



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 620 OF 2000

WACHIRA WAMBUGU GITUMBI PLAINTIFF

V E R S U S

MOBIL OIL KENYA LIMITED DEFENDANT

RULING

The Applicant in this application dated 24th June 2002 filed a plaint seeking prayer for a declaration that the Defendants dealership notice is illegal, wrongful and unwarranted in the circumstances. He was also seeking a mandatory injunction compelling the Defendant to carry out its express and / or implied conditions as reserved under the Dealership agreement and a prohibitory injunction to restrain the Defendant from repossessing and / or evicting the plaintiff from operations at the said Saba Saba Petrol Service Station. Together with that plaint, he also filed an application by way of Chamber Summons in which he sought mandatory injunction as is prayed for in the plaint and a prohibitory injunction seeking to restrain the Defendant from evicting the plaintiff from operating Saba Saba Mobil Petrol Station pending the hearing and determination of this suit. I heard that application on 29th May 2002 and reserved the Ruling to be delivered on 18th June 2002. However, I later realized that I would be away to Malindi Court on 18th June 2002 and so I did bring forward the date of the ruling and it was delivered on 14th June 2002 instead of 18th June 2002.

The Ruling still bear the date 18th June 2002 but it was actually delivered on 14th June 2002 in the presence of both Mr. Gikandi for the Applicant and Mr. Musinga for the Respondent. I did decline to give the orders that were prayed for and dismissed the application. The learned counsel for the Applicant Mr. Gikandi applied for temporary stay of the orders and the applicant was granted ten days stay to enable him make formal application for stay.

On 24th June 2002, this application was filed. It is seeking only one main order and that is an order that there be stay of execution of the orders made pursuant to the ruling delivered by me on 14th June 2002 and the existing status quo between the plaintiff / Applicant and the Defendant / Respondent prior to the delivery of the ruling he maintained pending the disposal of the Appeal filed herein. The application also seeks costs to be provided for. The grounds for application are three and these are:-

“1. The plaintiff has at all material times been a dealer of the Defendant at the Petrol Station known as Saba Saba Petrol Service Station.

2. The plaintiff has invested a lot of capital, time, labour, and s kills over the period the plaintiff has been operating the said Petrol Station and his stock and purchases to the stock of more than Kshs. 2 million, good will and substantial and liquidated amount which will all be lost should the plaintiff / applicant be evicted in the manner in which the Defendant has applied and obtained orders for.

3. *The balance of convenience between the parties and the end of justice shall best be served by maintaining the existing status quo and not otherwise as any otherwise would create injustice results.*”

There are two Affidavits in support of the same Application – one supporting affidavit and a further affidavit. In the supporting Affidavit the Applicant states inter alia at paragraph 3 as follows:-[

“That a Notice of Appeal has already been filed and have already applied, through my advocates, for certified copies of the proceedings and the said Ruling.”

The other aspects raised in the same supporting affidavit are that the said appeal has very good chances of succeeding, that the applicant has many machineries, petrol, diesel and goods on credit which would require sometime to recover and employees who would suffer if stay is not granted. In the further affidavit, he states that on 24th June 2002 before the 10 days temporary stay granted on 14th June 2002 the Respondent forcefully evicted him from the premises.

The Respondent opposed the application and filed Replying Affidavit which is erroneously referred to as supporting Affidavit. In that affidavit the Respondent stated that it took over the station on 24th June 2002 under an advise that the ten days stay granted on 14th June 2002 had expired and this was because the Applicant had not filed the normal application for stay within the ten days during which stay was granted and further because the Applicants application for injunction had been rejected. According to the Respondent, the station was taken over on 24th June 2002 after proper stock taking and after the Applicant had voluntarily removed all his properties and inventory was signed between the plaintiff’s Representative and the Respondent’s Representative. The applicant would not suffer any loss as he would be paid the exact monetary value of the products left at the station ; that the Respondent is suffering loss as a result of the Applicant staying at the station and that some things at the station, namely the canopy, was damaged, some iron sheets were falling, and pumps were damaged and tampered with. The Respondent maintained further that it had not been served with Notice of Appeal and that none had been filed. It ended its same Replying Affidavit by stating that the application has no merit as it does not comply with Order 41 Rule 4 in that:-

“(1) No appeal has been filed.

(2) Even if any Appeal has been filed, the Applicant does not stand to suffer any substantial loss particularly given the fact that the Defendant will pay to him the monetary value of whatever stock he had at the station as at 24 th June 2002.

(3) There has been unreasonable delay in making this Ap plication.”

There are certain aspects of the exchanges between the parties as summarised above which should not be allowed to cloud this application. First is that the Applicant states in its said ground in support of this application that he has stock etc “which will all be lost should the plaintiff / applicant be evicted in the manner in which the

Defendant has applied and obtained order for .

