REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 673 of 2005

FREDA STORES LIMITED……..…….....……PLAINTIFF

VERSUS

NATIONAL OIL CORPORATION……..….....……..DEFENDANT

R U L I N G

The defendant is the registered proprietor of the parcel land known as L.R. No. 9042/162 where upon is a petrol station and a restaurant. In 1999 the defendant granted the plaintiff a licence to operate the petrol station and the food restaurant. As a result of losses in business incurred by the plaintiff, the plaintiff requested to revert the sale of fuel at the petrol station to the defendant whilst the plaintiff would continue running the restaurant. That proposal culminated in an agreement between the plaintiff and the defendant dated 18th April 2005. That agreement in part provided: -

"…….**we have agreed as follows:**

(1) That NOCK shall take over the Embakasi station on the 1st May 2005.

(2) That the handover shall take place on the 30th April 2005.

(3) That NOCK shall advance to Freda Stores Ltd. Kshs 2, 000, 000 to offset its bank loan, upon approval by management. This amount shall be recorded from them upon resolution of the following items:

(a) Delivery losses as claimed by Freda Store Ltd and which shall be investigated and determined,

(b) The double banking claims that relate to supplies procured from Nakuru,

(c) Thorough determination of the dealer's level of investment in the restaurant business (structure and equipment), and

(d) Buy – out/goodwill, if and when approved by the board of directors.

In the interim period, prior to appointment of a new dealer, Freda Stores Ltd, will be allowed to continue with the running of the restaurant business."

This agreement was singed by both the plaintiff and defendant.

As per that agreement the plaintiff surrendered the running of the petrol station on 1st May 2005 but retained the running of the restaurant.

The defendant by its affidavit dated 8th February 2006 stated that it notified the plaintiff that they had obtained another dealer to run the petrol station and accordingly requested the plaintiff to vacate the restaurant as per the agreement dated 18th April 2005.

The other dealer was formally appointed on 26th July 2005 and this prompted the plaintiff to file this action in the Resident Magistrate's Court. The plaintiff also filed a injunction application dated 25th July 2005 which application was heard on the same day, with orders restraining the defendant from evicting the plaintiff, being granted on that same day exparte.

The plaintiff on 26th July 2005 returned to court with another application alleging that the defendant had failed to obey the court order and seeking further orders for the plaintiff to be afforded assistance by the Embakasi police to supervise the execution the order granted on 25th July 2005. The court once again, and exparte, granted the plaintiff the orders for the assistance of the police to be given as prayed.

The defendant on being served with the summons filed a defence and counter claim for kshs 5, 622, 571. 05, which removed this case from the jurisdiction of the Resident Magistrate's Court. The magistrate who heard the matter on 29th July 2005, inter partes extended the two previous orders, as aforesaid to an undetermined period.

The matter was thereafter fixed before a Senior Principal Magistrate, who directed that status quo in this suit be maintained and further stated that the Chief Magistrate Court had no pecuniary jurisdiction to hear this suit. This suit was then transferred to the High Court.

Faced with the injunction that was extended to an undetermined period by the Resident Magistrate and with the order for Status Quo to be maintained the defendant was aggrieved and therefore filed the application dated 8th February 2006, which application was argued before me and this ruling relates to it. The defendant's application is by way of Notice of Motion brought under Section 3A of the Civil Procedure Act. It seeks the following orders: -

· That this court be pleased to issue a mandatory injunction against the plaintiff/Respondent herein to vacate from L.R. No. 9042/162 pending the hearing and determination of the counter claim.

· That the officer commanding station, Embakasi do assist in the enforcement of the orders of this Honourable court.

The defendant's learned counsel Mr Martin Munyu argued in support of the defendant's application. He argued that the continued ex parte injunction was causing the defendant serious prejudice because the defendant had handed over possession of the petrol station to a third party in accordance to the parties agreement of 18th April 2005. That the plaintiff was running 24 hours bar on the premises which was a security risk to the person running the petrol station exposing him to theft of cash and also with the threat of fire because of plaintiff's patrons who smoke. In support to the claim of the risk of fire to the 3rd party, defendant stated that there was an incident of fire in the restaurant's kitchen in November 2005, which exposed people and property at risk.

