civil Case No. 82 of 1998)** and submitted that this was not a proper case to be determined on affidavit evidence. That being the case, he further submitted that damages were not an adequate remedy as the 1st Defendant is a foreign Company with no assets or funds in the Republic of Kenya to cover any award or compensatory order if the Plaintiff is successful. For that reason, he further submitted that the balance of convenience tilted in favour of the Plaintiff. While conceding that there was no privity of contract between the Plaintiff and the 2nd and 3rd Defendants, Counsel submitted that the two parties were interested parties and were sued in that capacity. In the circumstances, he prayed that the 3rd Defendant's notice of motion filed on 13th July, 2010 be dismissed with costs and the *ex parte* orders Nos. 1, 2, 3, 4 and 8 be confirmed and granted and that prayers Nos.5, 6, 7 and 10 also be granted.

In his submissions, Mr. Amin for the 1st Defendant contended that the entire Chamber Summons application brought by the Plaintiff was an abuse of the process of the Court as the same lacked merit

and failed to disclose any reasonable cause of action. According to him, the application and the suit were motivated by malice, vengeance and mischief and were calculated to oppress and unjustly hamper the 1st Defendant's business and hinder their freedom to contract with each other in response to the justified termination of the Plaintiff's agency by the 1st Defendant. He cited the time-honoured case of **GIELLA v. CASSMAN BROWN & CO. LTD. [1973] E.A. 358** and submitted that the Plaintiff had failed to satisfy the test for the grant of interlocutory injunctions it had sought. He further submitted that the Plaintiff's entire case was built on the premise that the 1st Defendant was not at liberty to terminate the agency agreement between it and the Plaintiff.

Mr. Luseno for the 2nd Defendant observed that the 2nd prayer sought a restraining order against the 1st Defendant from appointing the 2nd Defendant as its Agent in Kenya. However, the Agency Agreement had already been executed on 7th June, 2010 which was before the Plaintiff moved to Court on 30th June, 2010. Moreover, the Plaintiff had recognized that the contract between it and the 1st Defendant had been terminated and, having done so, its recourse was only a claim for damages as set out in paragraphs 7 and 8 of the Plaint. Counsel further submitted that the Plaint does not disclose any cause of action against the 2nd Defendant who was not a party to the contract between the Plaintiff and the 1st Defendant. He urged the Court to dismiss the application dated 30th June, 2010 as it does not meet any of the grounds spelt out in **GIELLA'S CASE**.

For the 3rd Defendant, Mr. Alawi argued that for the purpose of lifting cargo from the ships coming to habour, it is incumbent upon the 3rd Defendant to maintain equipment of international standards and to obtain from time to time modern equipment. That was how the 3rd Defendant came into contract with the Plaintiff and the 1st Defendant. He submitted that the Plaintiff was always an Agent and an Agent cannot sue a 3rd party where the principal is disclosed. He further submitted that there was no wrongdoing, contractually or in tort, against the 3rd Defendant for which the remedy sought has been prayed for. Furthermore, if the 3rd Defendant was at fault in the process of its procurement, **Section 25** of the **Public Procurement and Disposal Act** provides an appropriate remedy. Finally, Mr. Alawi submitted that if the orders of injunction granted by the Court are confirmed, the effect will be to bar the 3rd Defendant from obtaining better quality goods from other sources. He therefore urged the Court not to confirm the orders, and instead to dismiss the application with costs, and in the alternative to allow the 3rd Defendant's application for setting aside the temporary injunctive orders.

I have considered the application and the respective submissions of Counsel. The main issue to determine here is whether the Plaintiff/Applicant is entitled to an injunction against the Defendant herein. The case of **GIELLA v. CASSMAN BROWN & CO. LTD. (Supra)** is the *locus classicus* in the grant of interlocutory injunctions within our jurisdiction. In that case, the Court of Appeal for East Africa observed that –

"The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly,

an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt it will decide an application on the balance of convenience."

Applying these principles to present case, the contract which is alleged to have been breached is said to have been entered into in 1997. The Plaintiff's case is that the contract constituted the Plaintiff alone the sole Agent for the 1st Defendant from 1997 to 2015, and therefore by terminating the contract and appointing the 2nd Defendant as its Agent, the 1st Defendant was in breach of that contract; hence the injunctive orders sought by the Plaintiff. For the Plaintiff to establish a *prima facie* case in this matter, it is imperative that the contract allegedly entered into between the Plaintiff and the 1st Defendant be established. As at this stage, a copy thereof has not been availed to the Court. The only reference to a contract is in the form of some letters addressed by the 1st Defendant to the 3rd Defendant. The first of the said letters is dated September, 30th, 2009 and is addressed to the Managing Director, Kenya Ports Authority, Mombasa. Whereas the said letter is titled **"exclusive sole dealership for Kalmar in Kenya"**, for a reason that will become apparent soon hereafter, the first sentence in the said letter reads as follows –

"Since 1997, the exclusive accredited dealer for the Kenya market has been and continues to be Adra International Limited, 5th Floor, Shimmers Plaza, Westlands Road, Nairobi, also having a branch office in Mombasa."

