



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

Civil Suit 486 of 2004

**JANE WAMBUI GICHANGI..... 1ST
PLAINTIFF**

**CHARLES MUNENE GICHANGI..... 2ND
PLAINTIFF**

**KIGUMO PETROL STATION LTD..... 3RD
PLAINTIFF**

VERSUS

**KENYA OIL COMPANY LTD.....
DEFENDANT**

RULING

By chamber summons dated 12.05.04 and filed on 13.05.04 under Order XXXIX rules 2,3 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap.21), the plaintiffs applied for the following orders:-

1. That a temporary injunction do issue pending the hearing and determination of this application restraining the defendant its servants and/or agents or any other body authorized by it from evicting the plaintiffs or in any way interfering with the operation of the petrol station situated on land parcel Mutira/Kaguyu/696/60 E.
2. That costs of this application be provided for.

The grounds upon which the application is based are:-

1. That the lease and dealership agreement between the plaintiffs and defendants are intertwined and one cannot be severed from the other.
2. That the plaintiffs are not in breach of the dealership agreement.
3. That the agreements make no provision for evicting of the plaintiffs the proprietors of the land parcel where the petrol station is situate.
4. That the plaintiffs will suffer irreparable loss if it was to be evicted from its parcel of land.

5. That the rent payable is based on the sales by the 3rd plaintiff thus the lease is inoperative and null and void on termination of dealership agreement.

The application is supported by the affidavit of the 2nd plaintiff, Charles Munene Gichangi. Among other things, the 2nd plaintiff depones that he and the 1st plaintiff are registered proprietors of the land where the subject petrol station is situated and, further, that he (2nd plaintiff) is a director of the 3rd plaintiff company. The 2nd plaintiff also makes various other depositions in support of the temporary injunction sought by all the plaintiffs.

The application came up for hearing inter-partes before me on 24.02.05 whereat the plaintiffs/applicants were represented by learned counsel, Mrs N.W. Ikinu while the defendant/respondent was represented by learned counsel, Mr. F.N. Karanja.

Plaintiffs'/applicants' counsel made the following main points:

a) Contracts

Counsel said the defendant and plaintiffs have 3 contracts:

- i. The letter of offer of lease of the suit premises dated 17.12.97 (annexture 1 to the chamber summons). In this letter the 1st and 2nd plaintiffs were offering the subject land to the defendant together with the service station thereon on the terms stipulated therein. Counsel pointed out that the consideration for the lease is at paragraph 2 of the letter.
- ii. The lease (annexure 2) between the 1st and 2nd plaintiffs on one hand and the defendant on the other. In the lease entered into on 22.12.97 the parties were formalizing the offer of lease made vide the letter of 17.12.97.
- iii. The licence agreement of 17.02.98 (annexure 3) between the 3rd plaintiff and the defendant. In the licence agreement, the defendant gave the dealership of the petrol station on the suit land to the 3rd plaintiff co., of which the 2nd plaintiff is a director.

b) Low Sales

Plaintiffs'/applicants' counsel complained that the defendant relied on low sales to threaten termination of the dealership licence. She pointed out that the plaintiffs/applicants have operated the petrol station on the suit land since 1998 to date. That vide letter of 20.04.04 the defendant announced eviction of the 3rd plaintiff from the petrol station but the plaintiffs have not moved out to date, maintaining that the defendant is not entitled to evict them because the above 3 agreements are intertwined since terminating the dealership/licence agreement between the defendant and 3rd plaintiff makes the lease between the defendant on one hand and the 1st and 2nd plaintiffs on the other inoperational. She pointed out that the consideration for the lease is based on fuel sales as per the licence agreement; that rent is according to how much fuel the plaintiffs sell; so if no sales, no rent.

The plaintiffs/applicants, while admitting through their counsel that they had at the material time failed to meet sales targets set by the defendant, maintained that the defendant co. was the main contributor to the low sales through, inter alia, its sponsorship of its own subsidiary co. (Mid-oil Co. Ltd) to sell its fuel at a subsidized price within the plaintiffs' area of operation and that the defendants' termination of the licence agreement is unjust. Plaintiffs/applicants' counsel pointed out that the plaintiffs had built the subject premises and are the registered owners of the land on which the premises stand; that they (plaintiffs) have carried on business there as their source of livelihood since 1998; and that the dealership agreement is not properly executed. Counsel referred to HCCC No.1494 of 1999, Kigwe Complex Ltd -vs- Caltex Oil (Kenya) Ltd basically to make the point that the licence/dealership agreement cannot be severed from the lease.

