

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 248 of 2006

CHEVRON KENYA LIMITED

(FORMERLY CALTEX OIL KENYA LTD)PLAINTIFF

V E R S U S

1. MUVIR HOLDINGS LIMITED

**2. CITY COUNCIL OF NAIROBI
DEFENDANT**

PRELIMINARY RULING

By a ruling dated 5th and delivered on 6th February 2009, the court herein (Waweru, J) granted the Plaintiff temporary injunctions against the Defendants, essentially to preserve the then existing *status quo* pending disposal of the suit. The temporary injunctions were granted subject to the condition that the Plaintiff do file, within seven days of delivery of the ruling, appropriate undertakings as to damages. The condition was apparently met. In that ruling a background of the dispute was given. The dispute is essentially between the Plaintiff and the 1st Defendant, each of whom claims to have a *bona fide* leasehold interest in the suit property, L. R. No. 36/1/923 (Grant I.R. No. 23451) situated at Eastleigh, Nairobi.

The 1st Defendant has come back to court by notice of motion dated 19th May, 2009 seeking the variation or discharge of the temporary injunction granted to the Plaintiff against it. The variation or discharge is sought upon “such terms and conditions that meet the interests of justice”.

The 1st Defendant’s case in this application as set out in the supporting affidavit sworn by its director, FRANCIS MBURU KIMANI, is that the Plaintiff is no longer in possession of the suit property as it has sub-let it to a third party. It is its further case that the Plaintiff has sold, or is about to sell and transfer, all its properties and businesses in Kenya to a third party, and then leave the Kenyan market altogether. In that event the undertaking for damages given by the Plaintiff pursuant to the temporary injunction granted to it against the 1st Defendant will be hollow as the 1st Defendant could not possibly enforce it should the need arise. Besides, a new person having now been brought into the suit property, the present litigation will thereby be unnecessarily prolonged and complicated.

The application is expressed to be brought under the inherent jurisdiction of the court. But it is essentially for review under Order 44, rule 1 of the Civil Procedure Rules.

The Plaintiff has opposed the application as set out in its replying affidavit filed on 27th May, 2009. That affidavit is sworn by one AMIE HATEGO, the Corporate Counsel of the Plaintiff. It is conceded in the replying affidavit that indeed the Plaintiff is transferring or assigning its entire share-holding as a going concern to a company called TOTAL OUTRE MER. But it is argued that by virtue of section 20(4) of the Companies Act, Cap 486, any rights and obligations that the Plaintiff has *vis-à-vis* any person would continue to subsist beyond the change in its status as envisaged by the transfer or assignment of its properties, liabilities and assets within the Republic.

It is further argued for the Plaintiff in the replying affidavit that the Plaintiff will continue to be in existence and will prosecute the present case to its logical conclusion.

At the hearing of the application the learned counsels for the parties elaborated the respective positions of the parties as set out in their affidavits. I have considered those submissions.

The Plaintiff has affirmed the 1st Defendant's assertion that it is in the process of transferring or assigning all its assets and businesses in Kenya to a third party. That third party is not before the court. The Plaintiff has not placed before the court the precise contractual arrangements between it and the third party. It is not clear at all if the Plaintiff's liabilities are being transferred as well. More importantly, it is not at all certain that the 1st Defendant would be able to enforce against the third party the undertaking as to damages given by the Plaintiff in exchange for the temporary injunction granted to it herein against the 1st Defendant.

I am satisfied that the 1st Defendant has made out a case for variation of the condition imposed for the temporary injunction granted to it against the 1st Defendant. I therefore invite the 1st Defendant and the Plaintiff to address the court as to the nature and extent of such variation. I shall make orders as necessary to dispose of the application upon hearing submissions of the counsels on this issue.

DATED AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 17TH DAY OF SEPTEMBER, 2009