



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

COMMERCIAL CASE NO. 18 OF 2017

GALEXON KENYA LIMITED.....PLAINTIFF/APPELLANT

VERSUS

CENTRE FOR YUOTH LINKAGES

AND EMPOWERMENT PROGRAMMES...1ST DEFENDANT/RESPONDENT

COUNTY GOVERNMENT OF VIHIGA.....2ND DEFENDANT/RESPONDENT

ANNET ILAMUNYA

ESTUS ZARANGO

JOHN WAMBINGWA

WYCLIFFE MUSOGA (sued on their own behalf

and as officials of Mbale Open

Air Committee (C.B.O).....3RD DEFENDANTS/RESPONDENTS

RULING

1. By a plaint amended on 4.11.17 and filed on the same date, plaintiff seeks from the 1st and 2nd defendant/respondents the following:

- a. Kshs. Twenty one million, seven hundred and ninety eight thousand, four hundred and fifty*
- b. General damages for breach of contract*
- c. Payment of interest on (a) above at court rates from date of initial demand*
- d. Any other relief that this Honourable Court may deem fit to grant*
- e. Costs of the suit*

2. Contemporaneously with the plaint, plaintiff/applicant filed a notice of motion dated 24th January, 2018 and filed on 25th January, 2018. Prayers 1 to 4 have been spent and what remains for determination is a prayer for orders that:

- i. This Honourable Court do issue a temporary mandatory injunction evicting the 3rd defendants/respondents and all its members whether by themselves, agents, directors, employees, servants or anybody acting on their behalf or claiming under them from all those 201 stalls known as Mbale Market Modern Entrepreneurial Stalls within Mbale Town in Vihiga County*
- ii. OCPD Mbale Police Station to ensure compliance of the above court order*

iii. Any other orders that court shall deem fit and just to grant

3. The application is based on the grounds among others that:-

i. By an agreement dated 27.7.16 between the applicant and 1st respondent, it was agreed that applicant would construct 500 Modern Entrepreneurial Market Stall at Vihiga at Kshs. 54, 225,000/-

ii. That it was subsequently agreed that plaintiff would initially construct 200 stalls which it constructed

iii. That 1st respondent approved of the stalls and they were occupied by members of 3rd respondent

iv. That 1st respondent has refused to release payment for the stalls

4. The application is further supported by an affidavit sworn on 21.1.18 by Mukhunji Makatiati Cyril, the manager of the applicant, who reiterates the grounds on the face of the application. Annexed to the affidavit is a contract agreement dated 27.7.16 between applicant and 1st respondent; MOU between applicant and 1st respondent dated 21.7.16; copy of minutes dated 21.9.16; copy of letter dated 4.8.16; copies of emails and approved plans; letter dated 23.11.16; letter dated 28.11.16; letter dated 28.10.16; copy off agreement dated 26.1.17; copies of eviction notice dated 2.3.17 and 4.3.17; minutes dated 2.5.17; copy of advisory dated 31.5.17; letter dated 26.5.17 and demand letters all marked **CM 1 to 15** respectively.

5. In opposing the application, 1st defendant's County Director swore an affidavit on 20.3.18 in which the contract between applicant and 1st respondent for construction of 500 stalls for Kshs. 54, 225,000/- is conceded. 1st respondent further concedes that applicant undertook the construction; completed construction of 201 stalls and was paid Kshs. 1,000,000/- to rectify various defects which were noted but it declined to do so. 1st respondent further avers that the agreement between it and applicant provided for a dispute resolution mechanism which applicant has ignored.

6. The 2nd and 3rd respondents did not file any response to the applicant's notice of motion. When the application came up for hearing on 22.3.18; I directed that it be disposed off by way of written submissions which the applicant dutifully filed.

Applicant's submissions

7. Applicant holds the view that it has completed 201 stalls and that failure by the 1st respondent to pay for work done is a breach of contract. Applicant further submits that the 3rd respondents have with the authority of the 2nd respondent illegally occupied the stalls which they continue to waste.

8. I have considered the notice of motion in the light of the supporting affidavit ; 1st respondent's replying affidavit and the written submission filed on behalf of the applicant.

