



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 79 OF 2012

CHANIA SHUTTLE LIMITED.....PLAINTIFF

VERSUS

KENOL KOBIL LIMITED.....DEFENDANT

RULING

Before me is an application brought by way of Notice of Motion dated 22nd February 2012 brought under the provisions of section 3, 3A of the Civil Procedure Act, Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules and all other enabling provisions of law. By the said application the plaintiff/applicant is seeking the following **orders**:

- 1. That this application be certified as urgent and service be dispensed with in the first instance.**
- 2. That an order of injunction do issue restraining the Defendants either by themselves, servants and/or agents, from evicting and/or dispossessing the plaintiff from all that piece or parcel of land known as Kobil Petrol Station along River Road situate in Nairobi or in any other manner whatsoever interfering with the Plaintiff quiet possession and peaceful occupation of the said portion of the suit premises pending the hearing and determination of this application.**
- 3. That an order of injunction do issue restraining the defendants either by themselves, servants and/or agents, from evicting and/or dispossessing the Plaintiff from all that piece of parcel of land known as Kobil Petrol Station along River Road situate in Nairobi or in any other manner whatsoever interfering with the plaintiffs quiet possession and peaceful occupation of the said portion of the suit premises pending the hearing and determination of this suit.**
- 4. That the cost of this application be provided for.**

The application is supported by an affidavit sworn by **Fredrick Mwenda Nduru** sworn on 22nd February 2012.

In the said affidavit, the deponent who is a director of the applicant deposes that the plaintiff entered into an agreement with defendant in the year 2009 in which the Defendant gave the plaintiff a portion of their land near Kobil River Road for the purposes of setting up a booking office for their vehicles and as a parking lot. The consideration for this, it is deposed was that the plaintiff would fuel the said vehicles at the said station. Pursuant to the foregoing the plaintiff took possession of the said portion of the premises set up its office and has been operating therein for the last 4 years and in the process has accumulated a lot of goodwill. According to the deponent the aforesaid investment by the plaintiff was on the

understanding that it would enjoy peaceful and undisturbed possession thereof without payment of rent. However, it is contended that the defendant has illegally and unlawfully given the plaintiff a 14 day notice of the termination of the lease dated 9th February 2012 but served on 20th February 2012. According to the deponent the plaintiff is estopped from terminating the same without adequate notice and despite demands that the defendant withdraws the said notice, the defendant intends to proceed therewith unless restrained by the Court. If the defendant proceeds as per its intention, it is deposed that the plaintiff will tremendously suffer since it has no other place to relocate its business. Since the plaintiff has a *prima facie* case, it believes it is just and equitable that the respondent be restrained.

On its part the defendant opposed the application through a replying affidavit sworn by **Isaac Gachuria**, its Assistant General Manager on 2nd March 2012. In the said affidavit it is deposed contrary to the averments in the supporting affidavit the plaintiff illegally occupied the portion in question as there was no agreement in respect thereof. The plaintiff is accused of being a trespasser therein interfering with the defendant's normal business operations and should vacate and remove their structures therefrom at the expiry of the notice so as to allow the defendant develop and improve the station and the surrounding areas. Contrary to the allegation that the notice was received on 20th February, it is the defendant's case that the letter was hand delivered and received by a Director of the Plaintiff who intimated an intention to wind up the Company vide Special General Meeting held on 8th February 2012. Since the plaintiff is a trespasser, it is the defendant's view that estoppel does not arise. Since the plaintiff is seeking to enforce rights which are legally tainted, it is inequitable to grant the same or assist them in that regard since it would be unjust and inequitable for the plaintiff to continue illegally occupying the defendant's station in the absence of a formal agreement or consent. Since the plaintiff is in the process of winding up there is no guarantee that it will act equitably. Accordingly, the Court is urged to order the plaintiff to give a substantial guarantee for security for costs. According to the deponent, the Plaintiff's suit and application are a fraud upon the Defendant as they seek to continue to illegally occupy the Defendants property and are trespassers in the eyes of the law.

In a further affidavit sworn by **Fredrick Mwenda Nduru** on 7th May 2012, the plaintiff denies that there was a meeting of the company to discuss the winding up of the company and that some of the Directors have since disowned the alleged minutes.

