



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 314 OF 2002

FUAD MAHMOUD MOHAMED PLAINTIFF

VERSUS

KENYA OIL CO. LTD RESPONDENT

RULING

The application set for hearing was the chamber summons dated 26/7/02 under order 39 rules 1,2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, filed under a certificate of urgency seeking both a prohibitory injunction as well as a mandatory injunction. However the counsel for the defendant raised a preliminary objection through the grounds of opposition filed on 7th August 2002. Both counsels agreed to proceed with the preliminary point first.

The brief facts are that the defendant entered into a lease agreement with the plaintiff in respect of property known as Kwale/Tiwi/2394 for purposes of operating a petrol station and which was registered on the 21st March 2001. The lease was for a period of 15 years from the 1st February 2001. Prior to the lease agreement the defendant had extended it's offer to the plaintiff by letter dated 6th February 2001 and the same accepted by the plaintiff who signed the same on the same date signifying acceptance.

The parties had agreed vide the letter of offer to have the plaintiff appointed as a dealer of the petrol station upon the plaintiff signing a Dealers licence as provided under clause 8 of the letter of offer. The parties also agreed that on the registration of the lease agreement and on the defendant taking possession the plaintiff would be paid a sum of kshs.4,000,000/- being advance rent, out of which a sum of kshs.3,000,000/- would be paid in form of products and kshs.1,000,000/- would be retained as security deposit for products purchased by the plaintiff from the defendant as provided under clause (b) (1) of the Lease Agreement. The parties are in agreement that clause b (1) of the Lease Agreement has been fulfilled.

When the plaintiff came to court on 26th July 2001 he sought and was granted a temporary order of an injunction restraining the defendant from repossessing, taking possession or demanding vacant possession of the suit property pending the hearing and determination of the suit.

The main issues raised in the preliminary objection can be summarized as follows:

- (a) Whether the suit and in particular the hearing of the application dated 26/7/02 ought to be stayed as the provisions of section 6 of the Civil Procedure Act are clear as for duplication of suits is concerned.

(b) Whether the ex parte injunction was issued upon false, misleading and perjured evidence in that:

(i) Passing of possession in the property to defendant in March 2001 was not disclosed.

(ii) Injunction was granted on the basis that plaintiff was in possession as opposed to the defendant.

(iii) If defendant was in possession then the injunction cannot issue. (iv) The petrol station belongs to the defendant as opposed to the plaintiffs as long as lease was in force.

(c) Are damages adequate compensation in the event the plaintiff succeeds.

(d) On a balance of convenience ought the injunction have issued?

In its defence filed on 7th August 2002, at paragraph 3, the defendant did state that it would raise a preliminary issue that the suit was commenced with full knowledge of a pending suit being Nairobi High Court Civil Case No. 886 of 2002 filed by the defendant on 16th July 2002 as against the plaintiff and a company known as Fuel Mogulls Services Ltd in which the matters in issue are directly and substantially the same. No reply to the said defence has been filed. The issue was raised in an application under order 50 rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act filed by the defendant seeking order staying the proceedings in this suit pending the hearing and determination of the suit filed at Nairobi being HCC 886 of 2002.

The application by Notice of Motion was filed on 7/8/02 and the plaintiff's counsel Mr. Kiarie Kariuki did confirm having been served with the same. However even as at the time of writing the ruling herein, there was no replying affidavit on record. Section 6 of the Civil Procedure Act provides:

“6. No court shall proceed with the trial of any suit or proceedings

in which the matter in issue is also directly and substantially in issue

in previously instituted suit or proceeding between the same parties,

or between parties under whom they or any of their 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”.

Underlining mine.

The plaint in Nairobi HCC 886 of 2002 is annexed to the defendants Notice of Motion and I am satisfied that the issues for determination are essentially the same and the parties are the same save for the 2nd defendant a limited liability company in which Mr. Kiarie Kariuki for the plaintiff concedes the plaintiff in the current suit is a Director. All the correspondence annexed by the plaintiffs supporting affidavit to chamber summons application for the injunction are written by the plaintiff on letterheads of the said company. Even in the unexecuted dealers licence annexed to the Replying Affidavit by Israel Segman a director of the defendant company the parties therein are given as Kenya Oil Company Limited and Fuel Mogulls Services Ltd and the guarantors as Mr. Fuad Mahmoud Mohamed and Mohamed Fuad Mahmoud.

The provisions of section 6 are not only clear but mandatory and there is no doubt the suit herein is a duplication of the Nairobi HCC 886 of 2001. I would have stopped here but would like to consider the other issues raised.

