



NO. 57/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 23 OF 2013

GREEN GAS COMPANY LIMITED.....1ST PLAINTIFF

AHMED SHEIKH ADAN2ND PLAINTIFF

VERSUS

FEISAL MAHSEN SAGGAF.....1ST DEFENDANT

KHALID MAHSEN SAGGAF.....2ND DEFENDANT

QUALITY GAS LIMITED.....3RD DEFENDANT

MAHSONS INVESTMENT CO. LTD.....4TH DEFENDANT

RULING

1. In an application dated 24th May, 2013 by way of Notice of Motion the applicants/plaintiffs seek a temporary injunction order restraining the defendants herein, their agents, servants or employees from entering, removing any plant or equipment, attaching any movables in the suit property, passing as partners of the plaintiffs, interfering with employees of the plaintiffs or in any other way interfering with the plaintiffs' quiet use and enjoyment of all that parcel of land described as Land Reference 20616 situated within Mavoko, Machakos County pending hearing and determination of the suit.
2. The application is premised on grounds that:-
 - *The plaintiffs are the owners of the suit premises.*
 - *The defendants were mere licensees who abandoned operating at the suit premises after incurring massive debts to their parties.*
 - *The defendants are misleading creditors and giving false impression that they trade from the suit property and hence passing off as the plaintiffs' business partners. The threatened interference with the plaintiffs' movables is tortious and thus wrongful, the plaintiffs will suffer irreparable harm unless the defendants are restrained.*
 - *The defendants are foreigners with no traceable assets within the Republic of Kenya and hence it is necessary to preserve the suit property. The plaintiffs have a prima facie case with a probability of success.*
3. The application is supported by an affidavit deposed by the 2nd applicant/ Plaintiff where he stated

- that he owns parcel Land Reference Number 20616 jointly with the 1st applicant; having acquired it for purposes of setting up a liquefied petroleum gas business. They made substantial investment which included change of user, extension of user, site layout and consultancy services for LPG depot construction.
4. The 1st defendant and 2nd plaintiff developed a business plan to work as partners at the suit properly. They worked on mutual trust with little documentation of the business relationship.
 5. The 1st and 2nd defendants were shareholders and directors of the 3rd and 4th Defendants. The 2nd Plaintiff was offered directorship of the 3rd defendant. Having become a director and shareholder he contributed capital, approximately USD 1.5 million at various times.
 6. The 1st and 2nd defendant were involved in active running of the business. In April, 2013, the 2nd plaintiff realised that the defendants had abandoned the suit premises and were no longer trading. The 1st and 2nd defendants declined to give him access to the 3rd defendant's statements. He was informed that the 3rd defendant was insolvent yet he had never received any dividends. Investigations launched by the 2nd plaintiff revealed that the 1st, 2nd and 3rd defendants had developed a scheme to swindle funds invested in the 3rd defendant by making gratuitous payments to the 4th defendant.
 7. To support these phantom transactions, documents were fabricated by the 1st and 2nd defendants to give semblance of business dealings.
 8. The 1st and 2nd defendants have set up a parallel LPG business in Eldoret under the name of the 4th Defendant. Other supplies were also owned money by the defendants.
 9. As a result of the defendants abandoning the business venture, the plaintiffs stand to suffer loss of prospective profits of approximately USD 1.5 million. The Plaintiffs are apprehensive that unless the defendants are jointly or severally restrained from entering and removing any plant and equipment; attaching any moveable assets at the suit property, passing off as partners of the plaintiffs, interfering with the employees of the plaintiff or interfering with the plaintiffs quiet use and enjoyment of the suit premises, they stand to suffer irreparable harm and loss that will be difficult to quantify, seeing that the impecunious defendants are foreigners.
 10. Service was effected upon all defendants but they refused and/or neglected to respond. The application therefore stands unchallenged.
 11. In his submissions **Mr. Ochieng**, counsel for the Applicant reiterated what has been stated in the application. He relied on the authority of ***Giella versus Cassman Brown 7 Co. Ltd [1973] E.A. 358***. He stated that the applicants/plaintiffs had proved ownership of the land in issue. The land has fixtures, an LPG has production equipment. Attachment of the assets in execution of an order would make the plaintiffs suffer irreparable damages as they were not party to the suit where the Officer Commanding Police Station, Embakasi had been directed to oversee attachment of assets.
 12. He submitted further that if the court was in doubt the balance of convenience titled in favour of the plaintiffs; and the defendants would suffer no prejudice if orders sought are granted.
 13. The principles of granting temporary injunction are set out in the classic case of ***Giella versus Cassman Brown and Co. Ltd [1973] E.A. 358*** cited where it was stated that :-
 - The plaintiff must establish a *prima facie* case with probability of success.
 - The plaintiff shall suffer irreparable injury if the injunction is not granted that cannot be compensated by an award of damages and;
 - If the court is in doubt, it should decide the application on balance of convenience.
 14. It is also essential to note that an injunction is a discretionary as well as an equitable remedy so that the conduct of the plaintiff prior to and subsequent to the mounting of the application may come into focus.
 15. It is not in doubt that a parcel of land L.R No. 20616 is owned by the plaintiffs herein.
 16. There are several correspondences between the plaintiffs and some companies which include Kurrent Technologies Ltd and Max and Partners Ltd Consulting Engineers. They all refer to putting up an LPG Depot on the suit property. There is also a letter from the Municipal Council of Mavoko which grants the plaintiffs permission to extend the Land to include filling and storage on the suit premises.

17. The plaintiffs have also annexed various bank statements dating back to 2009 showing debit and credit of the account in regard to the LPG business.
18. With the evidence aforesaid it is apparent that the plaintiffs have established a *prima facie* case which has probability of success.
19. With regard to whether the plaintiff may suffer irreparable injury if the injunction sought is not granted, the 2nd plaintiff has availed bank statements (*copies*) that establish the fact that he invested heavily in the business venture, which venture was being carried out in the suit premises. Any attachment of moveable property or plant or equipment at the suit premises will cause the plaintiffs irreparable injury. Whether the defendants herein are in a position to compensate the plaintiffs by an award of damages is not known, since they have neither filed a replying affidavit in response to the application nor have they made any appearance in the matter.
20. In view of the foregoing if any doubt were to be entertained the balance of convenience would tilt in favour of the plaintiffs.
21. Consequently, I do grant a temporary injunction as prayed pending hearing and determination of the suit.
22. Costs shall be paid by the Respondents.
23. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 24th day of JUNE 2013.

L.N. MUTENDE

JUDGE