The application was prosecuted by way of written submissions. In its submissions, the plaintiff after reiterating the contents of the application and the affidavits in support, submit that the applicant occupies the suit premises as a licensee with consent and authority of the defendant on a consideration and the existence of the relationship is buttressed by the letter terminating the relationship on the ground that they want to put up proper offices and have in fact offered the plaintiff one such office when completed. Basing its claim on promissory estoppel, it is contended, on the strength of **Halsbury's Laws of England**, that when one party has, by his word or conduct, made to the other a clear and unequivocal promise or assurance which was intended to take effect the legal relationship between them and to be acted on accordingly, then the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relationship. Since the defendants acquiesced into the plaintiff's occupation of the suit premises it cannot now claim that they are trespassers and section 121 of the ***Evidence Act Cap 80 Laws of Kenya*** as well as the case of **Esther Akinyi Odidi vs. Sagar Hardware Stores Ltd & Another** are cited as authorities on that submission. It is further submitted that this is a proper case for the granting of an order of injunction as enumerated in **Giella vs. Cassman Brown & Co. Ltd [1975] AC 396** since the plaintiff has a prima facie case against the Defendant and it stands to suffer irreparable loss as it has developed a large clientele in its area of operation and the Defendant's Petrol Station. It is further contended that the balance of convenience tilts in favour of the applicant to retain the status quo awaiting the determination of the suit as it has already offered a security on cost.

The respondent, on the other hand, submitted that the applicant has been in illegal occupation of the suit premises and their claim that there was an agreement permitting it to set up a booking officer and parking is untrue due to the size of the suit premises which is merely 50 by 75 feet. The occupation of the said premises being illegal, it is contended that the applicant is a trespasser therein which act was discovered

while the respondent was taking inventory of its assets while auditing its dealer. Accordingly, the applicant's contention that there exists an agreement between the parties is baseless and untrue. According to the respondent, the notice to vacate does not invalidate the plaintiff's wrongful occupation and the said notice was issued on discovery of the applicant's wrongful said occupation. Relying on ***Black's Dictionary***, the respondent contends that since the applicant is a trespasser, it does not come under the term licensee. On the strength of the case of ***Charles Ogejo Ochieng vs. Geoffrey Okumu [1995] eKLR*** and ***Halsbury's Laws of Kenya, 3rd Edn. Vol. 38 page 744***, it is submitted that trespass being an injury to possessory right, the proper plaintiff in an action for trespass is the person having title or in possession. According to the a respondent the suit is devoid and short of the elements of estoppel in that it does not demonstrate a promise reasonably expected by the promisor to induce action for forbearance; action or forbearance by the promise (applicant) in justifiable reliance on the promise i.e. detrimental reliance; and injustice can be avoided only through enforcement of the promise. Citing ***Doge vs. Kenya Cannery Ltd [1989] KLR 127***, it is submitted that promissory estoppel can only be employed as a defence since it is a shield and not a sword and hinges upon there being a promise as to future conduct. According to the respondent, therefore, the principles guiding the grant of injunction as stipulated in the cases of ***Giella vs. Cassman Brown and Company Ltd [1975] AC 396***; ***American Cyanamid Co. vs. Ethicon Ltd [1975]*** and ***Mrao Ltd vs. First American Bank Ltd and 2 Others [2003] KLR at page 127***, have not been satisfied since the applicant has not shown a prima facie case in the absence of a nexus between the respondent's position and its clientele. It is further submitted that the plaintiff has neither demonstrated how it will suffer irreparable loss not that the balance tilts in favour of the applicant. The applicant, i is contended continues to enjoy the respondent's premises without paying any rent, fees or any other form of compensation and continues to be unjustifiably enrich itself at the expense of the respondent. Citing ***Halsbury's Laws of England (4th Edition)*** paragraph 948 the respondent urges the Court to discharge the interim injunction and dismiss the application with costs.

I have considered the application herein, the affidavits and submissions both in support and opposition of the application.

The principles guiding the grant of interlocutory injunctions are now well settled in this country. Firstly, 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. See ***East African Industries vs. Trufoods [1972] EA 420***; ***Giella vs. Cassman Brown & Co. Ltd [1973] EA 358***.

