



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 207 OF 2013

KENYA INDEPENDENT PETROLEUM DISTRIBUTORS

ASSOCIATION LIMITED.....APPLICANT/PLAINTIFF

VERSUS

NAIROBI CITY COUNTY. RESPONDENT/DEFENDANT

RULING

The application before the court is the Notice of Motion dated 5th June, 2013 by the Plaintiff against the defendant. It is brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules, Section 99(1) of the Energy Act No. 12 of 2006 and Section 3A of the Civil Procedure Act. It seeks an injunction order against the defendant and its agents and servants to restrain them from collecting parking fees in respect of the Plaintiff's tankers, trailers and other motor vehicles along specific roads or areas in Nairobi, until the Defendant has specifically designated such areas and roads for Plaintiff's use and/or parking.

The Application and opposition thereof are properly supported by supporting and Replying affidavits. Both parties also filed their submissions which they as well highlighted before the court.

By their letter dated 21st May, 2014 the Defendants informed the Plaintiff/Applicant that effective of June, 2014 all members of the Plaintiff who parked their tracks, trailers, tankers and other motor vehicles along Nanyuki Road and Lunga Lunga Raod, for the purpose of collecting petroleum products from the go-downs at Base House, would be charged parking fees of between Ksh.3,000/- to Ksh.20,000/-. That would be so notwithstanding the fact that the Defendant as the City County of Nairobi has not officially and deliberately designated the parking zones or roads for use by the Plaintiff's members who are petroleum dealers.

The Defendant argued that it is entitled to charge such parking fees upon all persons who parked on any space in Nairobi, whether specifically designated or not. The Defendant conceded however, that it was obligated under the Energy Act No. 12 of 2006, to designate specific area and/or roads for specific use by the members of the Plaintiff and has been trying for the last two to three years to do so, but has not so far succeeded. It also conceded that it has been in continuous negotiations with the Plaintiff towards that end and is aware that its obligation to designate specific areas or roads for Plaintiff's members use, is statutory under the Energy Act aforesaid. That, however, and notwithstanding such obligation, it is also nevertheless authorized by statute to collect such parking fees from the public which includes the Plaintiff's members. In the circumstances, Defendant argued, the right to collect parking fees overrode the Plaintiffs members to have designated areas/roads for parking for the purpose of collecting petroleum products.

The Plaintiffs, on the other hand, took the position that, the Defendant was under statutory obligation to specifically designate certain roads and areas for use by the Petroleum dealers under the Energy Act No. 12 of 2006. That it was imperative for the defendant to obey that law and in doing so resolve the problem and that until the Defendant did so, the Plaintiff was entitled to withhold payment of such parking charges to force it to obey the law.

The court has carefully considered the issues before it. I have no doubt that the Defendant is under statutory obligation to designate certain areas/roads for the use by the Plaintiffs' members. Negotiations between the parties herein have led to that understanding and both sides concede that under the Energy Act Section 99(1) aforesaid, it is mandatory for the Defendant to carry out such obligation. Furthermore, that the Defendant has not successfully fulfilled its such obligation is not denied nor in doubt.

What, however, the Plaintiff is asking this court to do is to deny the Defendant its right to collect parking charges from Plaintiff's members' motor vehicles until the Defendant designates areas and roads for the parking of Plaintiff's members' trucks and trailers. In other words, the Plaintiff concedes that the Defendant has a right to collect parking charges but cannot collect such charges or fees until parking areas or roads have been provided specifically for petroleum dealers as mandatorily required under the Energy Act, Section 99(1) aforesaid.

I am left with no doubt in my mind that the Defendant has a right and power to collect any parking charges from members of the public of whom the petroleum distributors form a part under other parking laws. The Defendant can, therefore, use such other laws to collect such parking fees from the Plaintiff as a member of the public using city space to park. I also indeed note that the Plaintiff could have forced the Defendant to carry out its statutory duty of designating certain areas and roads for Plaintiffs' members use, by using or applying for the relief of "**mandamus**". But for reasons not stated, the Plaintiff has not applied for the said relief.

The question still to be answered then is this: has the Plaintiff demonstrated an adequate case to grant the orders of injunction it seeks?

There is no doubt in my mind that the Plaintiff has established a case that the Defendant is and has been under statutory obligation for the last two to three years, to designate areas/roads for the Plaintiff's members use but has not successfully done so. That obligation to designate such roads and areas is for the use and convenience of the Petroleum dealers who form the membership of the Plaintiff. Such obligation in addition is however also statutory and mandatory. Indeed failure to carry out the said designation by the Defendant is so serious, because it raises serious danger to members of the public that it forms a criminal offence which attracts a fine of Ksh.20,000/- against the Defendant (Nairobi City County). That the Plaintiff is seeking enforcement of its right to have roads designated for its members use as well as force the Defendant to carry out its statutory obligation, would therefore, appear to demonstrate a prima facie case against the Defendant.

On the second leg of the principles of the case of **Giella Vs Cassman Brown & Company Ltd [1973] EA** and **Mrao Limited Vs First American Bank of Kenya & Others [2003] KLR 125**, it is not clear that the Plaintiff will not suffer irreparable injury which will not be adequately be compensated by an award of damages. For example, the damage which might result if inflammable products carried by the petroleum dealers catch fire in areas not designated by the Defendant could be colossal and not easily assessable by either party. The court is, therefore, also persuaded that the Plaintiff might otherwise suffer irreparable injury which might not be adequately compensated in damages.

Thirdly, even if this court were not sure of the first two conditions it would still find that it is more convenient and safer, to grant the injunction sought by the Plaintiff since I would in the meantime bring it to bear upon the defendant to carry out its statutory and mandatory obligation of designating parking areas/roads for the Plaintiff's members – the Petroleum products dealers.

The upshot is that the Plaintiff's application dated 5th June, 2014 is hereby granted by this court ordering

the issuance of the injunction orders sought therein until the main suit is heard and finally determined. Orders are made accordingly as the costs shall abide the result of the suit.

Dated and delivered at Nairobi this 19th day of February, 2015.

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JUDGE