That gives the impression that the Defendant did apply and did obtain orders to evict the applicant in a certain manner. This is not a proper reflection of the record of this case. The Applicant is the one who applied for mandatory injunction and prohibitory injunction, against the Defendant. That application was refused and hence the Respondent proceeded to evict on grounds that there were no orders stopping them from evicting, and not on grounds that the Respondent had obtained any order to evict the Applicant in any manner whatsoever.

Secondly, there is the question of eviction which took place on 24th June 2002. That was not proper as the ten days stay granted on 14th June 2002 had not expired by the time that eviction took place. That blunder was brought to the attention of the court and the court intervened so that the Applicant was

reinstated back to the station pending this Ruling. That should no longer cloud the consideration of this application.

I have anxiously considered this application. In my humble opinion, whether the Appeal to be preferred has overwhelming chances of success or not is not for me to decide here. That is for the court of Appeal to decide when similar application for stay is made before it. I must however, accept that the Appeal could succeed or not succeed such that both possibilities are there. However, what I find rather disturbing is that the Applicant deposed as I have reproduced herein above at paragraph 3 of the supporting Affidavit that Notice of Appeal had already been filed by 21st June 2002 when he did swear affidavit yet perusing the entire application, I cannot see any Notice of Appeal having been filed by the time he swore that Affidavit and even as I am now writing this Ruling none is in the file yet. The learned counsel for the Applicant never mentioned this fact in his address in Chief to the court and indeed on 27th June 2002, when he obtained *ex parte* interim stay on the basis of that Affidavit and that allegation at paragraph 3 he never cared to have it corrected. After this fact was brought to the notice of the court by Mr. Musinga the learned counsel for the Respondent and by the Affidavit filed by the Respondent in reply, Mr. Gikandi in his submissions in reply did admit that no such Notice of Appeal was filed with the application and went on to argue that under Order 41 Rule 5, he could proceed informally without the Notice and he said from the Bar that such a notice had now been filed. In my mind, whereas it is true that under Order 41 Rule 5, a party can informally apply for stay on the same day of the ruling and that would mean that no Notice of Appeal would be in the file at that time, that provision is there to take care of cases to be decided on the basis that there was a genuine intention to appeal. Here two things have happened. First the applicant had been granted time to bring a proper application for stay which meant he had to rely not on intention but on real Notice of Appeal being availed to the court.

Secondly, if the application is based on Order 41 Rule 5, then why tell a lie that Notice of Appeal had already been filed while that had not been done? Why say that application had already been made for certified copies of the proceedings and the said ruling while no such copy of the letter is annexed? He says that it has since been filed, but there is no supplementary affidavit annexing the same and no leave has been obtained to file one.

The law is now well settled and that is that party seeking a discretionary remedy must come to court with clean hands and that a party who obtains *ex parte* orders by not telling the court the truth in the first place does not deserve confirmation of such orders even if the orders are deserved. On my part, I do find it difficult to endorse any action that is meant to obtain or which results in an order of the court being obtained through unfair means. I cannot encourage such an action.

On the question of whether this application has been brought without delay, I do feel there has not been any inordinate delay. The ruling was delivered on 14th June 2002 and not on 18th June 2002 as appears in the typed copy of the ruling, but the Applicant was given 10 days stay to enable him bring this application. He filed it on the 10th day and that was not in any way an inordinate delay.

I do feel that the question of balance of convenience and where it goes to does not apply in this application. It would be a matter to be considered in an application for injunction and not in or application for stay of execution. It had been considered when I did rule against the applicants application for injunction. I do agree with the Applicant that the fact that he is buying petrol, diesel, oils and almost all other materials to be used at the station from the Respondent to an extent makes it unnecessary for security to be required before a stay can be granted.

The last point I need to consider is whether the Applicant would suffer serious loss if stay is not granted. He says he has invested a lot of capital, time, labour and skill over the period into the business and that he has stock and products at the station. In my mind, the Respondent is not 'a man of straw' and no proof of the same has been availed to the court. The plaintiff will retain his skill, wherever he goes to next. His staff can be paid their dues but I do agree that will need sometime to do. It will also need sometime to clear the stock although the stock can conveniently be taken care of by the Respondent and can be paid for. All in all what I can appreciate is that the applicant may need about 30 days to wind up all its activities at the station.

In conclusion, the sum total of all the above and being aware that at one time the Respondent also took law into his own hands and removed the Applicant from the petrol station notwithstanding a court order to the contrary, I will not grant full stay till the appeal is heard for there is no evidence of the Appeal having been filed. I will grant a stay of execution for thirty days (30 days) from the date hereof. The Respondent will have half of the costs of this application.

Orders accordingly.

Dated and delivered at Mombasa this 12th day of July, 2002.

J. W. ONYANGO OTIENO

JUDGE