As to whether possession had passed to the defendant upon execution of the lease, Mr. Oyasti for the defendant referred to the principal in the case of **REX - VS - KENSINGTON INCOME TAX**

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K.B 1916 with a view to show that the plaintiff is guilty on none disclosure of material facts and especially so, that the lease did provide for possession vesting in the defendant upon signing and registration of the lease. On his part Mr. Kiarie Kariuki submitted that there was no handing over of the premises by the plaintiff to the defendant and therefore he had not relinquished possession. The provision at page 2 of the lease agreement provides.

“(i) PROVIDED THAT AND IT IS HEREBY AGREED BETWEEN THE PARTIES that upon execution of this lease, registration of the lease at the lands offices and the lessee taking possession of the demised premises”

(ii) The lessee shall advance to the lessor Kenya shillings Four Million (kshs.4,000,000/-) only in two parts of which Kenya shillings Three Million (kshs.3,000,000/-) only will be advanced to the lessor in form of products and Kenya shillings one million (kshs.1,000,000/-) only to be retained by the lessee as security deposit for purchases of products by the lessor”

The plaintiff does acknowledge receipt of the Kenya shillings 4 million by letter dated 13 February 2002 by the plaintiffs counsel. In the same letter he is requesting for a further advance of kshs 8 million in products and return the plaintiff offers to sign a charge over the said property in favour of the defendant. From the sequence of events and correspondence there is indication that some form of contract was already in force as between the plaintiff and the defendant and that the plaintiff was already enjoying some of the facilities that the defendant in it's letter of offer was only to extend to the appointed dealer.

The provisions of lease agreement are clear in that the sum of kshs. 4 million would only be released on possession vesting upon the defendant. Does the plaintiff want to portray the defendant as having breached it's own condition and released such large sums of money before taking possession? If that is the case, why is the plaintiff confidently asking to be advanced a further sum of kshs 8 million?. Mr. Kiarie Kariuki submitted that since there was no written agreement reached between the parties the same means the plaintiff did not part with possession. However from the evidence on record, and especially correspondence by the plaintiff to the defendant, no doubt some form of contract had been reached as far as the dealership is concerned but the full facts and terms are not clear at this point. However, there is evidence to show possession as provided for in the lease had changed from the plaintiff to the defendant and this is a fact that even the position as regards the dealers licence cannot change.

Who then at the time of filing the suit did the petrol station belong to? The defendant was in possession and had allowed the plaintiff, either in his personal capacity or through a third party associated to the plaintiff to run the same upon the terms of the lease agreement. However I wish to state herein that all these issues cannot exhaustively be dealt with at this point as only scanty submissions for purpose of the preliminary issues were advanced. The issue as to whether there was full and frank disclosure, can be dealt with by examining at the submissions advance at the preliminary stage by Mr. Kiarie Kariuki when he sought the temporary injunction. He said:

“He agreed to lease petrol station to the defendant on understanding that he or his company would be appointed dealer. They were to sign a dealers licence. The defendant in breach of lease has failed to agree on the terms of dealer licence agreement and as a result no dealer licence has been signed”.

From the submissions, it is clear the bone of contention was the dealer licence but he said nothing as

regards whether possession had taken place in terms of the lease agreement and why the title document was held by the defendant.

“plaintiff wanted to improve station and called for Title for purposes of changing the same to obtain funds defendant has referred to release it, saying he can only release it if allowed to charge it first. They are now accusing plaintiff of breach and are threatening to take over plaintiffs station his only means of livelihood”

Nowhere in the said submissions does the plaintiff disclose the fact that he had parted with possession in order to receive a sum of kshs 4 million in terms of the lease agreement. In the case of **KENSINGTON**, the court found that the fact of failure to fully disclose issues or material facts to the court amounted to some fraud on the part of the plaintiff. This case was referred to in the **LILIAN’S** case which I have considered. In my opinion had the matters raised been disclosed to the court perhaps the court then would have seen the need to further investigate them by hearing the full submissions by both sides before the grant of the injunction. Having arrived at such a conclusion, it matters not at this stage to consider whether damages would have been adequate compensation.

For the reasons given the preliminary objections is upheld. The suit herein is stayed pending the determination of Nairobi HCC 886 of 2001 and the order of injunction issued consequently is lifted costs shall be to the defendant.

Dated and delivered this 27th day of September 2002

P.M. TUTUI

COMMISSIONER OF ASSIZE