Plaintiffs'/applicants' counsel submitted that the plaintiffs/applicants have raised a prima facie case with

probability of success; that their eviction is unjust; and that the temporary injunction they seek should issue.

To put the present interlocutory application in perspective, it must be recorded here that the genesis of the application is a plaint filed by the plaintiffs on 13.05.04 seeking the following orders:-

- a) That the defendant be restrained by the order of this court from evicting the plaintiffs from the petrol station erected on parcel of land know as Mutira/Kaguyu/696/60 E.
- b) That a declaration be made that the lease between the 1st and 2nd plaintiffs on one hand and the defendant is null and void on termination of the dealership agreement and further that the dealership agreement is not valid and enforceable.
- c) That the costs of this suit be paid by the defendant.
- d) That the court be pleased to make any other order as it may deem just and fit to grant.

On 25.05.04 the defendant filed grounds of objection to the plaintiffs' chamber summons application of 12.05.04. The defendant's grounds are:-

1. That the plaintiffs' application for an injunction is misconceived.
2. That the plaintiffs have failed to disclose material facts to the court which were known to them at the time the ex-parte injunction was granted.
3. That no prima facie case with a probability of success has been made out.
4. That there is no allegation or evidence of irreparable damage to the plaintiffs.
5. That damages would more than adequately compensate the plaintiffs for any alleged wrong.
6. That the plaintiffs' suit does not disclose any or reasonable cause of action against the defendant as the plaintiffs have admitted that they were indeed in violation of the dealership agreement for which the defendant was entitled to terminate forthwith.

The defendant's grounds of objection are supported by the replying affidavit of Isaac Gachuria, Marketing Manager of the defendant co. sworn on 24.05.04. In his address to this court, defendant's counsel submitted in essence that the plaintiff failed to disclose material facts known to them at the time they obtained an ex-parte injunction. By way of illustration, defendant's counsel drew attention to the fact that by the time the plaintiffs case to court on 13.05.04 the issue of eviction had been overtaken by events in that the defendant's letter of 20.04.00 terminating the licence agreement had been withdrawn by the defendant's subsequent letter of 27.04.04 following discussion between the parties on 26.04.04. Defendant's counsel also submitted that the termination had not been based only on low sales but also on inadequate stocking of fuel products by the plaintiffs owing to inadequacy of working capital, which inadequacy the plaintiffs acknowledged. Alternatively, defendant's counsel submitted that the plaintiffs have not raised a prima facie case with probability of success against the defendant/

On the issue of compensation, defendant's counsel submitted that the defendant is a well established co. capable of compensating the plaintiffs in damages if found liable. In counsel's view, the compensation issue is a prerequisite for issuance of injunction. In this connection, he referred to High Court Milimani Commercial Courts Civil Case No.602 of 2000, Woodcraft Industries Ltd & 3 others -vs- The East African Building Society. On the issue of non – disclosure of material facts, defendant's counsel referred to Court of Appeal Civil Application No. NAI 140 of 1995, Uhuru Highway Development Ltd -vs- Central Bank of Kenya & 2 others and HCCC No.5169 of 1990, Solomon Kitundu Munyoki -vs- Credit & Commerce Finance Ltd. He submitted that Kigwe's case referred to by plaintiff's counsel was distinguishable on facts. She pointed out that while it is true that in its letter of 27.04.04 the defendant

