



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAKURU**  
**CIVIL SUIT NO 265 OF 2004**

**SHELL & BP (MALINDI) KENYA LTD ..... PLAINTIFF**

**VERSUS**

**KINGS MOTORS LTD..... DEFENDANT**

**RULING**

The plaintiff has made an application under order XXXIX rule 1, 3 and 9 of the Civil Procedure Rules and section 3A seeking the orders of this Court for temporary mandatory injunction be issued to compel the defendant, its servants and or agents to vacate from the suit property. The plaintiff has further sought the orders of this Court to restrain the Defendant from using or in any way dealing with the suit property pending the hearing and determination of the suit. The application is based on the grounds stated on the face of the application. The said grounds are that the defendant had trespassed upon the suit property and is operating a motor vehicle selling business without the plaintiff's consent; that the defendant had failed, refused or neglected to move out of the suit premises and that the plaintiff stands to suffer irreparable damage if the defendant is not immediately enjoined by the Court. The application is supported by the annexed affidavit of Simon Chacha Nyangi, the retail property manager of the plaintiff. The application is opposed. The defendant has filed grounds of opposition to the plaintiff's application. The defendant has stated that the plaintiff did not have *locus standi* to bring the suit concerning the suit land since the said parcel of land had been leased to Agip (K) Limited and not the plaintiff. The defendant further stated that the plaintiff's suit was incurably defective and did not disclose a reasonable cause of action. The defendant further stated that the plaintiff was guilty of breaching the same clause of the lease that it is seeking to enforce against the defendant. The defendant further states that the plaintiff had not established what right it had over the said suit land. The defendant therefore stated that the plaintiff had not established a *prima facie* case with a probability of success. The defendant further filed two replying affidavits sworn by Kelly Kingori Mbacio, the Managing Director of the defendant Company and Juma Muchemi, the registered owner of the suit land, ie Nakuru Municipality/Block 11/650. Both deponents have made averments to the effect that the plaintiff did not have any colour of right over the suit land.

In his submissions before court, Mr Majanja learned counsel for the plaintiff submitted that the plaintiff is the holder of a lease dated the 23<sup>rd</sup> of July 1996 granting the plaintiff exclusive possession of the suit property for a term of fifteen years from the 1st of August 1996. He submitted that the lease is set to expire in the year 2011. The said lease was granted to the plaintiff by the landlord, the registered owner of the property, Juma Muchemi. Mr Majanja submitted that the lease was entered between the landlord and Agip (K) Ltd which changed its name to Shell & BP (Malindi)Ltd. The plaintiff submitted that a change of name did not change the legal obligations of a company by virtue of section 20(4) of the

Companies Act. The plaintiff further submitted that the purpose for which the said parcel of land was leased was to erect a petrol station which petrol station could only be built after the plaintiff had secured the consent from the Commissioner of Lands for change of user of the said parcel of land. The plaintiff

submitted that the defendant had without its consent entered upon the said parcel of land and started a motor vehicle selling business. The plaintiff argued that the defendant had entered the said parcel of land in spite of the fact that the lease that the plaintiff was holding had not been terminated. The plaintiff therefore submitted that the defendant was a trespasser who had interfered with the plaintiff's exclusive possession of the suit property. The plaintiff further submitted that the fact that the defendant had deponed that it entered into the said parcel of land with the permission of the landlord is no defence to the plaintiff's claim to exclusive possession of the said parcel of land. The plaintiff argued that the defendant had not shown that it had a superior claim over the suit property to that of the lease held by the plaintiff. The plaintiff submitted that since the defendant had been proved to be a trespasser, the plaintiff had established a *prima facie* case to entitle it to be granted the orders of mandatory injunction sought. The plaintiff further submitted that the argument by the landlord that the lease agreement was terminated by the plaintiff's name being changed, was not a sufficient reason to deny the plaintiff the orders sought. The plaintiff contended that the landlord had not terminated the lease as envisaged by the lease agreement or provisions of the Registered Land Act. The plaintiff argued that the fact of trespass was not denied by the defendant is more the reason why the application sought by the plaintiff should be granted. The plaintiff submitted that it had been denied the right to exclusive possession and occupation of the suit land in spite of the fact that it holds a lease to the said property. The plaintiff contended that it was not necessary to join the Landlord as a party to the suit as the plaintiff's cause of action arose when it was denied possession by the defendant, who according to the plaintiff, was a trespasser.

