Petygas and Lubes Limited & another v National Oil Corporation of Kenya (Civil Suit E724 of 2021) [2022] KEHC 13549 (KLR) (Commercial and Tax) (31 August 2022) (Ruling)

Neutral citation: [2022] KEHC 13549 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E724 OF 2021

A MSHILA, J

AUGUST 31, 2022

BETWEEN

PETYGAS AND LUBES LIMITED ..... 1ST APPLICANT

UNICITY SERVICE STATION LIMITED ..... 2ND APPLICANT

AND

NATIONAL OIL CORPORATION OF KENYA ..... RESPONDENT

RULING

1. There are two Applications before the Court to be canvassed together. The 1st Application is a Notice of Motion dated August 2, 2021 and supported by the sworn Affidavit of Lucy Kinya Mwiti. The Motion was brought under Order 51 Rule 1 of the *Civil Procedure Rules* for the following orders;

    a. Pending the hearing and determination of this Application, an interim injunction do issue barring and/or restraining the Respondent from levying, or continuing to levy, the "Through-put based Forecourt Fee" as notified in its circular to all retailers dated July 15, 2021.

    b. Pending the hearing and determination of the main suit, an interim injunction do issue barring and/or restraining the Respondent from levying, or continuing to levy, the "Through-put based Forecourt Fee" as notified in its circular to all retailers dated July 15, 2021.

    c. The Applicant be awarded the costs of this Application.

2. The 2nd Application is a Notice of Motion dated September 1, 2021 brought under Order 51 Rule 1 of the *Civil Procedure Rules* and supported by the sworn Affidavit of Lucy Kinya Mwiti. The Applicant sought orders that;

a. Pending the hearing and determination of this Application, an interim injunction do issue barring and/or restraining the Respondent from recovering from the Applicants, or surcharging the Applicants the combined sum of Kshs 383, 392/- as notified in its letter to the Applicants dated July 23, 2021.

b. Pending the hearing and determination of the main suit, an interim injunction do issue barring and/or restraining the Respondent from recovering from the Applicants, or surcharging the Applicants the combined sum of Kshs 383,392/- as notified in its letter to the Applicants dated July 23, 2021.

c. The Applicant be awarded the costs of this Application.

Applicants' Case

3. The Applicants stated that on July 26, 2021, the Respondent sent an email to the Applicants with a circular attached; which circular was dated July 15, 2021. The circular gave notice to all retailers that with effect from August 1, 2021, the Respondent would begin levying a new fee called the "Through-put based Forecourt Fee".

4. The said fee is to be computed at Kshs 0.86 per litre of petroleum product purchased by the Applicants from the Respondent. This is a 400% increase from the current through-put fee of Kshs 0.20 per litre provided for in the Dealer License Agreement between the Respondent and the Applicants respectively.

5. The said circular effectively gave the Applicants only 5 days' notice of the implementation of the new fee. The said new fee is not provided for in the Dealer License Agreement between the Parties and the Applicants were not consulted before the decision was made to introduce the fee.

6. The arbitrary introduction of this unconscionable and un-contractual new fee would decimate the Applicant's profit margins and render their entire business operations unviable and untenable.

7. Further, the Applicants averred that the fee is opaque in its computation and arbitrary in its application and will undoubtedly devastate the Applicants' business if not stopped; and this court is the only forum that can offer reprieve to the Applicants.

8. In addition, the Respondent stated a claim against the Applicants that in the 15-month period between January 2020 and March 2021. The Applicants procured a total of 47,915 litres of petroleum product from parties other than the Respondent, in alleged breach of their respective Dealer Licenses.

9. In that same period, from the Respondents own records, the Applicants procured in excess of 8,000,000 litres of petroleum product from the Respondent. Effectively, therefore, the Respondent's claim against the Applicants is that in a 15-month period, they procured approximately 0.58% of petroleum product from third parties. Such a claim is on the face of it absurd, illogical and filled with malice and ill motive.

10. It was the Applicants' submission that they have established a prima facie case with a probability of success that the Respondents actions are in breach of the Dealers License for attempting to amend the License without the consent of the Applicants.

11. The Applicants will suffer irreparable injury if the orders sought are not granted. In Paragraph 5 of the Applicant's Supporting Affidavit dated August 2, 2021, the Applicants aver that new "through-put based forecourt fee" of Kshs.0.86 per litre, is tantamount to a 400% increase in the current contractual through-put fee of Kshs 0.20 per litre.