Defence argued that before the injunction was granted, on 25th July 2005, the plaintiff's licence to run the restaurant had been determined which fact was not related to the magistrate at the time. Defendant therefore argued that even though the plaintiff sought equitable relief it failed to do equity. Defendant relied on the case of EAST AFRICAN FOUNDARY WORKS (K) LTD – V – KENYA COMMERCIAL BANK LTD; [2002] 2 EA 371. Justice Ringera in that case stated:

"……**I would have taken the view that it was of fundamental importance that in matters where injunctive relief sought, the court exercises an equitable jurisdiction and if anything was shown to be inequitable it should not be sustained**."

Defendant also relied on the case AGIP (K) LTD – V – VORA [2002] 2 EA 283. Per curiam the holding of the court was that

"…….**where the licence has been effectively terminated, as in this case. An order of restoration would be improper unless the applicant had prayed for a mandatory injunction**."

The court of appeal also, in that case, made a finding that:

" **To begin with, the respondents were not, by the licence, given possession of the station. In which event, the respondent's losses (if any), which might have ensued from the termination of the licence can be measured in damages**".

Defence used the aforesaid portion of that case to support its contention that the plaintiff was a licencee and its licence had been terminated by the time the first injunction was issued and accordingly that injunction ought to be discharged since damages, if any are measurable.

The defendant also in support of its application highlighted the plaintiff's director's violent reaction to the termination of his licence and there was a statement that the said director brandished his gun against the defendant and 3rd party running the petrol station. This behaviour together with the fact that the plaintiff is running a 24 hour bar, the defendant said, is a source of anxiety to the defendant and new dealer of the petrol station.

The defendant further stated that the plaintiff has not been paying rent for the restaurant.

Defendant concluded by saying that it had demonstrated the special circumstances to justify the assurance of a mandatory injunction.

The plaintiff's learned counsel Mr Okoth opposed the application. He began by saying that since the defendant had not sought the discharge of the injunction by the Resident Magistrate and the status quo ordered by the Senior Principal Magistrate those orders are still in force, and should remain.

Plaintiff counsel stated that the plaintiff is a tenant and not a licencee. Plaintiff in this argument relied on the case KENYA SHELL LIMITED – V – VIC PRESTON LIMITED (MILIMANI) HCCC NO. 1133 OF 1999 (0.SS). This case related to the running of a petrol station, garage and showroom. The court found that in absence of formal documentation, the relationship between the registered owner and those operating the garage and showroom, was one of the landlord and tenant.

Having argued that the relationship between the plaintiff and defendant is one of landlord and tenant the plaintiff then stated that what the defendant ought to have prayed for was eviction of the plaintiff. in support of this contention plaintiff relied on the case, M/s GUSII MWALIMU INVESTMENT CO. LTD – AND MWALIMU HOTEL KISII LTD. CIVIL APP. NO. 160 OF 1995.

Plaintiff further stated that the defendant had failed to fulfil some of the terms of the agreement dated 18th April 2005, clauses such as the loan of kshs 2 million that the defendant was supposed to advance to the plaintiff. The plaintiff argued that having failed to honour those clauses, the defendant was not entitled to the prayers it sought of mandatory injunction. The plaintiff in this regard relied on the case CIVIL APPEAL NO. 332 OF 2000 KENYA BREWERIES LIMITED & OTHERS – AND – WASHINGTON O. OKEYO; where it was held:

"**It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party**."

In response to issues raised by the defendant the plaintiff by its affidavit dated 17th February stated:

· Paragraph 6, "**That it was paramount and a general understanding for clause No. 3 of said agreement dated 18th April 2005 to take effect prior to last condition taking effect**."

· Paragraph 7, "**That the plaintiff have run the restaurant Freda Corner Club for past six (6) years with enormous good will…..**"

· Paragraph 12, "**That I have been paying rent separately for the restaurant premises, Freda Corner Club rent of kshs 40, 000 per month…….**"

The plaintiff filed another affidavit dated 7th March 2006. The deponent therefore stated that the restaurant was a separate entity to the entity that was licenced to run the petrol station. The plaintiff in paragraph 7 of that affidavit stated:

"**That I have not refused to pay rent for the premises. A standing order placed with my bankers was stopped by defendants vide letter dated 4th May 2005……..as such I am not to blame and I am willing to continue paying rent**."