withdrew its earlier letter of 20.04.04 terminating the licence agreement, on 11.05.04 the defendant's agents again attempted to evict the plaintiffs from the petrol station and/or to repossess the station from the 3rd plaintiff thereby necessitating the plaintiffs' recourse to court. Counsel pointed out that this fact deponed to at paragraph 27 of the 2nd plaintiff's affidavit of 12.05.04 was not denied by Isaac Gachuria, Marketing Manager of the defendant co. in his replying affidavit of 24.05.04 and in this regard counsel referred the court to paragraph 13 of Gachuria's affidavit. The court pointed out that paragraph 13 of Gachuria's affidavit does not say that the visit by defendant's agents alluded to therein was for purposes of eviction and plaintiff counsel clarified that paragraph 13 had to be read with paragraph 12 of the same affidavit and that if the two paragraphs were related to the penultimate paragraph of the defendant's letter of 27.04.04, the inevitable conclusion is that the defendant's agents were on an eviction mission since no improvement had been achieved by the plaintiffs in fuel sales.

On the issue of prima facie case with probability of success, plaintiffs' counsel reiterated her earlier submission that the plaintiffs had established such a case and added that if a 3rd party were to take over the running of the petrol station, the plaintiffs' would not know what rent was payable since the letter of offer, the lease or the licence agreement give no description of any relationship between the plaintiffs and the 3rd party and how the plaintiffs would know about sales made from the petrol station.

Regarding low sales, plaintiffs' counsel re-emphasized that the defendant's subsidiary co. embarked on selling the defendant's products in their area of business at a lower price; that the defendant was the major cause of the plaintiffs' law sales; and that the defendant co. cannot benefit from its own wrongful actions.

On the issue of compensation, plaintiffs' counsel pointed out that nowhere in its affidavit does the defendant state that it is in a position to compensate the plaintiffs in damages if the plaintiffs do not run the petrol station. Plaintiffs' counsel submitted that the authorities cited by defendant's counsel are distinguishable on facts.

I have given due consideration to the rival submissions of counsel for both parties, including the authorities cited by them.

Grave issues of property ownership and relationships are raised by this case. There is great controversy as to which party is in breach as between the plaintiffs on one hand and the defendant on the other. The pleadings show that there were at least some building already in existence when the lease of the land and the licence/dealership agreement were entered into, although more building or facilities may have been added thereafter. It is legally significant that the 1st and 2nd plaintiffs jointly own the land while the 2nd plaintiff is also a director in the 3rd plaintiff co. Ex-facie, there appears to be some inter-linkages between the letter of offer which led to the lease of the subject land, the lease itself and the licence/dealership agreement. Proper understanding of the inter-linkages and resolution of the dispute as to which party is in breach can only be arrived at upon full evidence being adduced. The plaintiffs, while acknowledging failure to meet sales targets set by the defendant, blames the defendant for the low sales which they (plaintiffs) say the defendant significantly contributed to by sponsoring its subsidiary co. (Mid – oil Co. Ltd) to sell the same products in the same area at a subsidized price, thereby undermining the plaintiffs' business. Documents in the court file, such as the 3rd plaintiff's letters of 08.10.01, 09.09.02 and 16.10.03 show that the 3rd plaintiff made pleas to the defendant to address the issue of unfair competition by lowering prices to close down on the price gap between the 3rd plaintiff's products and those of its competitors but the complaints do not appear to have been addressed by the defendant, who seems to have attributed the low sales principally to the 3rd plaintiff's inadequate working capital. In turn, the plaintiffs hold the defendant as the principal contributor to the low sales. A proper determination of these irreconcilable perspectives can be effectively made only upon full evidence being adduced.

The plaintiffs also maintain that the dealership agreement was not properly executed. This is a legal issue also calling for determination on full evidence.

It is instructive that the attempted eviction deponed to at paragraph 27 of the 2nd plaintiff's affidavit of 12.05.04 is not denied by Isaac Gachuria, Marketing Manager of the defendant co. sworn on 24.05.04.

All in all, I am of the considered view that the pleadings in this case raise various serious issues which call for trial and determination upon full evidence. No proper justice can be done to the said issues at this interlocutory stage. The authorities cited by defendant's counsel are in my respectful view distinguishable on facts from the present case. I hold that the proper course in this case is for the status quo to be maintained pending trial of the main suit. Accordingly, I order that the restraining orders already issued against the defendant shall remain in force until hearing and determination of the suit herein and that the parties should proceed to take a date for such hearing. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 11th day of April 2005.

B.P. KUBO

JUDGE