12. It was the Applicants' argument that there is no business that can absorb an arbitrary 400% increase in costs. That the increase is arbitrary has already been established above; and the fact that such an increase would be debilitating to the Applicant's business is proven by Paragraphs 8, 12 and 14 of the Applicant's said supporting Affidavit.

13. In addition, the financial distress of the Respondent is a matter that is prominently in the public domain and has received sufficient notoriety to warrant the Court to take judicial notice of that fact. Moreover, there is no doubt that given the precarious financial circumstances of the Respondent, an award of damages would be entirely inappropriate, and wholly insufficient to remedy any loss that the Applicants would suffer.

14. The balance of convenience, therefore, lies in favour of granting the interim reliefs sought by the Applicants, if only so as to preserve the Applicant's business and maintain the status quo between the Parties pending the hearing and determination of the main suit.

15. In summary the Applicants submited that the two Applications have both met the threshold for a grant of interlocutory relief as set out in the case of *Giella vs Cassman Brown*(1973) EA.

Respondent's Case

16. The Respondent in its Replying Affidavit in response to the Application, contended that Clause 43.1 of the Dealer License Agreement gives authority to the Respondent to make amendments to the Dealer License Agreement. More particularly and relevant to the subject amendment of the throughput based margin, clause 7.1.1.1 of the Dealer License Agreement allows the Respondent to amend the margin without reference to the Applicant by giving notice.

17. Further, the Respondent stated that sufficient notice for a general meeting slated for June 15, 2021 was issued to all Retailers/ Dealers, the Applicant included, to deliberate on the consolidated fee known as "Through-put based forecourt Fee" the subject of the present Application. However, it was the Respondent's contention that the Applicant did not honor the invitation and the deliberations and resolutions passed at the meeting were made in their absence but with the concurrence of all the other Dealers/ Retailers present in the said meeting.

18. It was also the Respondent's position that based on the meter readings and investigations conducted, it was established that the Applicant had breached its Dealer License Agreement and engaged in what is termed as dumping in the Dealer License Agreement- this entailed the Applicants selling another Oil Marketer's product at the Respondent's Service Station, thereby depriving the Respondent revenue from the margins of the sales made. The said dumping activities by the Applicants resulted in the Respondent making a loss of Kshs 383, 392/=.

19. It was the Respondents submission that the Plaintiffs Application is frivolous, vexatious and an abuse of the court process as the Applicants had declined the Respondents formal invitation to a meeting for all Dealers/ Retailers on June 15, 2021 to deliberate on various issues among them being the consolidated fee known as "Through-put based forecourt Fee"

20. It is evident that the Applicant has enjoyed temporary injunctive orders that have ensured that their business has continued to operate on the terms before the amendment and as such they have suffered no prejudice whatsoever and the period during which they have enjoyed these orders are indeed sufficient time for the Applicant to adjust to the new through put forecourt based fee.

21. Consequently, after a successful meeting with its network Dealers, the Respondent implemented the new throughput based forecourt fee with almost all its Dealers in compliance and the sole motive of

the Applicant can only be deduced as one to harass the Respondent and to cause it unnecessary anxiety, trouble and expense through litigious action.

22. It is trite law that the court should not be used to rewrite a contract between Parties and the Applicant's attempt to bar the Respondent its discretionary entitlement under Contract to review and amend the contract is unwarranted as similar provisions have already been enforced for all the Respondent's Dealers across its retail network and the Respondent cannot then isolate the terms applicable to the Applicant while prejudicing its own business.

23. The Respondent argued that the Applicant failed to provide complete information to the Court that there were several other changes implemented in relation to the Dealership, most of which were beneficial to the Applicant's operations and that the notion of 'dominant power' as alleged does not apply presently as the parties are not in competition with each other but are in a mutually beneficial business relationship.

24. In *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR the court pronounced itself that in order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.

25. The alleged harm contended by the Applicant in both its applications is entirely quantifiable in monetary terms as demonstrated by the Applicant by itself in its Supporting Affidavit. Therefore, the balance of convenience tilts in favour of the Respondent as the Applicant's continues to utilize the services of the Respondent and enjoy the use of the Forecourt at the Service Station.

26. Further it ought to be noted that the Plaintiff/ Applicant has made prayers in its Amended Plaint dated September 1, 2021 which is more than adequate potential remedies of course subject to the final determination of the court.

Issues For Determination

27. Having considered both Applications, the Responses and the written submissions by the parties, the Court framed the following issues for determination;

    a. Whether an interim injunction should issue against the Respondent?