Mr Githiru, learned counsel for the defendant opposed the application. learned counsel submitted that the defendant was on the said parcel of land with the express permission of the landlord. The defendant submitted that the plaintiff did not have *locus standi* to bring the suit against the defendant as it did not have a lease on the suit property. The defendant further submitted that the plaintiff was not known to the landlord as it had taken over the lease of Agip (K) Ltd without first seeking the consent of the landlord. The defendant submitted that the plaintiff had not proved that it would suffer irreparable loss if the mandatory injunction sought was not granted. The defendant argued that the fact that the plaintiff had not enjoined the Landlord as a party to the suit was proof that the plaintiff had not made the application in good faith and further had come to Court without clean hands. The defendant submitted that the plaintiff could be remedied by being paid damages. The defendant contended that this Court would act in vain if it granted the orders sought as the orders issued would be incapable of being enforced without the landlord being enjoined in the suit. The defendant submitted that the fact that it was on the suit land with the permission of the landlord is more the reason why the application should not be allowed. The defendant argued that the plaintiff had not established special circumstances that would make this Court grant the orders of mandatory injunction sought.

In reply Mr Majanja submitted that the fact that the plaintiff's name was changed is not a bar to it seeking to enforce its right. The plaintiff argued that the defendant by committing the act of trespass had violated the plaintiff's exclusive right to possession of the suit property. The plaintiff submitted that it rightly sued the defendant as it was defendant who had trespassed onto the leased suit land. The plaintiff submitted that a landlord cannot allow a third party to disregard an existing lease.

I have anxiously considered the arguments made by learned counsel for the plaintiff and the learned counsel for the defendant. I have also read the pleadings filed in court by the parties to the application in support of their respective positions. Several issues for determination have arisen from the submissions made by the plaintiff and the defendant. The first issue for determination is whether there existed a valid lease agreement between the plaintiff and the registered owner of the suit land. It is not disputed that the landlord, Juma Muchemi entered into a lease agreement with Agip (K) Limited whereby he agreed to lease all that parcel of land known as Nakuru Municipality/Block 11/650 to the said Agip (K) Limited for a term of fifteen years with effect from the 1st of August 1996. The said lease was registered on the 7th of August 1996. The landlord was paid the rent for the leased period in advance. Agip (K) Limited changed its name to Shell and BP (Malindi) Kenya Ltd on the 12th of October 2000.

It is this change of name that seems to have made the landlord assume that he was no longer bound to honour the lease agreement that he had entered into with the plaintiff's forerunner in name, Agip (K) Limited.

The defendant has argued that the plaintiff in effecting a change of name breached clause 1(k) of the lease agreement which provided that the lessee was:

“not to transfer sublet or part with possession of the said premises or part thereof without the consent of the lessor which consent shall not be unreasonably withheld provided that the appointment of an operation of the station by the lessee shall not constitute a transfer, subletting or parting with possession of the premises by the lessee.”

The plaintiff has answered the defendant’s submission by arguing that section 20(4) of the Companies Act provided that a change of name shall not affect the contractual obligations of a company. What does section 20(4) of the Companies Act provide? It states that

“A change of name by a company under this section shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.”

The defendant has obviously misinterpreted the provisions of clause 1 (k) of the lease agreement. In changing its name the plaintiff did not

“transfer, sublet or parted with possession” of the suit property. I do not find any merit in the defendant’s submission that due to landlord’s belief that the plaintiff had breached the conditions of the lease agreement, he was then entitled to terminate the lease and let the said premises to the defendant. The lease agreement between the plaintiff and the landlord still subsists. If the landlord wanted to terminate the lease, he was required to have terminated the said lease agreement in accordance with the provisions of the said lease agreement. If he found that the said lease agreement did not provide for the termination of the lease, he was at liberty to invoke the provisions of the Registered Land Act as relates to termination of leases. Specifically the landlord could have invoked section 58 and 59 of the Registered Land Act. The landlord did not issue any notice to the plaintiff that he intended to terminate the said lease agreement. It is the finding of this Court that the landlord used the fact that the plaintiff had changed its name as an excuse to lease the said suit property to the defendant. The landlord had no basis in law to remove possession of the said suit property from the plaintiff who was holding a valid lease which had been duly registered.