It must however be emphasised that the conditions enumerated above are not the only conditions for consideration by the court. As was aptly held by **Tanui, J** in the case of ***Hesbon Owuor Oluoch vs. Enos Omollo Misiani Kisumu HCCC No. 22 of 2002*** it is not true that the only conditions for grant of injunction are the 3 enunciated in the case of ***Giella vs. Cassman Brown & Co. Ltd. [1973] EA 358*** as there are more conditions which the Courts have found over a period of time essential and an undertaking by the applicant as to the security for damages is one. Order 40 rule 2(2) empowers the court to make an order for injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise as the court deems fit. Accordingly the court is empowered in appropriate cases to grant a conditional injunction with respect to the duration and even impose such terms as appropriate including an order that the applicant secures a bank guarantee.

However, in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. Nevertheless whereas in an application for injunction, although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a prima facie view of the matter and is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true

In the case of ***Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*** the Court of Appeal held as follows:

“in civil cases a *prima facie* case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case”.

The plaintiff’s cause of action is hinged on a licence which according to it permitted it to use the premises belonging to the respondent as a booking office and as a parking space for its vehicles. That agreement was entered into in 2009 and the consideration according to the applicant was that it would fuel its vehicles at the said station. Neither in the plaint nor in the supporting affidavit is it indicated the form of the agreement in question. However, no such agreement was exhibited. According to the applicant, the 14 days notice that was given was illegal and unlawful on the ground that it went against what had been agreed hence the respondent is estopped from taking possession without adequate notice. However, there is no contention that it was part of the said agreement that possession could only be taken by a reasonable notice and there is no suggestion of what this reasonable notice in the applicant’s opinion is. Although the applicant has annexed a copy of the notice that aggrieved it, there is no written response made to the said notice refuting the allegation therein that the respondent’s occupation thereof was without the respondent’s approval and in disregard of the respondent’s private property ownership. The response, if any, is to be found in the replying affidavit in form of a letter dated 9th February 2012 to which minutes of a meeting purportedly held on 8th February 2012 by the applicant were enclosed. According to the said minutes, the applicant resolved, *inter alia*, to cease operations pending formal winding up and to terminate its lease with the respondent in Mombasa. Confronted with this damning evidence, the applicant retorted vide a further affidavit that some of the directors have disowned the said minutes and exhibited an affidavit purportedly sworn by one **Julius Wamwea Kabue** in which while denying the said resolutions, the deponent admitted that the directors were experiencing some misunderstandings. While admitting that he signed the last page of the minutes without having site of the first page and that the said minutes were signed before the date of the meeting, there is no explanation offered as how the said page 2 bore the date 8th February 2012. Again going by the said minutes, without any evidence that the other four signatories thereof have recanted the contents thereof while one of the directors is deceased, the other directors would be in the minority.

Taking into account all the foregoing, I am not satisfied that the applicant has a right which has apparently been infringed by the respondent to call for an explanation or rebuttal from the latter. In my view, the applicant has not demonstrated that it has more than an arguable case in order to warrant the grant of the injunction sought. The conditions for the grant of interlocutory injunction have been rightly held to be sequential with the result that once the court finds that a *prima facie* case has not been established there is no need to consider whether the applicant stands to suffer irreparable loss. However, even if I were to consider the second condition the applicant would still fail. The applicant’s complaint is that the notice is too short. They do not dispute the fact that the respondent was entitled to terminate their relationship. The allegation, therefore, that the applicant has nowhere to relocate does not hold. In my view therefore loss, if any that may be sustained by the applicant is capable of being compensated by way of damages.

I, however, take into account the fact that the allegation by the applicant that it has been in occupation of the suit premises has not been seriously disputed. That it has constructed offices thereon is not disputed. Therefore, whereas I decline to grant the orders sought in the Notice of Motion dated 22nd February 2012, I hereby restrain the respondent from evicting the applicant from the suit premises for a period of 21 days to enable the applicant relocate.

Subject to the foregoing the said Motion is dismissed with costs to the defendants.

Ruling read, signed and delivered in Court this 23rd day of July 2012

G.V. ODUNGA

JUDGE

In the presence of:

Mr. Waiganjo for the Plaintiff

Mr. Wachira for Mr. Wanga for the Defendant