



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI COMMERCIAL DIVISION, MILIMANI

CIVIL CASE 221 OF 2005

MAJDOON KENYA LIMITED.....PLAINTIFF

VERSUS

KENYA OIL COMPANY LIMITED.....DEFENDANT

R U L I N G

On 26th April, 2005 the Plaintiff herein, **MAJDOON KENYA LIMITED**, filed suit against the Defendant, **KENYA OIL COMPANY LIMITED**, seeking the following reliefs:-

(1) An order directing that the dispute be referred to arbitration in accordance with clause 19 of the Licence Agreement dated 6th July, 2001 between the parties.

(2) Pending such reference an order that the suit be stayed and an injunction to restrain the Defendant and its servants and agents or nominees from interfering with the Plaintiff's operation of the petrol station in question or taking over the business thereof.

(3) A declaration that the purported termination of the Licence Agreement on 15th April, 2005 by the Defendant was unlawful and without justification.

(4) A declaration that the Defendant is in breach of the Licence Agreement aforesaid and an order to compel the Defendant to repair or replace all the defective equipment, particularly the leaking 13,000 litre premium petrol underground tank, and to hand over the petrol station to the Plaintiff with all the equipment, fuel pumps and underground tanks in good working order and condition as stipulated in the Licence Agreement.

(5) Costs of the suit. Contemporaneously with the plaint the Plaintiff filed a chamber summons dated 25th April, 2005 seeking the following order:-

1) That the application be certified urgent, service thereof be dispensed with and the Plaintiff be heard ex parte in the first instance.

2) That an interim injunction do issue restraining the Defendant and its servants and agents from interfering with the petrol station, equipment thereof and business situated on L.R. No. 209/4399, Koinange Street, Nairobi, pending hearing and determination of the application.

3) A temporary injunction do issue restraining the Defendants and its servants and agents from entering and interfering with the aforesaid petrol station and its equipment, pumps, tanks and business pending reference to arbitration and hearing and determination of the dispute as

stipulated in clause 19 of the Licence Agreement of 6th July, 2001 between the parties.

4) An order to compel the Defendant to repair and/or replace the leaking underground premium petrol tank as is required of it under the Licence Agreement dated 6th July, 2001.

5) That the proceedings in this suit be stayed pending arbitration as stipulated in the Licence Agreement.

6) Such further orders as the court may deem fit.

7) That the Plaintiff be awarded costs of the application.

The application was filed under certificate of urgency and on the same date it was filed it was placed before me. Upon hearing the Plaintiff's learned counsel *ex parte* and upon reading the application and supporting affidavit I was satisfied that it was urgent, and I fixed it for hearing *inter partes* on 10th May, 2005. For reasons that I recorded I also granted an interim injunction in terms of prayer No. 2 of the application, the same to remain in force until 10th May, 2005.

In its turn the Defendant came to court on 29th April, 2005 under certificate of urgency by chamber summons of the same date seeking to be heard *ex parte* and for an order to set aside the interim injunction granted on 26th (not 27th as stated in the application) April, 2005. I certified the application as urgent and ordered that it be heard *inter partes* on 10th May, 2005 together with the Plaintiff's application. I declined to issue any further *ex parte* order.

When the applications came up for hearing on 10th May, 2005 the court's attention was drawn to an application filed by the Plaintiff for orders to punish for contempt of court. It was by chamber summons dated 5th May, 2005 filed on the following day. It sought three main orders:-

(i) That the Defendant and its officers, JACOB ISACK SEIGMAN, PATRICK NJOROGE, DANIEL NJAI MACHARIA and ALFRED MAINA MWANGI, be cited for contempt for disobeying the court order of 26th April, 2005.

(ii) That the aforesaid JACOB ISACK SEIGMAN, who was the managing director of the Defendant, be committed to civil jail for a term of six (6) months for disobeying the court order of 26th April, 2005.

(iii) That the aforesaid PATRICK NJOROGE, DANIEL NJAI MACHARIA and ALFRED MAINA MWANGI, being the representatives and/or employees of the Defendant who were in charge of managing the subject petrol station on 26th and 27th April, 2005 and subsequently, be committed to civil jail for a term of six (6) months for disobeying the order of the court of 26th April, 2005.

I decided first to hear the contempt application. Mr. Oyatsi, learned counsel for the Defendant, raised a preliminary objection to the application as per notice thereof dated 9th May, 2005. This ruling is upon that preliminary objection. The objection is two-pronged:-

(1) That the court has no jurisdiction to hear the application.

