



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 9 OF 2015

RAINDROPS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF KILIFI...DEFENDANT/RESPONDENT

CORAM: Hon. Justice S.M.Githinji

Mr. Kondipo for the Plaintiff

Mr. Muthama for the Defendant

R U L I N G

The Applicants have filed three applications vide Notice of Motions dated 10th January, 2022, 17th January, 2022 and 19th January, 2022 in which application the Plaintiff seeks that this Court grants further interim restraining injunctive orders against the Respondent.

The Application dated **10th January, 2022** is supported by the affidavit deposed by **Shaib Hamisi Mtuwa** the Director of the Plaintiff's company who states that the Notice of Motion seeks inter-alia orders that the Respondent and the Branch managers of SBM Bank formerly Chase Bank, Malindi Branch or any other relevant officer to the said bank stop the immediate withdrawal and or release to the Defendant any of the sums held in the two Escrow accounts at Chase Bank, Malindi Branch operated under the names of County Government of Kilifi Cess and County Government of Kilifi Parking Account Numbers **0198xxxxx** and **0198xxxx**.

He further states that the Court rendered itself on 13th July, 2021 in a judgment which judgment reserved its final orders on conditions that; Auditor general do audit the Defendant's cess and parking Revenue collection on bank accounts and further a valuation of Revenue collection infrastructure set up by the Plaintiff and leaser done. The two conditions are yet to be complied with to date.

He states that since the date of judgment both the Applicant and Respondent have continued to collect Revenue and deposits the same in a joint escrow accounts at SBM Bank for a purported execution and that he was contacted by the Branch manager on 7th January, 2022 who informed him that they were releasing all the sums held in the accounts to the Defendant pursuant to the said decree.

He states that the above happenings were contrary to the consent between the parties at the Court of Appeal in Civil Application No. 84 of 2016, County Government of Kilifi versus Raindrops Limited dated 10th May, 2017 which provided that the cess and parking revenue was to be collected and deposited into the afore stated accounts and either party was not to access the said amounts until the hearing and determination of this suit.

The Respondent filed a Notice of Preliminary objection dated 21st January, 2022 on grounds that the Court has rendered itself with finality thus it's *functus officio*.

The matter came up for hearing on 24th January, 2022 where the Court directed that the preliminary objection raises weighty issues which ought to be determined before the Plaintiff's application is heard and determined. Being the case, Mr Kondipo Counsel for the Applicant sought that the interim orders issued on 17th January, 2022 be extended which application was opposed by Mr Bwire counsel for the Respondent.

Submissions, Analysis & Determination

Mr Bwire in his oral submissions, opposed extension of the interim orders on grounds that the Orders were granted based on an exparte application for interim orders against the County Government of Kilifi restraining them from taking cess and parking revenue. The said interim orders were granted on material placed before the Court. He submitted that the same orders had been sought in the main suit and the

Court made a determination that it could not issue a permanent injunction restraining the County Government of Kilifi from collecting Revenue and that the way out would be an award for damages which orders were made in favour of the Plaintiff. He further submitted that it was an error that the Court issued interim injunction after a permanent injunction was disallowed. That the only remedy available after judgement is an order for review or an appeal and the instant application is neither an appeal nor a review and that the suit is already determined.

He submitted that the Court awarded damages which in a way terminated the contract and it is not the duty of the Court to reconstruct the contract and the injunction leaves no one to collect the revenue.

Mr Kondipo Counsel for the Applicant submitted that the Plaintiff's application has annexed the partial decree. That two orders are important as given by the Court. That there must be an audit of all accounts held by the Kilifi County Government and Valuation of the Offices put in place by the Applicant. That the said Orders are yet to be complied with and withdrawal of money from the said accounts would interfere with an audit and possession of the premises would interfere with the valuation process thus need for extension of the interim orders.

Mr. Muthama Counsel for the Respondent adds that the contract is terminated therefore no provision for the Applicant to continue collecting the cess and parking fees.

I have considered arguments advanced by both parties and also appreciates the judgment delivered by my brother Hon Justice Nyakundi on 13th July, 2021.