The above sufficiently summarises the arguments presented before me. It ought to be noted that what is presented before me is an interlocutory application. It is therefore important, even though counsel's argument tried to entice the court into that arena, that court does not make final determination of certain issues, to do so is to usurp the trial judge discretion. One such issue is whether the plaintiff is a licencee or a tenant.

What has however captured my attention is this matter is the interim injunction granted to the plaintiff on 25th July 2005. The plaintiff by his plaint in paragraph 6 stated:

"**The defendant in fragrant breach of the said agreement, entered into the plaintiff's restaurant Freda Corner Club, and forcefully evicted plaintiff ejecting and removing plaintiff's property from restaurant**."

The plaintiff in its final prayers, despite disclosure that it had been evicted, did not pray for mandatory injunction to be restored into possession. However when the plaintiff came to court to seek an injunction on 25th July 2005, the plaintiff sought and was granted a mandatory injunction. That does not sit well with this court and such an order drives this court to invoke this its inherent power to discharge that order.

But that is not all, the magistrate in issuing the exparte injunction on 25th July 2005 failed to give reasons for granting that order, as required by Order 39 Rule 3 of the Civil Procedure Rules. Such an order is illegal and therefore a nullity by reason of lack of reasons. Akiwumi J, in Civil Appeal NO. 126 of 1995 UHURU HIGHWAY DEVELOPMENT LTD – V – CENTRAL BANK OF KENYA & OTHERS stated:

"**To my mind, the recording of the reasons by the learned judge why he should hear the application ex parte is mandatory and the learned judge having failed to record his reasons as required by Order 39 Rule 3 (1) could not, and should not, have gone on to hear the application ex parte and to grant a temporary injunction. This order was invalid, had no legal basis and is therefore of no legal effect……."**

In the case OMEGA ENTERPRISES (KENYA) LTD – AND – KENYA TOURIST DEVELOPMENT: CIVIL APPEAL NO. 59 OF 1993 P.K. TUNOI J.A., in the case where exparte injunction had been issued without reasons as required by Order 39 Rule 3 (1) referred to AFRICA CO. LTD [1961] 3 ALL ER 1169 as follows, in reference to such an order:

"**If any act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need**

for an order of the court to set it aside it is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so."

What then ought to be the fate of the injunction issued on 25th July 2005 and order of status quo ordered on 1st August 2005. That order is an a nullity and will be set aside. On being set aside the court will put the parties back into the position they were before that order was issued. According to the plaint the plaintiff had been ejected and removed from the defendants aforesaid property. Accordingly the court will issue a mandatory order of injunction for the plaintiff to vacate the defendant's property. It is worthy noting that had it not been that the injunction granted to the plaintiff was a nullity, the court would not have issued a mandatory injunction for the removal of the plaintiff from the defendant's property.

The court would not have granted that order because the defendant too has not prayed for it in its counter claim.

Additionally the court is of the view that following the contention by the defendant of the threats by the plaintiff's director towards the new dealer and his workers, and also towards the defendants' servant, that an order for the plaintiff to vacate the property would be necessary. It is note worthy that the defendant in its affidavits clearly stated that the plaintiff director reacted so menacingly, brandishing a gun towards the defendant's servants, and the new dealer. The plaintiff did not specifically deny that contention, such a claim need to be specifically traversed, and the court accepts that as the truth. Accordingly wishing to borrow the words of Justice Onyango Otieno in the case of KENYA SHELL LTD – V – VIC PRESTON LTD, that is, " ……**..in the interest of peace and good relationship in the commercial world**" I would grant an order of injunction for the eviction of the plaintiff. Business simply cannot be carried out in that manner, with some threatening others with guns.

The court does in view of its findings make the following orders: -

(1) **That a mandatory injunction does hereby issue directing the plaintiff, its servants or agents to within seven (7) days of this date hereof hand over vacant possession of all the Restaurant operated by the plaintiff under the name of FREDA CORNER CLUB located on property L.R. No. 9042/162 pending the hearing and determination of the defendant's counter claim**.

(2) **That the officer commanding station Embakasi do assist in the enforcement of this order to ensure that there is no threat to peace**.

(3) **That the costs of the Notice of Motion dated 8th February 2006 shall be in the cause**.

MARY KASANGO

JUDGE

Dated and delivered this 4th May 2006.

MARY KASANGO

JUDGE