



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL APPEAL NO. 33 OF 2020**

**HIGH SEAS PETROLEUM**

**CONTRACTORS LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**EAST AFRICAN GASOIL LIMITED.....1<sup>ST</sup> RESPONDENT**

**KITHEMU AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Otieno BN & Associates advocates for the appellant**

**Sherman Nyongesa & Mutubia advocates for respondent**

**RULING**

The appellant through his counsel brought an application through a notice of motion dated 1<sup>st</sup> March 2021 supported by the sworn affidavit of **Mr. Daniel Karisa Karabu**. The respondent filed a replying affidavit sworn by **Mr. Abdi Ali Salaad** on 9<sup>th</sup> March 2021.

**Background**

The application dated 1<sup>st</sup> March 2021 is premised on the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules 2010 and seeks the following prayers;

***i. Spent***

***ii. That this honourable court issue a temporary injunction restraining the Respondents whether by themselves, their agents, servants, employees or representatives from trespassing or in any manner interfering with, selling, subdividing and/or dealing with in any manner of all parcel of land known as KILIFI/ROKA/1887 belonging to the Plaintiff/Applicant and/or removing, demolishing, moving, restructuring and or any fixtures on the said parcel of land and/or interfere with the operations of the Plaintiff/Applicant on the said parcel of land pending the hearing and determination of this application***

***iii. That this honourable court issue a temporary injunction restraining the Respondents whether by themselves, their agents, servants, employees or representatives from trespassing or in any manner interfering with, selling, subdividing and/or dealing with in any manner of all parcel of land known as KILIFI/ROKA/1887 belonging to the Plaintiff/Applicant and/or removing, demolishing, moving, restructuring and or any fixtures on the said parcel of land and/or interfere with the operations of the Plaintiff/Applicant on the said parcel of land pending the hearing and determination of the appeal.***

***iv. That the costs of this application be borne by the Respondents***

In the supporting affidavit sworn by **Daniel Karisa Karabu** a director of the applicant, he states that the applicant entered into a petroleum Dealer Operating agreement with the respondent which agreement was to commence on 1<sup>st</sup> January 2017 for a term of five years and that the agreement was to continue thereafter for successive periods of three years each until determined by either party writing to the other of its intent to terminate the agreement.

The basis of the agreement was as follows;

**a. That the applicant owned a retail site (Kilifi/Roka/1887) which is part of a network service stations operating under the Respondent's brand.**

**b. The Respondent required the Applicant to operate the site and provide a range of services including**

**i. Retailing of petroleum products**

**ii. Running alternative profit centres**

**iii. Delivering consistently high customer value**

**iv. Supervising the performance of tasks and discharging of duties as set out in the agreement**

**c. In all of the contracts or engagements entered into by the dealer with customers for sale or supply of products and services, the dealer shall always act as a principal and not as an agent or on account of the company.**

**d. The quality of customer service and standards of performance required by the company are for the dealer to ensure that customers use patronize company sites with confidence knowing that the range, presentation and quality of products and services will always and consistently be of high standards.**

He further stated that the respondent breached the terms of the agreement which led to filing a suit before the Chief Magistrate's court at Kilifi being **Civil Suit no. 167 of 2019** seeking injunctive relief in a bid to protect the suit property which application was dismissed and consequently the applicant herein filed an appeal.

He stated that the respondent has now issued a notice of sale of the property with the knowledge that there is a pending appeal and if the respondent is allowed to sell the property, the appeal will be rendered nugatory and it is only just and fair that the orders sought in the instant application be granted to avert immense and irreparable damage.

In their response through the replying affidavit sworn by **Abdi Ali Salaad** the Chief Executive officer, he states that the applicant's supporting affidavit does not disclose material facts relating to the contractual transactions between the parties particularly the let, possession and activities carried out on the suit property.

He stated that pursuant to the lease dated 5<sup>th</sup> July 2016, the 1<sup>st</sup> respondent let out the parcel of land known as plot no. Kilifi/Roka 1887 from the applicant for purposes of running a petrol station with related services for a term of 10 years with effect from 1<sup>st</sup> July 2016 with an enhanced grace period of two months thereto.