Having found that the plaintiff is the holder of a valid lease over the suit property, the other issue for determination is whether the plaintiff has established that the defendant is a trespasser on the said suit property. A further issue is whether the plaintiff is entitled to the orders of mandatory injunction sought. The plaintiff has proved that it holds a valid lease over the suit property. It is apparent from the pleadings filed in Court in respect of this application, that although the plaintiff held the lease over the said suit property, it did not physically occupy the same. The plaintiff has submitted that it obtained the lease over the said suit property as it intended to construct a petrol station, which construction was subject to the Commissioner of Lands granting consent for the change of user of the said parcel of land. Presumably the plaintiff has still not obtained the consent for the change of user of the said suit property. The defendant has argued that it occupied the said suit property with the consent of the landlord. The plaintiff contended that it is entitled to possession. In *M’Mukanya –versus- M’Mbijiwe* [1984] KLR 763 it was held that exclusive possession supporting a claim for trespass did not necessarily mean continuous physical possession and occupation. It was further held that once a person had paid the rent due he was presumed to be in possession and entitled to sue for trespass. It was not necessary for the claimant to prove damages.

In the instant case the defendant took advantage of the fact that the plaintiff was not in actual possession on the ground, to move into the suit property and commence business. The plaintiff has established that it has a valid lease. It has established that it therefore has exclusive right to possession of the said suit property. It is no defence that the defendant was allowed into the said property by the landlord. The defendant ought to have conducted a search at the Lands Office in the encumbrance section of the suit property to establish whether the said parcel of land was available for the defendant to lease. The

defendant choose not to do so. It cannot blame the holder of the lease when it now demands exclusive possession of the suit property. It is apparent that the defendant took possession of the suit property with the active connivance of the landlord. The defendant was aware of the lease of the said property held by the plaintiff. I do hold therefore that the defendant is a trespasser. The defendant has not established that it has a better title to the said suit property than the lease held by the plaintiff. It will not do to state that the defendant was in occupation of the suit property with the consent of the landlord. The landlord had no right in law to demise the said premises to another person.

The landlord could only demise the said premises to another person after the expiry of the lease in the year 2011.

Is the plaintiff entitled to the orders of mandatory injunction sought? In *Kenya Breweries Ltd & Anor – versus- Washington Okeyo* CA Civil Appeal No 322 (Nairobi) (unreported) it was held by the Court of Appeal at page 3:

“The test whether to grant a mandatory injunction or not is correctly stated in *Vol 24 Halsbury’s Laws of England* 4th Edn Para 948 which reads:

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ..... A mandatory injunction will be granted on an interlocutory application.’”

Also in *Locabail International Finance Ltd V Agroexport and others*

[1986]1 ALL ER 901 at pg 901 it was stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

The principles of law enunciated by these decisions have received full approval by the Courts within our jurisdiction. See the cases of *Selle Maison Limited vs Yaya Towers Limited* HCCC 2225 of 1992, per Bosire, J (as he then was) and *The Ripples Limited vs Kamau Mucuha* HCCC No 4522 1992 per Mwera, J.

From the above exposition of the law it is evident that the plaintiff has established that it is entitled to the orders of mandatory injunction sought.

The plaintiff has established that it is a holder of a valid lease over the suit property and therefore entitled to exclusive possession of the said suit property. The defendant has not shown that it has any claim superior to that of the plaintiff.

The defendant has submitted that the plaintiff can adequately be compensated by damages and therefore should not be granted the orders of mandatory injunction sought. While it is true that the plaintiff may be compensated by an award of damages and therefore should not be granted the orders of mandatory injunction sought, the fact that the landlord brazenly and in blatant breach and disregard of the lease agreement installed the defendant into the leased suit property is more the reason why the orders of mandatory injunction should be granted. Men of business should always arrange their business affairs (and especially when they have agreed to be bound by a contract) with the certainty that in the event that there is breach of obligation imposed by a contract by the offending party, the Courts will be ready and

willing to intervene and enforce the provisions of the said contract.

In the instant case the defendant with the connivance of the landlord cannot purport to trash a valid lease agreement in the mistaken belief that the Courts would shy from boldly enforcing the provisions of the lease agreement just because an award of damages would be an alternative remedy. In the present case, it is the finding of this Court that the granting of the orders of mandatory injunction would be an appropriate remedy to prevent the defendant from stealing a march on the plaintiff. The defendant has not shown this Court that, in law, it is entitled to remain on the suit land.

In the premises therefore the plaintiff's application is granted on the following terms;

(a) A temporary mandatory injunction is hereby issued compelling the defendant its servants and or agents to vacate all that parcel of land known as Nakuru Municipality/Block 11/650 within fourteen (14) days from today in default thereof the defendant be evicted from the suit property.

(b) The defendant is hereby restrained by means of a temporary injunction from using or in any way dealing with all that parcel of land known as Nakuru Municipality/Block 11/650 pending the hearing and determination of the suit.

(c) The plaintiff shall have the costs of the application.

Dated and delivered at Nakuru this 25<sup>th</sup> day of November, 2004

**L.K. KIMARU**

.....

**Ag JUDGE**