Nowhere in the said letter is there any clause to the effect that the contract between the Plaintiff and the 1st Defendant was to run from 1997 to 2015. On the same date that this letter was written, that is September 30th, 2009, another letter was addressed by the 1st Defendant to the 3rd Defendant on the same subject, to wit, **"Exclusive soledelearship for Kalmar in Kenya"**. The first paragraph of the latter letter read as follows –

"Since 1997, the exclusive accredited dealer for the Kenya market has been as continues (sic) to be Adra International Limited, 5th Floor, Shimmers Plaza, Westlands Road, Nairobi until 2015 when new terms will be negotiated."

It is notable that whereas in the first letter the expression used in the first letter is **"… and continues to be …"**, the second letters reads **"… as continues to be …"**. Secondly, the first letter does not mention the period over which the accreditation would last. It is only in the second letter of even date that there is a reference to the contract lasting until 2015 when new terms would be negotiated. At page 2 of the first letter are to be found the words **Cargotec Sweden A.B.** against the Sale's Director's signature. However, similar words do not appear against the signature on the second letter. For these and other contradictory details, the 1st Defendant contends that it had no reason at all to write the two letters to the Managing Director of the 3rd Defendant, and that the 2nd letter did not originate from the 1st Defendant.

The position taken by the 1st Defendant *viz-a.viz* this letter casts a cloud over the origin of this letter. If it is true as the 1st Defendant contends that it did not write such a letter as it had no reason to do so, then a serious issue arises as to whether or not there was indeed a genuine agreement to the effect that the Agency contract would last upto 2015 when it would fall for review. Coming from the Plaintiff, that allegation is seriously contested, and since that letter is the only document which refers to the contract between the parties running to 2015, then it is not certain that the Plaintiff's allegation is factual. There is a possibility that the 2nd letter may not be genuine. Even if it had been authored by the 1st Defendant, it does not indicate anywhere that the sole Agency was not terminable by the 1st Defendant. The 1st Defendant's freedom to retain or terminate the contract was therefore left intact even though such a termination would be at the pain of paying damages for any breach of contract.

In the absence of a copy of the Agreement constituting the contract between the Plaintiff and the 1st Defendant, one cannot say with certainty that the said contract was to run upto 2015 when the terms thereof would be negotiated as alleged by the Plaintiff. Only a copy of the agreement would shed light on the Agreement between the parties as to whether the Agency contract was or was not terminable, and the procedure, if any, for termination.

According to the Plaintiff's pleadings, the Agency Agreement between the parties was terminated by a notice dated 1st June, 2010. The Plaintiff came to Court on 30th June, 2010 seeking *inter alia,* injunctive orders. By that time, the new Agent in the person of the 2nd Defendant had already been appointed. Granting an injunction at that moment in time is akin to trying to forestall that which has already happened, and the restraining orders would be seeking to restrain that which has already been done. That is not possible.

For the above reasons, I find that the Plaintiff has not made out a *prima facie* case with a probability of success, and therefore has not satisfied the principal condition set out in **GIELLA'S CASE** for the grant of an injunction. Even if it had established a *prima facie* case, it would not have been able to satisfy the 2nd condition which requires that an interlocutory injunction would not normally be granted unless the

Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. In the instant case, the Plaintiff has particularized the loss and damage which it would suffer as a result of the termination of the Agency. In paragraph 7 of the Plaint, the Plaintiff claims that it would suffer the loss of commission for supplying and sale of equipment and that it would also suffer the loss of profits for supply and sale of equipment. For these losses, **"… the Plaintiff claims special and general damages against the 1st Defendant".** This claim amply demonstrates that the Plaintiff would be adequately compensated by an award of damages and therefore the 2nd condition for the grant of an interlocutory injunction is also unsatisfied. Finally, this matter deals with a very sensitive issue affecting the Kenya Ports Authority's operations at the port of Mombasa which is the gateway not only to Kenya, but also to Northern Tanzania, Uganda, Rwanda etc, which would all be affected by any delays in the offloading of any shipping cargo. Although the Kenya Ports Authority is an interested party, as the Plaintiff's Counsel submits, it was not a party to the Agreement between the Plaintiff and the 1st Defendant and the balance of convenience would dictate that it be given a free hand in its operations pending a determination of the disputes especially between the Plaintiff and the other parties.

On account of the foregoing, I find that the Plaintiff has not established a *prima facie* case and the application by Chamber Summons dated 30th June, 2010 is hereby dismissed with costs to the Defendants. Needless to say, the interim orders granted herein on 30th June, 2010 and 6th July, 2010 are hereby set aside.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 20th day of December, 2010.

L. NJAGI

JUDGE