The term of the lease enjoyed by the 1<sup>st</sup> respondent over the demised suit property was subsequently extended to a term of thirteen years in pursuant to a deed of variation executed between the parties on 24<sup>th</sup> November 2016

The 1<sup>st</sup> respondent upon the request of the applicant advanced the applicant Kshs.13,000,000 for putting up necessary infrastructure on the suit property for a running petrol station and incidental service centers and the suit property was charged in favour of the 1<sup>st</sup> respondent and in consideration of the foregoing financial advancement.

Upon basic infrastructure being set up on the suit property, the applicant requested to be granted a dealership to run and operate the petrol station and both parties entered into a petroleum dealer operating agreement made on 13<sup>th</sup> March 2017 for a term of 13 years with effect from 1<sup>st</sup> January 2017 subject to performance of the terms of the dealership agreement on part of Applicant.

He stated that the applicant had numerous challenges in its due performance of its material obligations under the dealership agreement particularly in raising the finances required for it to meet its sale agreement which led to the 1<sup>st</sup> respondent advancing a loan of Kshs.2,500,000 to the applicant vide a memorandum of loan agreement executed between the parties on 6<sup>th</sup> December 2017 on an unequivocal understanding that in the event of unremedied default the 1<sup>st</sup> respondent shall be at liberty to move into the petrol station and take over the entire operations of the petrol station.

The applicant defaulted in satisfying the terms of the loan agreement which led to the 1<sup>st</sup> respondent taking over the operations of the petrol station after having issued a demand for remedying the default vide a letter dated 27<sup>th</sup> May 2018. The said takeover abided by the dealership agreement.

A notice of dealership agreement was issued in a joint meeting in the presences of the parties advocates on 13<sup>th</sup> July 2018 which meeting led to a compromise leading to execution of a memorandum of understanding dated 4<sup>th</sup> September 2018.

He further stated that the performance of the material terms of the memorandum of understanding was grossly frustrated and/or breached on the part of the applicant during the subsistence of the contractual period as follows;

**i. That the applicant in spite of the numerous requests by the respondent failed to approve the draft and/or execute the further deed of variation of the term of the lease forwarded by the 1<sup>st</sup> respondent's advocates to the Applicant's advocates.**

**ii. That the applicant was unable and completely failed to repay Kshs. 1,000,000 advanced to it as per the Memorandum of Understanding; and**

**iii. That the applicant failed to mobilize adequate resources and/or capital to take over the operations of the station and/or to be in a position to execute a dealership agreement to guide the operations of the of the petrol station during the subsistence of the term of lease.**

He stated that the applicant had breached the terms of the lease agreement, loan agreement and the memorandum of understanding and the instant application is an abuse of court process which ought to be dismissed with costs as the referenced appeal has never been admitted by this court occasioned by the applicant's failure to comply with the court's timelines.

### **Determination**

The above background and the annexed pleadings from the Lower Court in this context tend to show that there is a pending suit before the Chief Magistrate – at Kilifi referred as **CMCC No. 1670 of 2019**. In the same vein the applicant had filed a notice of motion dated 18.4.2019 expressed to be brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules and Section 1A, 1B and 63 of the Civil Procedure Rules.

It's the dismissal of that application which has triggered an appeal to this Court as supported by the annexed memorandum of appeal filed in Court on 13.7.2020. The gravamen of the applicants claim before Court is that temporary injunction do issue in the same terms as those prayed for in the Lower Court pending the determination of the pending appeal.

The ultimate question to be determined is whether the applicant's application has real prospect of success on the basis of resjudicata and estoppel. A brief examination of the Law governing the doctrine stated in the Civil Procedure Act will first be undertaken. That the doctrine may be a bar to the current notice of motion.