The conditions for the grant of interlocutory injunctions are well settled as stated in *Giella V Cassman Brown & Co. Ltd 1973 E.A 360, Mrao V First American Bank of Kenya Ltd and 2 Others 2003 KLR 125*. The principles are; -

- a) *An applicant must show a prima facie case with a probability of success.*
- b) *In an interlocutory injunction the applicant must show that unless the injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by damages.*
- c) *And if in doubt in any of the above, conditions the Court will decide then on a balance of convenience.*

These principles have stood the test of time as good law applicable on interlocutory injunctions and thus there is need to be guided by them.

The unique circumstances of the instant case is that the Applicant seeks extension of interim orders issued on 17th January, 2022 which orders are; Interlocutory Orders restraining the County Government of Kilifi and or any other third parties by themselves and or their servants and or agents and or employees from taking over collection points and or collection of cess and parking revenue pending the hearing and determination of the application inter-partes.

The Respondent opposes the same on grounds that the matter was decided with finality vide the judgment dated 13th July, 2021.

A deliberate glance of the disposition of the judgment of 13th July, 2021 sets out the conditions to be met before further orders of the Court are made. It is my understanding that the said judgment had not put to rest the issues as the same are contingent on the conditions being fulfilled.

As an equity Court, I am called upon to look at the matter wholly and consider how best to achieve a just and fair outcome on the peculiar facts of this matter.

In the case of *National Commercial Bank V Olint Corporation 2009 WLR 1405* the Privy Counsel stated; ***“the purpose of interlocutory injunction is to improve the chance of the Court being able to do justice after a determination of the merits at trial.”***

Further, the right to a fair hearing and due process is enshrined in the constitution under Article 50. In the case of *Thomas Edison Ltd V Bathock 19R CLR 679* it was held; ***“there is a primary precept governing administration of justice that no man is to be condemned unheard and therefore as a general rule, no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence, but instance occur where justice could not be done unless the subject matter of the suit is preserved and, if that is in danger of destruction by one party or irremediable by one party interim orders may issue to give room for the court to determine the dispute on merits” (emphasis mine).***

From the judgment, Applications and arguments, it is clear that the conditions set out in the judgment have not been fulfilled. I am also appraised of the steps taken *suo moto* by the Court in the letter addressed to the Auditor General seeking that the audit directed to be done and a report availed to Court so that the Court may issue further orders/directions on 3rd February, 2022. The question then is; would the substratum of the suit be defeated if the interim orders are not extended?

I am persuaded by the decision by *Lord Diplock in Siskena 1977 ALL E.R at page 824* where he held; ***“a right to obtain an interlocutory injunction is not a cause of action and cannot stand on its own. It is dependent on their being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the Plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the Court. The right to obtain interlocutory injunction is Merdy ancillary and incidental to the pre-existing course of action. It is granted to preserve the status quo pending the ascertainment by the Court of the rights of the parties and the grant to the plaintiff of the relief to which is his case of action entitles him which may or may not include a***

final injunction.”

I am conscious that I have discretion in this matter though exercisable on sound legal principles.

I have also weighed the partial decree drawn by the Respondent and it is not lost on me the conditions outlined. The same as I have observed are yet to be met. I have also considered that this matter pends before my brother Hon Justice Nyakundi and the same is to be placed before him on 3rd February, 2022 for further orders/directions. The constitution under **Articles 22 and 23** provides for conservatory orders. **Order 40 Rule 7** of the Civil Procedure Rules, 2010 allows a party affected by injunction to apply to Court for its discharge, variation or setting aside if dissatisfied with such order. The defendant is within his legal rights in opposing extension of the same.

Be it as it may, the discretion bestowed upon me to vacate interim orders is if there exist sufficient reasons to do so. In this case, I do not find sufficient reasons to warrant vacation of the interim orders issued on 17th January, 2022. For what logic would there be to enforce a partial decree while the Court is yet to give further orders/directions contingent on the conditions set out?

Flowing from the foregoing; I make the following orders; -

a) That the interim orders in place are extended until 3rd February, 2022 when the matter shall be placed before Hon Justice Nyakundi for directions.

b) The matter be placed before Hon. Justice Nyakundi Virtually on 3rd February, 2022 for further dispensation.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 26TH DAY OF JANUARY, 2022.

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S.M. GITHINJI

JUDGE

In the presence of:

1. Mr. Kondipo for the Plaintiff/Applicant
2. Mr Bwire holding brief for Mr. Muthama for the Defendant