Analysis

28. The germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of *Giella v Cassman Brown & Co Ltd* (*supra*) as follows:

    a) The applicant must first establish a *prima facie* case with a probability of success.

    b) The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.

    c) Where there is doubt on the above, then the balance of convenience should tilt in favor of the applicant.

29. The above principles were restated in the case of *Micah Cheserem v Immediate Media Services & 4 others* [2000] eKLR thus:

> " Firstly, the Applicant must establish a *prima facie* case with a probability of success. Secondly, the Applicant must show that he or she stands to suffer irreparable loss that cannot

be adequately compensated by way of damages. Thirdly, where the court is in doubt, then the balance of convenience should tilt in favour of the Applicant"

30. Firstly, have the Applicants established a *prima facie* case with a probability of success? Prima facie case was defined in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR as;

> " We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

31. The Respondent herein, sent an email to the Applicants with a circular attached; which circular was dated July 15, 2021. The circular gave notice to all retailers that with effect from August 1, 2021, the Respondent would begin levying a new fee called the "Through-put based Forecourt Fee". The Applicants alleged that the said new fee is not provided for in the Dealer License Agreement between the Parties and the Applicants were not consulted before the decision was made to introduce the fee.

32. It was also the Respondent's contention that the Applicants did not honor the invitation and the deliberations and resolutions passed at the meeting were made in their absence but with the concurrence of all the other Dealers/ Retailers present in the said meeting.

33. On this ground this court is satisfied that the Applicants have established they have a *prima facie* case.But it is trite law that it is not sufficient to merely establish a *prima facie* alone the Applicants must satisfy the court that the injury they will suffer in the event that the injunction is not granted is irreparable and that damages would not be an adequate remedy; in the case of *Nguruman* (*supra*) it was held that;

> " The existence of a *prima facie* case does not permit "leap frogging" by an Applicant to injunction directly without crossing the other hurdles in between."

34. Which then leads to the issue of irreparable damage; the question is do the Applicants stand to suffer irreparable loss that cannot be adequately compensated through damages? The Applicants argued that the arbitrary introduction of this unconscionable and un-contractual new fee would decimate the Applicant's profit margins and render their entire business operations unviable and untenable.

35. Further, an arbitrary 400% increase in costs would be debilitating to the Applicants business. The Applicants also alleged that it is in the public domain that the Respondent is in financial distress thus would not be in a position to compensate them through damages.

36. On the other hand, the Respondent stated that the alleged harm contended by the Applicants in both the applications is entirely quantifiable in monetary terms.

37. This Court reverts to what the Court of Appeal had to say with regard to what amounts to irreparable damage in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others supra*

> "On the second factor, that the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

38. The Applicants saving grace is that they are seeking an equitable remedy and it is trite law that equity relies less on precedent but more on the need that justice be served. The remedy is discretionary and the Applicants do not have to prove the underlying claim all they have to do is persuade the court that there is good reason why the Respondents' actions should be restricted;

39. This court is not pre-judging the Respondent but is satisfied and persuaded that from the material tendered there is a serious questions and doubts arising on the nature of the Respondent's business and financial dealings. The Applicants are found to have a good and arguable case as this is a question that needs to be established;

40. In this instance this court will exercise its discretion on a balance of convenience.

41. Both parties contend that they both stand to lose. Therefore, in the exercise of balancing and in weighing the relief vis a vis the injury this court has satisfied itself that the potential injustice that may be caused to the Applicants arising greatly outweighs the injury that may be done to the Respondent.

42. For those reasons this court finds that the balance of convenience tilts in favour of the Applicants.

Findings and Determination

43. For the forgoing reasons this court makes the following findings and determinations;

    a. This court finds the applications to be meritorious and both are hereby allowed.

    b. Pending the hearing and determination of the main suit, an interim injunction do issue barring and/or restraining the Respondent from levying, or continuing to levy, the "Through-put based Forecourt Fee" as notified in its circular to all retailers dated July 15, 2021.

    c. Pending the hearing and determination of the main suit, an interim injunction do issue barring and/or restraining the Respondent from recovering from the Applicants, or surcharging the Applicants the combined sum of Kshs 383,392/- as notified in its letter to the Applicants dated July 23, 2021.

    d. The Applicants to ensure the matter is disposed of within 12 months from today's date.

    e. The Respondent shall have the costs of this instant Application.

    Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 31ST DAY OF AUGUST, 2022.

HON. A. MSHILA

JUDGE

Virtually in the presence of: -

Lucy: Court Assistant

Mr Paul Maina: Advocate for the Applicant

Mr Lumumba: Advocate for the Respondent