



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

CIVIL CASE 381 OF 2008

V/d BERGE ROSES KENYA LIMITED.....1ST PLAINTIFF

PROJECT FLORA LEASE LIMITED.....2ND PLAINTIFF

VERSUS

SHER KARUTURI LIMITED.....DEFENDANT

RULING

The Plaintiffs/Applicants in the Chamber Summons dated 16th December, 2008 are a parent and subsidiary company wherein the 1st applicant (the parent) carries on the business of flower farming on the 2nd applicant's land known as L.R. No.25263 (formerly L.R.No.10854/5. By a licence agreement reduced into writing on 28th September, 2007 "Sher Agencies Limited" the predecessor of Sher Karuturi Limited (the Defendant/Respondent) was allowed by the 1st applicant to "continue using" 14 hectares of the applicants' flower farm comprising of lines 6 and 7, including the Plaintiffs'/Applicants' grading hall, cold room, propagation greenhouse, equipped with two vacuum units, 2 spray units and other small equipments up to and including 31st October, 2008.

Following a change of shareholding in which one Flower Xpress FTZE acquired interests in Sher Agencies Limited, the name of the company changed to Sher Karuturi Limited (the Defendant/Respondent) on 25th March, 2008. The Respondent continued carrying on the occupation and use of the suit land and refused to hand over the portion granted under the licence even after the 31st October, 2008 leading the Plaintiffs/Applicants to file the suit in which this application herein is brought. The application seeks injunctive orders, inter alia, as follows:

1. That pending the hearing and determination of this application inter partes, the Plaintiffs by themselves, their servants, agents and/or representatives be granted access to and the use of their propagation unit Vendera greenhouses, grading hall, cold room, irrigation units and to be allowed to harvest the Akito, Red Calypso, Inka and Sweet Shell flower varieties growing on lines 6 and 7 within their land parcel No.L.R.No.225263(formerly L.R.NO.10854/5
2. That pending the hearing of the application exparte, the Defendants by themselves, their servants, agents and/or representative be restrained from using the Respondent's propagation unit Vendera green house, grading hall, cold room, irrigation units and/or from harvesting or in any way dealing with the Akito, Red Calypso, Inka and Sweet Shell flowers varieties growing on the Applicants' piece of land.

Orders in the terms of prayer 1 and 2 above were granted ex-parte on 16th December, 2008 and the application set down for inter partes hearing on 31st December, 2008. The applicants now pray that an injunction order do issue pending the hearing and determination of the suit as follows:

That the Defendant/Respondents by themselves, their servants, agent and/or representatives be restrained from using the propagation unit Vendera green house, grading hall, cold room, irrigation units and/or from harvesting or in any way dealing with the Akito, Red Calypso, Inka and Sweet Shell flowers varieties growing on the Applicants' piece of land pending the hearing and determination of the suit.

In a brief summary, the grounds upon which the application is founded are as follows:

1. That the licence to Sher Agencies Limited has expired
2. That the Respondent is an independent legal entity from the licensee and is holding onto lines 6 and 7 of the Plaintiffs' flower farm illegally.
3. That the Respondent is a trespasser on the plaintiffs/applicants' land on which it continues to harvest the Plaintiffs/Applicants' flowers illegally and to use the Plaintiffs'/Applicants cold rooms, storage and other equipment despite having no interest whatsoever over the same.
4. That by virtue of the Respondent's actions, the Applicants continue to suffer loss in the sum of Euros 7000 per day.

An affidavit highlighting the above grounds was filed with copies of the title document and the licence annexed thereto.

Submitting for the applicants, learned counsel, Mr. Tom Ojienda argued that the Respondent's continued occupation and use of the Plaintiffs' land is illegal since no interest was created under the licence agreement as would entitle the Respondent to be on the land after the expiry of such licence on 31st October, 2008. He submitted that the essentials for the granting of an injunction as stated in the case of **Giella Vs. Cassman Brown** 1973 E.A. 358 had been fulfilled in that the applicants have established a prima facie case with a probability of success against the Respondent and that they have demonstrated loss of Euro 7000 per day which is irreparable and incapable of compensation in damages. He argued further that the Defendant/Respondent, having admitted, in the Replying affidavit, filed on 29th December, 2008, that the licence only allowed the Respondent to occupy and use the land up to 31st October, 2008, The Respondent has no valid ground upon which to oppose this application or reasons to justify its continued occupation and/or use of the land in dispute. He submitted that the Plaintiffs, not being parties to the agreements for the transfer of shares in "**Sher Agencies Ltd**", they should not be denied the prayers sought herein on the basis of orders obtained in H.C.C.C.NO.539 of 2008, filed in respect of matters relating to those agreements, as is suggested in the Replying Affidavit, since the orders in that suit cannot be enforced against them.

Mr. Ojienda was of the view that even in the presence of a status quo order (requiring that matters remain as they were on 4th November, 2008) the legal position does not change since the licence under which the Respondent purports to occupy the suit land expired on 31st October, 2008.

As already indicated, the application is opposed on the strength of a Replying Affidavit sworn by Srinivas Rao Karuturi on 29th December, 2008 and filed on the same date, to which is annexed, inter alia, copies of the Shares Transfer Agreements pursuant to which the Respondent succeeded "**Sher Agencies Ltd**", the plaint in H.C.C.C. No.539 of 2008, a Chamber Summons dated 3rd November, 2008 and orders made therein.

The licence agreement between the 1st applicant and Sher Agencies Limited is not denied. It is actually admitted in paragraph 3 of the Replying Affidavit in which the deponent clearly states that the

licence was to subsist until 31st October, 2008. In paragraph 5 of the said affidavit, it is deponed that upon the acquisition of shares and the licensee's change of name from "***Sher Agencies Limited***" to "***Sher Karuturi limited***"

"...all the existing liabilities and obligations of "Sher Karuturi Agencies Limited" as against or in favour of 3rd parties remained as they were prior to its change of name to "Sher Karuturi Limited" the defendant herein."

