



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 11 OF 2020

DAVID MWANGI MUIRURI.....1ST PLAINTIFF/APPLICANT

SYLVIA HILDEGARD ERNA.....2ND PLAINTIFF/APPLICANT

VERSUS

LAGUNA BLU TOURS & TRAVEL LTD.....DEFENDANTS/RESPONDENTS

Coram: Hon. Justice R. Nyakundi

Katsoleh advocates for the applicants

Abdulattif Abdallah Aboud Advocates for the respondents

RULING

This is an application by the applicants **David Mwangi Muiruri** and **Sylvia Hildegard Erna** in which they seek one substantive order:

That this Honourable Court be pleased to issue an order restraining or restricting the respondents, their agents and legal representatives from evicting the applicants herein from the suit properties pending the hearing and determination of the suit.

In that application, an affidavit has been annexed laying out the basis of the injunction pursuant to Section 1A, 1B and 3A of the Civil Procedure Act. The notice of motion was duly served upon the respondents who failed to enter appearance or file any rejoinder to the issues raised therein. The chronology of the claim is based in the memorandum of understanding between the applicants and the respondents dated 25.9.2009 and other applicable annexures.

Determination

The case concerns the application by the applicants for an interim injunction against the respondents to restrain them from contravening the memorandum of understanding made on 25.11.2009 and set to expire on 25.11.2024. In contending with the principles to be applied to the granting of injunctions, the **Superior Courts in Cut Tobacco Kenya Ltd v British American Tobacco (K) Ltd CA No. 126 of 2000 and the celebrated case of Giella v Casman Brown {1973} EA** emphasis the following test:

“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.”

The purpose of an injunction is to ensure that the applicants assets in which the claim is based are not dissipated, wasted or intermeddled or otherwise, before the dispute is heard on the merits.

Further, the applicants may be unable to enforce a successful Judgment at the end of it all. The *locus classicus* case of **American Cyanamid Co. & Ethican Ltd {1975} AC 396** highlights the following principles:

“Firstly that the Court must be satisfied that the claimants case is not frivolous or vexatious for such cases will fail at the threshold, similarly, put, the claimant must show that there is a serious question to be tried, in other words, the applicant must have a real prospect of success at the trial. Secondly, the balance of convenience was seen as a governing consideration.

Thirdly, the inadequacy of damages is a significant factor in determining the balance of convenience, and the Court should consider the adequacy of damages to each party; namely whether damages would adequately compensate the claimant for any loss caused by the acts of the defendant prior to the trial. This undertaking in damages is given to the Court, so that non-performance is a contempt of Court and not a breach of contract; it therefore follows that enforcement with respect to a breach of this undertaking is at the Courts discretion.”

In the instant case the Court’s attention was drawn to the existence of a memorandum of understanding governing the rights and obligations between the parties to the suit. Determination of the issue of the applicants’ rights and alleged infringement is dependent upon compliance of the various clauses in the memorandum of understanding by either the applicants and/or the respondents. In this matter the substratum of the dispute relate to the breach of the agreed terms by the respondent in the agreement i.e. disconnecting water and electricity, threatening to lock out staff from Mpeketoni Home and threats of eviction from the suit property.

The pertinent question therefore is whether the applicants have established a prima facie case with regard to the alleged infringement of the memorandum of understanding. It is evident that the applicants served the respondent for purposes of responding to the issues raised in the notice of motion and affidavit in support. However, for reasons best known to the respondents they did not avail themselves of the opportunity to the extent of issuing a rejoinder on the disputed issues. All these contentious issues remain uncontroverted and can only be determined at the trial after the Court has heard both parties and characterization of the evidence. In my view therefore, the notice of motion and the relief sought in the Plaint raises serious issues about the alleged infringement by the respondent and the rights entitlements of the parties which attaches to the vested interest in the property. Its apparent that the contents of the notice of motion remains unchallenged on the allegations levelled against the respondent.

After a careful scrutiny of the motion and affidavit evidence, I take the following approach as elucidated in the case of **Combi (Singapore PLC Limited v Ramnath Sriram & Another {1997} EWCA 2164)** the Court observed:

“In my Judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay or injunction is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the Court concludes that there may be some merit at the trial.”

Stated above, I have only one side to weigh and on those facts alone I am of the view that its just and convenient to grant the required injunction pending the hearing and determination of the suit.

On this score I make no order for costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF AUGUST 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Bwanadi holding brief for Katsoleh advocate for the applicants