This concept as incorporated under Section 7 of the Act prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. In this process **"no Court shall by any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of their claim, litigating under the same title, in a Court of competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."** In speaking of the doctrine of resjudicata the Court in **Karia & Another v The Attorney General & Others (2005) 1 EA 83, 89** where it was noted that it applies with:

**(i) The issue in the first suit must have been decided by a competent Court.**

**(ii) The matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar and the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title."**

Learned Authors in **Halsbury's Law of England, 4<sup>th</sup> Edition, Vol – 16 para 1527** observed:

**"That the doctrine is not a technical concept applicable only to records but that it is a fundamental doctrine of all Courts. That there must be an end to litigation on the same set of facts by the same people before a competent Court ordinarily, it is conveniently treated as a branch of the Law of estoppel. Whatever differences there might be between the two concepts, however, it cannot be denied that they work with each other towards the attainment of the same results, which is to put an end to litigation in the interests of justice."**

The pertinent argument which the parties shied away from discussing in their averments as deduced from the affidavits concerns the initial notice of motion before the Lower Court being essentially an injunction under Order 40 Rule 1 of the Civil Procedure Rules to restrain the respondents from dealing, intermeddling, or taking over exclusive possession or interfering with quiet occupation of the premises in LR Kilifi/Roka 1887.

The fundamental similarity between the two application lies in the fact that they operate to seek an order of injunction against the respondent from trespassing, interfering, subdividing or dealing with in any reason of all that parcel of land known as Kilifi/Roka 1887. As noted, the only underlying difference is that of pending an appeal in the present motion whereas in the Lower Court was for purposes of the pending suit.

The test on the application of the doctrine is well stated in **Kamuye & Others v The Pioneer, General Assurance Society Ltd Civil Appeal No. 28 of 1970 (1971) EA 263** held:

**"That the test whether or not a suit is barred by resjudicata seems to be is the plaintiff in the second suit trying to bring before Court, in another way and in the form of a new cause of action, a transaction which has already been put before a competent jurisdiction in earlier proceedings and which has been adjudicated upon."**

In the comparative jurisprudence in **Gordon Stewart v Independent Radio Company Ltd & Witmot Perkins (2012) JMCA**, the Court added its voice to the application of the doctrine on resjudicata and noted as follows:

**"The doctrine of resjudicata is to protect Courts from having to adjudicate more than once on issues arising from the cause of**

**action and to protect the public interest that there should be finality in litigation and that justice be done between the parties (See also the dicta in Trade Bank Ltd v L Z Engineering Consultation Ltd (2000) 1 EA 266)**

What is clear from the facts pleaded in the previous notice of motion, weighed against the current notice of motion before the Court. They all relate to applicable principles under Order 40 Rule (1) of the Civil Procedure Rules on prayers for grant of an injunction; the given subject matter. It therefore follows that the proceedings, though at an interlocutory stage, the principle underlying the litigation was anchored under Order 40 Rule (1) (2) of the Civil Procedure Rules. To allow the appellant to pursue an order of temporary injunction which is concurrent with the claim litigated and determined before the trial Magistrate at Kilifi would by operation of the Law under Section 7 of the Civil Procedure Act be considered as resjudicata.

It is true from the memorandum of appeal, the applicant is aggrieved with the ruling of the Magistrate Court for dismissing that application on grant of injunction under Order 42 Rule 6 of the Civil Procedure Rules. It is obvious from these two provisions, the limelight of the factual matrix and the principles underpinning a grant of injunction and stay of execution are substantially dissimilar. The expression heard and finally determined is considered to bind the applicant on the ground of resjudicata as the previous decision was also on denial of an injunction. It is not competent for this Court to adjudicate the same notice of motion on injunction between the same parties, unless the issue is raised on appeal. A more broadly based approach on the concept of resjudicata on relitigating matters already ruled on was a subject of discussion in the case of **Thoday v Thoday (1964) ER AC. 181 – 198** in which the doctrine of estoppel was illuminated by **Lord Diplock** as follows:

***“the second species which I call issue estoppel is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish the cause of action and there may be cases where the fulfillment of an identical condition is a requirement common to two or different causes of action. If in litigation, upon such cause of action any of such separate issues as to whether, a particular condition has been fulfilled is determined by a Court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation neither party can in subsequent litigation between one another upon any cause of action depends upon the fulfilment of the identical condition, assert that the condition was fulfilled, if the Court has in the first litigation determined that it was not, or deny it was fulfilled if the Court in the first litigation determined it was.”***

Thus in **Halsburys Laws of England 4<sup>th</sup> Edition Vol 16, Learned Authors** observed:

***“A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issues, had been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different the findings on a matter which came directly, in issue, in the first action and which is embodied in a judicial decision, that is final is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision is one of fact or Law or asked question of fact and Law.”***

A review of the record shows that the application before the Court seeks to relitigate an issue on injunction already determined by the trial Court whatever mode the applicants wants this Court to understand the substratum of the motion all that the Court is asked to consider as couched in the prayers are orders of injunctive relief.

In my view, I conclude that, the application merit falls within the scheme of resjudicata and estoppel which act as a bar to consider the issues raised under Order 40 Rule 1 & 2 of the Civil Procedure Rules.

It is apparent from the notice of motion a memorandum of appeal has been lodged against the ruling of the Magistrate Court. On examination of the relief requested by the applicant is to issue an injunction under order 40 Rule (1) 920 pending the hearing and determination of an appeal.

It is clear from the spirit of the application and the legal argumentation in this motion, the applicant is in need of the relief of stay under Order 42 Rule 6 of the Civil Procedure Rules for grant for a temporary stay pending the hearing of an appeal. The centrality of the Rule emphasizes the following conditions before exercising discretion in favour of a litigating party;

- (a) The application must be filed without undue delay.***
- (b) The applicant must demonstrate substantial loss or irreparable harm not compensated by way of damages.***
- (c) Deposit of security for due performance of the decree.***

In resolving the application, the Courts have held in a plethora of cases the test to apply to guide in the exercise of discretion to grant or deny the application. In the cases of **Reliance Bank Ltd v Norlake Investments Ltd (2002) 1 EA 227, Oraro & Rachier Advocates v Co-operative Bank of Kenya Ltd (CA No. 358 of 1990)** where the Courts observed that:

***“In considering the application for stay of execution pending an appeal, the Court is bound to consider the conflicting claims of both parties. The issue of the balance of countenance or the claims of both sides is one of the elements to be considered when dealing with the question of whether the success of appeal would be rendered nugatory if a stay of execution or an injunction is not granted. What may render the success of an appeal nugatory must be considered within the circumstances of each particular case.”*** (See also **J. Odunga, Digest on Civil Case Law and Procedure 2<sup>nd</sup> Edition Pg 7301 at paragraph 117 a, b, c, d).**

In the leading cases of **Delphis Bank v Cane Land Ltd & Others (CA No. 200 of 1998), Butt v Rent Restriction Tribunal (1982) KLR**

417 The Court held inter alia,

***“That one of the key criteria in an application for stay is whether substantial loss may result to the applicant which the applicant may not be compensated by way of damages.”***

On substantial loss, I refer to the affidavit in support of the application what is captured is a range of facts on the terms of the contract, subject matter of the suit in Kilifi Law Courts. It is clear from the averments that the dealership agreement was revoked on or about 27.3.2018. That dispute became a subject of litigation in the claim filed in the **CMCC No. 167 of 2019**. The same trial Court was approached to consider the matter under the guidelines set out in **Giella v Cassman Brown Co. Ltd (1973) EA 360**. That application apparently was dismissed by the trial Court on 17.6.2020. Whereas the applicant is aggrieved with the termination of the contract and that its likely to lose the business investment located at Kilifi/Roka 1887. I find no evidence that substantial loss would occur to the applicant if stay is not granted.

In this case although the applicant has agitated the application based on the memorandum of appeal its not sufficient to determine the application for stay of execution without copies of the Ruling or the decree of the Lower Court appealed from by the applicant (**See Kenya Bus Services Ltd v Nyamogo & Nyamogo CA No. 11 of 2004**) For the Court to exercise discretion, in favour of the applicant, the precise terms of the Ruling and order and decree appealed from, ought to be annexed to the motion on stay of execution. It is not within the Courts jurisdiction to go for a hunting expedition to piece together material existence in a case to constitute sufficient cause for purposes of granting stay of execution. The invocation of Order 42 Rule 6 (1) of the Civil Procedure Rules behooves on the applicant to go a step further to lay a strong basis upon which this Court can make a finding on substantial loss which cannot be ordinarily remedied by way of a sum of damages or costs in the event a stay order is denied.