9. As clearly stated earlier in this ruling, the only prayer that remains to be determined is the one seeking to evict the 3rd respondents from the stalls in question. The gravamen of this suit is the 1st respondent's alleged failure to pay for construction works of the stalls in issue carried out by the applicant. This can evidently be deduced from the plaint which prays for orders for specific performance and damages for breach of contract.

10. The principles on which the courts will grant an interlocutory injunction are well known. The Court of Appeal in the case of **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** reiterated the principles in **Nguruman Limited V. Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012.** together with the mode of their application as follows:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between." (Emphasis added).

11. It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, in the absence of special circumstances or only in the clearest of cases. The circumspection with which the

court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage.

12. There are countless authorities for the above proposition. In Shepherd Homes Ltd V. Sandahm[1971] 1 CH. 34, Megarry, J. stated:

***“[I]t is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.*”**

...

[O]n motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.”

13. In LOCABAILL INTERNATIONAL FINANCE LTD. V. AGROEXPORT [1986] 1 ALL E.R. 901, Mustil, LJ restated the same principle thus:

***“The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.*”**

14. The principles in the abovementioned authorities have been consistently followed by the Court of Appeal in a host of decisions including EAST AFRICAN FINE SPINNERS LTD (IN RECEIVERSHIP) & 3 OTHERS V. BEDI INVESTMENTS LTD, C. A. NAI. 72 OF 1994 (UR), MUCHUHA V. RIPPLES LTD (1990-94) EA 388, KENYA AIRPORTS AUTHORITY V. PAUL NJOGU MUIGAI & 2 OTHERS, CA NO. NAI. 29 OF 97 (UR), GUSII MWALIMU INVESTMENTS CO. LTD & OTHERS V. MWALIMU HOTEL KISII LTD [1995-1998] 2 EA 100, MALINDI AIR SERVICES & ANOTHER V. HALIMA ABDINOOR HASSAN, CA NO. NAI. 2002 OF 1998, and KENYA BREWERIES LTD & ANOTHER V. WASHINGTON O. OKEYO, (2002) 1 EA 109.

15. Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to restrain, with the intention of defeating the plaintiff’s claim or where the defendant is otherwise bent on stealing a march on the plaintiff.

16. On the other hand, the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. Save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

17. Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In BHARAT PETROLEUM CORP LTD V. HARO CHAND SACHDEVA, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

18. Earlier in NANDAN PICTURES LTD. V ART PICTURES LTD & OTHERS, AIR 1956, CAL 428, Chakravarti, CJ. of the High Court of Calcutta set out, in the following passage, the rather limited scope in which a mandatory injunction is available at the interlocutory stage:

“At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the Courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff’s suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issues in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiff’s suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit.”

19. In GALAXY PAINTS COMPANY LIMITED V. FALCON GUARDS LIMITED COURT OF APPEAL CASE NUMBER 219 OF

1998, the Court of Appeal stated that issues for determination in a suit generally flow from the pleadings. A perusal of the plaint undoubtedly demonstrates that applicant has neither sought any injunctive order nor sought any order, whatsoever, against the 3rd respondents. Failure to do so means that any subsequent orders sought against the 3rd respondents cannot be sustained since they do not flow from the pleadings.

DISPOSITION

20. The fundamental question is whether the respondent made a specific prayer for eviction in its plaint. The answer is in the negative and even if it had been pleaded, an eviction order is a final order that cannot as has been shown from the authorities cited hereinabove be granted at an interlocutory stage except in a simple and clear case.

This leads this court to the conclusion that the applicant's application to evict the 3rd respondents is not merited. To find otherwise would amount to the court rendering a decision without any parameters or borders which would lead to total disorder and abuse of the judicial process.

21. In view of the foregoing finding, this court holds that this is not a simple and clear case that would entitle the applicant to a mandatory injunction.

22. In the premises notice of motion dated 24th January, 2018 and filed on 25th January, 2018 is dismissed with no order as to costs.

DATED, DELIVERED AND SIGNED THIS 24th DAY OF May 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Appellant - Mr. Keniaro

For 1st Respondent - N/A

For 2nd Respondent - N/A

For 3rd Respondents - Festo o Nyalyte