



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 75 OF 2020

RUBIS ENERGY KENYA PLC.....PLAINTIFF

VERSUS

SAS AFRICA GENERAL TRADING LIMITED.....1ST DEFENDANT

HASSAN SAID BOBOO.....2ND DEFENDANT

SAID MARIDADI MAULANA.....3RD DEFENDANT

RULING

(Plaintiff seeking injunction against the defendants to stop them from operating a petrol service station; objection that this suit is sub judice; there being a previous suit filed in the Magistrate's Court; the two suits raising similar issues; whether this suit should be stayed or struck out; Section 6 Civil Procedure Act; court of opinion that later suit should be struck out as there is no value in merely staying it; suit struck out)

1. This suit was commenced through a plaint filed on 25 June 2020. It is pleaded that the plaintiff is the registered proprietor of the land parcel Subdivision No. 300 of Section XVI Mombasa, LR No. 1149 (the suit property). It is averred that on 30 April 2018, the plaintiff entered into a dealership licence agreement with the 1st defendant wherein the 1st defendant would operate a petrol service station under the terms indicated in the licence agreement. The 2nd and 3rd defendants are guarantors of the 1st defendant under the said agreement. The licence was to subsist for one year and subsequently automatically renewed from year to year until its termination. There are sale targets indicated, which if not met, the plaintiff would be entitled to enter and take over possession of the service station and the licence would be terminated. The licensee is also supposed to maintain a minimum of three days stock. The plaintiff avers that the 1st defendant breached the licence agreement by maintaining very minimal stock and being persistently late in making product orders.

2. The plaintiff has pleaded that through a letter dated 29 May 2020, it informed the 1st defendant of its concerns but the letter elicited no response. The plaintiff avers that in view of the 1st defendant's breach, it has terminated the agreement through a letter dated 20 June 2020. The plaintiff avers that despite the termination, the defendants have continued to interfere with the suit premises. In the suit, the plaintiff seeks the following orders :-

(a) A permanent injunction restraining the defendants by themselves, their agents or representatives from interfering in any way whatsoever with the suit property and the business operations of the plaintiff situated thereon.

(b) An order directing the OCS Mombasa to ensure compliance with the above order.

(c) Costs of the suit.

(d) Interest.

(e) Any other relief deemed just and fair to grant.

3. Together with the plaint, the plaintiff filed an application seeking an order that pending the hearing and determination of the suit, the defendants be restrained by an order of injunction from interfering in any way with the suit property and the business operations therein. The supporting affidavit is sworn by Fredrick Patta, the retail manager of the plaintiff. He has more or less stated what I have set out above as having been pleaded in the plaint. He has added that on 25 June 2020, the defendants blocked access to the station and incited crowds to gather at the service station and disrupt the business operations.

4. In reply to the application, the defendants filed two affidavits sworn by Hassan Said Boboo, the 2nd defendant and a director of the 1st defendant. He has deposed that this court lacks jurisdiction as the suit is *sub judice*. He has deposed that on 23 June 2020, the 1st respondent filed the suit Mombasa CMCC No. 632 of 2020 against the plaintiff, challenging the unlawful termination of the licence agreement. He has annexed copies of the pleadings. He has stated that on 24 June 2020, the Magistrate's court issued an order of temporary injunction, and subsequently, after *inter partes* hearing, the order of injunction was confirmed to remain in place until the suit is heard. He has averred that the plaintiff herein has not raised any issue of jurisdiction with the matter in the Magistrate's Court. He has averred that the plaintiff was aware of that suit when it instituted this case. On the termination of the licence, he deposed that it was illegal and unlawful. He has stated that the 1st defendant has been requesting for fuel but the plaintiff has not been supplying the same. The defendants also filed a notice of preliminary objection citing Section 6 of the Civil Procedure Act, and have asked that this suit be dismissed.

5. I directed that both the application and the preliminary objection be canvassed together and counsel agreed to file written submissions. I have taken note of what counsel submitted alongside their brief oral submissions made to highlight their written submissions.

