



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 249 OF 2015

PIUS NJAI MWANGI..... APPLICANT/PLAINTIFF

V E R S U S

HON. FRANCIS WAITITU.....DEFENDANT/RESPONDENT

RULING

1) The substantive suit in this matter is expressed in the plaint dated 14th July 2015 in which Pius Njai Mwangi, the Plaintiff herein seeks for judgment against Hon. Francis Waititu, the Defendant as follows:

1. A declaration that the breakage, raid, looting and destruction conducted on the Plaintiff's business premises on 3rd, 4th and 5th July 2015 by and under the instruction of the Defendant was illegal, unwarranted and unjustified.

2. A permanent injunction does issue restraining the Defendant either by himself, his supporters, his servants, agents and or employees be restrained from interfering with the Plaintiff's business premises, warehouse and/or distributor trucks, confiscating, destroying, burning, pouring or in any manner damaging the Plaintiff's alcoholic drinks and beverages.

3. Special damages of ksh.46,245,300/=.

4. Any other amount that will be found to be due and owing from the Defendant.

5. Costs of this suit and interest thereon on (3), (4) and (5).

6. Any other and further relief that this honourable court may deem fit and just to grant in the circumstances.

2) The Plaintiff has now taken out the motion dated 14.7.2015 in which he sought for the following orders:

1. THAT the instant application be certified as urgent and heard ex-parte in the first instance.

2. THAT pending the hearing and determination of the instant application, the Defendant/Respondent either by himself, his supporters, his servants, agents and or employees be restrained from interfering with the Plaintiff's/Applicant's business premises, warehouses and/or distributor trucks, confiscating, destroying, burning, pouring or in any manner damaging

the Plaintiff's/Applicant's alcoholic drinks and beverages.

3. THAT pending the hearing and determination of this suit, the Defendant/Respondent either by himself, his supporters, his servants, agents and or employees be restrained from interfering with the Plaintiff's/ Applicant's business premises, warehouses and/or distributor trucks, confiscating, destroying, burning, pouring or in any manner damaging the Plaintiff's/Applicant's alcoholic drinks and beverages.

4. THAT the OCS Juja Police Station does assist in effecting these orders.

5. THAT a mandatory injunction does issue compelling the Defendant/Respondent to pay the Plaintiff/applicant special damages to tune of kshs.46,245,300/=.

6. Costs of this application and interest thereon.

7. Any other and further relief that this honourable court may deem fit and just to grant in the circumstances.

3) The motion is supported by the affidavit of the Plaintiff. The Defendant filed a replying affidavit he swore to oppose the application. When the motion came up for interpartes hearing learned counsels recorded a consent order to have the same disposed of by written submissions.

4) I have considered the grounds stated on the face of the motion plus the facts deponed in the supporting and opposing affidavits. I have further considered the rival written submissions. At this stage it is apparent that the Plaintiff is seeking for both prohibitive and mandatory orders of injunction plus costs of the motion. The first issue to determine is whether or not the Plaintiff is entitled to a temporary order of injunction pending the hearing and determination of this suit. It is important to note that the Plaintiff has been enjoying a similar order pending the interpartes hearing of the motion herein. At the exparte state, the Plaintiff was able to demonstrate that he has a prima facie case with a probability of success.

5) In order to determine whether or not the Plaintiff is entitled to the orders sought, it is important to first apply the principles enunciated in the celebrated case of **Giella =vs= Cassman Brown & Co. Ltd (1973) E.A 358** vizly: First, an applicant must show a prima facie case with a probability of success.

Secondly, an applicant should show that he would suffer damage that cannot be compensated in monetary terms if the order is denied.

Thirdly, if the court is in doubt it will decide the application on a balance of convenience.

6) The Plaintiff has presented affidavit evidence in an attempt to show that he has a prima facie case with a probability of success. He has annexed therein copies of receipts for payments he made to purchase alcoholic products for sale. It is said none of those products are either second nor third generation alcoholic drinks. The Plaintiff stated that he is aware that the 2nd and 3rd generation alcoholic drinks were at the time being seized and destroyed. The Plaintiff is bitter that he was arrested and his products. It was pointed out also that the Defendant and his supporters stormed into the applicant's premises destroying the applicant's products. In his defence, the Defendant denied having entered into the Plaintiff's premises or destroy property owned by the Plaintiff. The Respondent further contended that it was an order from the president of Kenya that all second generation drinks from all the dealers be destroyed. On my part despite the spirited arguments, I am of the view that the Plaintiff has shown a prima facie case with a probability of success.

7) On the second limb of whether the Plaintiff would suffer irreparable loss, both the Plaintiff and the Defendant are in agreement that the damage so far suffered has been put in monetary value. There are a number of decided cases which clearly show that where the damage can be ascertained in monetary terms, no order of injunction can issue. However, the issue being addressed here appear to be more complex than just the monetary aspect. What has been put on the table as damage is the value of the alcoholic

drinks. The question as to the anticipated profit from the sale at this stage cannot be ascertained. A business empire can go to ruin in the circumstances. This may lead to job losses and so on. In the circumstances an order of injunction should issue. I have no doubt in my mind, therefore I will not apply the balance of convenience principle.

8) The second prayer is a prayer for a mandatory prayer of injunction.

9) The principles to be considered in determining such an application were restated in the case of **Locaball International Finance Ltd =vs= Agro Expert and others (1986) 1 ALL E.R 901** as follows:

“A mandatory injunction ought not to be granted at an interlocutory stage in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which can be easily remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance, that at the trial, it would appear that the injunction had rightly been granted.....”

10) It is clear from the above cited case that the main principle to be considered before granting a mandatory order of injunction is that the case must be exceptional, plain and very clear. The Plaintiff has argued that it would be unfair and contrary to justice to allow a belligerent Defendant the advantage of time which ordinarily attends to a hearing. The Defendant admits that he led his constituents in the removal and destruction of second general alcoholic drinks from premises of several dealers. He however denied even entering the premises of the Plaintiff as alleged. He also denied destroying the property owned by the Plaintiff. The Defendant further challenged the Plaintiff to show evidence that the items listed were actually available and stocked in the Plaintiff’s premises. The Defendant’s response to the Plaintiff submissions raises several questions which in the end creates some doubts in my mind at this interlocutory stage. The Defendant is saying that he led his voters in the removal and destruction of the second generation alcoholic drinks. He denies that he took part. The Defendant has specifically stated that he did not personally enter into the Plaintiff’s premises. He also says he did not destroy the Plaintiff’s property. There is also the question as to whether or not the alcoholic drinks were in the Plaintiff’s stores.

11) I am convinced that this is not one of those clearest cases, therefore I will not in the circumstances grant the order of

mandatory injunction.

12) In the end, I grant prayers 3 and 6 of the motion dated 14.7.2015. Prayers 4 and 5 denied.

Dated, Signed and Delivered in open court this 19th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Respondent