On the whole, the applicant has not satisfied the criteria on substantial loss or otherwise in accordance to the well settled principles on this condition.

Lastly, before I leave the matter, the Court has also to satisfy itself on the condition of the prospects of the intended appeal succeeding in **Githunguri v Jimba Credit Corporation Ltd CA No. 161 of (1988) KLR 838 Dainji Pragji Mandavia v Sara Lee Household & Body Care (Ltd) CA No. 345 of 2004** The Courts observed that:

***“for an order of stay of execution to be granted pending an appeal, the applicant has to demonstrate that the intended appeal is not frivolous or is arguable and that if successful it would be rendered nugatory, unless the order of stay is granted.”***

In the instant case a panoramic view of the conflicting affidavit evidence shows that matters arising as against the respondent are underpinned on breach of contract in the following situation. That the applicant has purported to perform its part of the contract but the performance is incompetent or defective precipitating the action taken by the respondent to terminate the lease agreement on dealership.

A contract between the parties is viewed as an entire contract if complete performance by one party is a condition precedent to the other's liability to pay, the agreed price or to render any other agreed counter performance becomes the operative terms to regulate their relationship. An analogous situation deductible from the affidavit evidence there seems to have been a series of correspondences in the sense of ensuring that the applicant completely performs its part of the bargain. Therefore, if complete performance by A is a condition precedent to the liability of B, then if A has performed defectively, it would seem to follow that B should be under no liability – to perform his part of the agreement. There are allegations by the respondent that the applicant breach prevents complete performance of the agreement as apportioned in the contract. Without delving into the merits of the suit before the trial Court the basis of the Ruling was to consider the inter-relation between the applicant and respondent governing performance of the entire contract.

In considering the application for injunction, the trial Court may have been influenced majorly by the central terms and the grounds upon which an order of temporary injunction is bound to be granted or declined for or against an applicant. The first point to be borne in mind on appeal is whether the Learned trial Magistrate erred in the manner he exercised his discretion or that grounds exist for interfering with the exercise of discretion to dismiss the application for an injunction.

In a panoramic view of their yet to be canvassed appeal, I consider the justification of it under the present Law and its force lead to a result of the intended appeal not arguable with high chances of success. That denial of stay of execution would render the appeal nugatory. An important factor in this interlocutory application on appeal is that there is no indication that the applicant is desirous in prosecuting the suit before the trial Court. The matter has been pending since 2019 and no explanation on record that shortly the suit would be heard on the merits. There is therefore some risk to a party who initiates a suit before a Court of competent jurisdiction and as part of his litigation endeavours to further his rights through filing of various application with a hope that the interests of justice may come through these applications. There should be no room for allowing frivolous applications lodged with aim to delay the adjudication of the main suit.

It is also my observation that parties to the contract had provided for and decided on a forum and choice of Law for determining their contractual disputes. ***“In the circumstances, the parties should have been held to their mutual undertaking, that in the event of a dispute, the matter be referred to the chairman of the Institute of Arbitrators of Kenya or in the alternative his nominee.”***

Before the trial Court exercised jurisdiction over the dispute, it was incumbent upon the parties to bring to attention of the Court, the Arbitral Clause on resolution of their disputes. In construing that clause, the Court would not even have the jurisdiction to entertain the matter as such.

As a result, none of the grounds set forth by the applicant are sufficiently persuasive to the Court to exercise discretion for grant of an injunction pending the hearing and determination of the intended appeal. I would therefore dismiss the notice of motion with costs payable to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 18<sup>TH</sup> DAY OF MARCH 2021

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R. NYAKUNDI

JUDGE

**In the presence of:**

1. Mr. Onduso advocate for the applicant
2. Mr. Wafula holding brief for Naliaka advocate for the respondent