(2) Alternatively and without prejudice, that the application is in any event misconceived and/or incompetent upon the grounds;

(i) that there was no personal service of the application and affidavits upon the alleged contemnors;

(ii) that the Applicant has not sought or obtained leave of the court to commence the contempt proceedings; and

(iii) that no application for leave has been served upon the Attorney- General.

I have considered the arguments of the learned counsels appearing. I have also read the authorities referred to. Mr. Oyatsis's argument was as follows as I understood it. Section 10 of the Arbitration Act, No. 4 of 1995, denies the court jurisdiction where the parties have contracted to refer to arbitration. That section is in the following terms:-

“10. Except as provided in this Act, no court shall intervene in matters governed by this Act.”

The parties have contracted under clause 19 of the Licence Agreement to refer to arbitration. Therefore the court would have no jurisdiction to grant the reliefs sought in prayers Nos. 3 and 4 of the plaint. The suit is thus incompetent in regard to those reliefs. The court however does have jurisdiction, further argued Mr. Oyatsi, to grant interim protection under section 7 of the Arbitration Act pending or during arbitration. But such protection must be sought by way of originating summons. The suit is thus incompetent in prayers Nos. 1 and 2 as well. The court can exercise jurisdiction under Order 29 of the Civil Procedure Rules (the Rules) only in a suit where it has jurisdiction to determine the rights of the parties. It has no jurisdiction in the present suit to hear and determine the rights of the parties. The application by chamber summons dated 25th April, 2005, which was brought under the aforesaid Order 39 of the Rules is thus incompetent and the interim injunction granted on 26th April, 2005 is null and void as the court lacked jurisdiction to grant it. No issue of disobedience of an order that is null and void can thus arise, argued Mr. Oyatsi. But he did concede that an order of the court, though null and void or illegal, must be obeyed, though that does not render valid what is null and void; nor does it confer jurisdiction upon the court to hear a matter for which it does not have jurisdiction.

To my mind the arguments by Mr. Oyatsi with regard to the competence or otherwise of the Plaintiff's suit and application by chamber summons dated 25th April, 2005 will be germane and relevant only when considering the said application and the Defendant's application by chamber summons dated 29th April, 2005 (to set aside the interim injunction granted on 26th April, 2005). These arguments do not commend themselves to a consideration and decision now. We are not now dealing with those two applications. We are dealing with the contempt application by chamber summons dated 5th May, 2005. Mr. Oyatsi has conceded, correctly in my view, that a court order must be obeyed, even though in someone's view it be illegal or null and void. It cannot be left to parties and their legal advisers to decide or declare a court order to be illegal or null and void and thereby proceed to trash it. That would be a recipe for chaos and cannot be permitted. A party will not be heard to argue that as far it is concerned the court order is illegal or null and void and that therefore the court will not have jurisdiction to consider whether anyone bound to obey the order has been in disobedience of that order and should be punished for it. Such argument is not acceptable.

Having said that, however, Mr. Oyatsi's next line of argument does raise a genuine procedural issue with regard to the contempt application. That issue is that the jurisdiction of the court to punish for contempt has not been properly invoked in that no leave of court has been sought or obtained to bring the application. I think it is now well-established in our jurisdiction that before contempt proceedings are instituted leave of the court must be sought in line with English law and procedure as indicated by section 5(1) of the Judicature Act, Cap. 8. See for instance the case of **ANDALO & ANOTHER –VS- JAMES GLEEN RUSSEL LTD. (1990) KLR 54**. In this court, almost invariably, a party will first seek leave of the court before bringing contempt proceedings. So it was rather surprising that the Plaintiff filed chamber summons dated 5th May, 2005 without first seeking and obtaining leave of the court. And such leave is not sought or obtained as matter of formality. It is at that stage that the court will consider whether the order alleged to have been disobeyed was served personally upon the alleged contemnor, and whether the order served was endorsed with a notice warning of penal consequences in the event of disobedience.

As the Plaintiff herein did not seek or obtain leave of the court before bringing the chamber summons dated 5th May, 2005 I hold that the same is incompetent and not properly before the court. Upon this ground alone I will uphold the preliminary objection. The said chamber summons is hereby struck out with costs to the Defendant. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF JUNE, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 3RD DAY OF JUNE, 2005.