The above being the case, I am of the considered view that the Defendant/Respondent, having stepped into the shoes of "***Sher Agencies Limited***", was clearly bound by the licence agreement and obligated, therefore, to vacate the applicants' properties come the 31st October, 2008.

I have considered Learned Counsel's Mr. Gachuhi's submissions in regard to the rest of the contents of the Replying Affidavit, all relating to a dispute between the Respondent and the persons from whom the shares in "***Sher Agencies Limited***" were bought and which dispute is said to have been referred to arbitration. I have also considered the submissions to the effect that H.C.C.C. NO.347 of 2008 (formerly Nairobi H.C.C.C.NO.539 of 2008) was filed in an attempt to forstall the Respondent's eviction from parcel of land in dispute upon the expiry of the license.

From my perusal of the annexures to the Replying Affidavit, I see nothing to suggest that the applicants herein had anything to do with the dispute said to be under arbitration. Mr. Gachuhi has submitted that, in his opinion, the lapsing or termination of the license gave rise to a claim in damages and that the applicants are not entitled to injunctive orders for that reason. He submitted also that they ought to have disclosed to the court the existence of the earlier suit when they appeared before me at the ex-parte stage. Mr. Gachuhi expressed the view that had I been made aware of that suit, I would not have granted the interim orders now sought to be confirmed by the granting of prayer 4 as a consequence of which the injunction would extend until the hearing and the determination of the suit. Counsel asked the court to dismiss the application and to stay the proceedings herein until the earlier suit is heard and determined.

It appears to me that the Respondent herein wishes to have its cake while eating it at the same time. Having accepted that the license to its predecessor has expired and that the company, in its new name, is bound by the obligations of the predecessor, arising prior to the change of shareholding and company name, what right, one may ask, does the Respondent have to file the suit now being relied upon to stay these proceedings?

The Respondent's complaint as appearing in the Replying Affidavit of 29th December, 2008 is that the Applicants ought not to have asked the Respondent to vacate lines 6 and 7 when there was an arbitration pending between Flower Xpress FTZE on one hand and Peter Barnhoon and Gerruit Barnhoon on the other, in regard to the purchase of shares in (among others) "***Sher Agencies Limited.***"

It is not clear to me how that arbitration gives rise to a cause of action against the applicants herein to warrant the filing of a suit to stop the eviction of the Respondent from the parcel of land in dispute. All the Respondent's representative says in the Replying Affidavit is that on 1st November, 2008, Peter Barnhoon, "***acting as a servant or agent of the 1st Plaintiff came to (the deponent's) office and demanded that the Defendant hands over possession of the suit property to the 1st Plaintiff.***"

The alleged action by Peter Barnhoon does not, in my view make the applicants parties to his dispute in respect of which there is an on-going arbitration. The applicants are neither vendors nor purchasers in the arbitral proceedings. Yet in the application made in H.C.C.C.NO.539 of 2008 (NKR.H.C.C.C.NO. 347 of 2008), wherein a status quo order was issued, the Respondents told the court that they were in occupation of the suit land "***by virtue of a sale of shares agreement dated 12th July, 2007 and a supplementary agreement dated 11th October, 2007***" and that the 1st Plaintiff in this suit was one of the companies listed under those agreements and further that the Respondent's occupation would "***form part of the claim referred to arbitration.***" To win the sympathy of the court, the Respondent stated in those

proceedings, that the Plaintiffs' threats to take possession of the disputed parcel of land were consistent with the offence of forcible entry under Section 90 of the Penal Code.

In view of the existence of the licence referred to earlier in this ruling, the above is a clear misrepresentation of facts before court. The status quo order obtained on the basis of such misrepresentation cannot be relied upon to persuade this court to stay these proceedings.

Learned Counsel Mr. Gachuhi submitted further before me that the applicants have not fulfilled the essentials of granting an injunction as stated in the case of **Giella Vs. Cassman Brown Ltd.** *Supra* in that all they have done is to submit on a prima facie case without demonstrating irreparable loss or that the Respondent cannot pay damages, which counsel considers to be the only remedy available to the applicants in this case. He also holds the view that the interim order granted under prayer 2 of the application ought not to have been granted at an interlocutory stage it being mandatory in nature.

Given the facts of this case, the applicants have clearly established a prima facie case against the Respondent by virtue of the licence agreement which, as admitted by the Respondent themselves expired on 31st October, 2008. The law being that a licence confers no proprietary interest over the licensor's property and being one which is revocable, even at will, the issue of damages clearly does not arise. It is clear to me that the Respondent might not even consider paying any damages to the applicants given that it would rather cling onto the applicants' property despite the termination of the licence and knowing very well that it had no legal right whatsoever to do so.

I do not accept that the injunction in terms of prayer 2 ought not to have been granted. There being no dispute as to the nature and economic value of the investment in dispute, prayer 3 could not have been issued in a manner that would leave a vacuum as to the operations at the applicant's flower farm. The substantial loss that would no doubt ensue from so doing was considered when this court exercised its discretion and made the orders of 16th December, 2009. A court of law cannot make an order which leads to an escalation of losses sought to be curtailed.

This court is in no doubt of the loss that the Applicants would suffer in the event that the injunction sought herein is not granted. I consider such loss to be irreparable, given the facts of the case. In view of my findings herein, I am of the considered opinion that the application before me has merit and the orders sought are well deserved. Accordingly the application is allowed with costs and the orders sought hereby granted.

DATED, SIGNED and DELIVERED at Nakuru this 19th day of February, 2009.

M. G. MUGO

JUDGE