6. I opt to start with the issue of whether this suit should be struck out as being *sub judice*. The defendants have cited Section 6 of the Civil Procedure Act, CAP 21, Laws of Kenya, which provides as follows :-

6. Stay of Suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

7. The defendant has pointed out to this court that there exists the suit Mombasa CMCC No. 632 of 2020 and I have seen the pleadings annexed. The plaint was filed on 23 June 2020 and was served on 26 June 2020. I can see that the plaintiff is the 1st defendant herein and the defendants are the plaintiff herein and Kenol Kobil PLC. In that case the 1st defendant has sought orders inter alia to have the plaintiff herein and Kenol Kobil PLC, permanently restrained from terminating the dealership licence agreement dated 30 April 2018, or repossessing, or in any way hindering their operations in the suit property. Together with the suit, the 1st defendant filed an application for injunction. I have seen that a ruling was delivered on 20 July 2020 wherein the application of injunction was allowed. Specifically, the court restrained the plaintiff herein from repossessing, or dispossessing the 1st defendant or hindering its business operations until the case is heard and determined.

8. In his submissions, Mr. Mitto, learned counsel for the plaintiff, submitted that this court has jurisdiction, and that the jurisdiction is not ousted by the fact that the Magistrate Court may in fact have jurisdiction. He submitted that if this court finds this case to be *sub judice* the remedy will be to stay it. He referred me to the decision in the case of *Thiba Min Hydro Company Limited vs Josphat Karu Ndigwa (2013) eKLR*.

9. Having made an assessment of the two suits, I have no doubt in my mind that the issues in this suit and the suit filed at the Magistrate's Court are precisely similar. Whatever the plaintiff has raised in this case can very well be raised in the suit before the Magistrate by way of defence and/or counterclaim. It may be that the plaintiff filed this suit in good faith, for I can see that it was filed on 25 June 2020, and service of the suit pending at the Magistrate's Court was done the following day, 26 June 2020, but the plaintiff has actively litigated in the suit before the Magistrate, and has even participated in the application for injunction until a ruling has been delivered. I have seen nowhere where the plaintiff has raised issue that the Magistrate's court has no jurisdiction. It is thus apparent that the plaintiff herein wants to continue litigating over a matter that is already pending before another court. That cannot be allowed as it may embarrass the judicial process. The issue is not whether this court has jurisdiction, but whether it should exercise its jurisdiction, in light of the fact that there is another similar suit pending before another court.

10. The only question that I need to decide is whether this suit should be struck out or be stayed. Although the marginal note of Section 6 states "stay of suit" nowhere in the body of Section 6 is there a direction that the latter suit should be stayed. What Section 6 states boldly is that, "*No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit...*". I do not see the value of staying a suit which the law bars from proceeding. If the matter cannot proceed, what is the propriety of leaving it on the court shelves? In my view, the remedy is to have the latter suit struck out and not stayed. I think stay of suit ought only to apply where the outcome of one suit is contingent upon the outcome of another suit, but should not apply where the parties are the same, the subject matter is the same, and the issues are precisely similar, so that when one is determined, the other is automatically spent. I have seen that in the case of *Thiba Hydro*, the court opted to transfer the suit to the Magistrate's Court to consider consolidation or to stay the latter suit. I am not bound by that decision, and I have already stated that my take is that what needs to happen is to have the second suit struck out; that is precisely what I will do.

11. This suit, being *sub judice* the suit Mombasa CMCC No. 632 of 2020 is hereby struck out. I will not make any orders as to costs, for I have mentioned that this suit was filed on 25 June 2020 before the pleadings in the other suit were served on 26 June 2020 and I have nothing to indicate that the plaintiff was aware of the other suit when this one was filed.

12. With the dismissal of the plaintiff's suit, I need not make any orders on the application for injunction, for it is swallowed up in the dismissal.

13. Orders accordingly.

DATED AND DELIVERED THIS 20 DAY OF JANUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA