



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 395 OF 2017**

**PETRO OIL KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**THE NATIONAL POLICE SERVICE COMMISSION.....1<sup>ST</sup> DEFENDANT**

**THE OFFICER IN-CHARGE TONONOKA**

**ADMINISTRATION POLICE CAMP.....2<sup>ND</sup> DEFENDANT**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. There are two applications coming up for determination. There is the Notice of Motion dated 2<sup>nd</sup> November 2017. It is brought under Section 1a, 1b, 3a and 63 of the Civil Procedure Act and Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010.

2. It seeks orders;

**1. Spent**

**2. Spent**

**3. Spent**

**4. Spent**

**5. That after hearing this application interpartes the Honourable Court be pleased to grant an interlocutory injunction restraining the Defendants (and each of them) or any other person, whether by themselves and for their officers, servants, agents or other persons under their control or otherwise howsoever from entering upon the suit property, demolishing or further demolishing or destroying any wall, building, or other structure or structures or any part of the suit property or otherwise trespassing onto the suit property pending the hearing and determination of this suit.**

**6. That after hearing the application interpartes this Honourable Court be pleased to grant an interlocutory injunction restraining the defendants (or any of them) whether by themselves and/or through their officers, servants agents or other persons under their control or otherwise howsoever from harassing, intimidating or otherwise preventing the plaintiff or its servants, agents or licensees from entering, occupying or using any part of the suit property or constructing the boundary wall or any other structure thereon pending the hearing and determination of this suit.**

**7. That the costs of this application be provided for.**

8. The grounds are on the face of the application and are listed as in paragraph a-d. I do not need to reproduce them here.

9. The application is supported by affidavit of Benjamin Kingori, Chief Executive Officer of the plaintiff/applicant sworn on the 2<sup>nd</sup> November 2017 and a further affidavit, sworn on the 23<sup>rd</sup> January 2018.

10. The application is opposed. The 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents have filed grounds of opposition. There is a replying affidavit sworn by Nelson Masengeli the Administration Police Commander Mombasa County on 22<sup>nd</sup> January 2018. The 3<sup>rd</sup> defendant/respondent has filed grounds of opposition dated 13<sup>th</sup> November 2017 and a replying affidavit by Jecinta Bungei, an investigator with the 3<sup>rd</sup> defendant/respondent.

11. There is also the plaintiff's/applicant's Notice of Motion dated 17<sup>th</sup> November 2017. It is brought under section 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 50 rule 1 of the Civil Procedure Rules.

12. It seeks orders:-

**1. Spent**

**2. That this Honourable court be pleased to order that the Mombasa County Police Administration Police Commander Mr. E K Cherono be cited for contempt for being in contempt of court and committed to civil jail for six (6) months and/or purge the contempt on the terms this court will deem fit.**

**3. That summons be issued against the Mombasa County Administration Police Commander Mr. E. K. Cherono to appear before this court to show cause why he should not be committed to civil jail for such terms as the court may deem just.**

**4. That costs of this application be provided for.**

13. The grounds are on the face of the application and are listed as in paragraph a-e.

14. The application is supported by the affidavit of Benjamin Kingori the Chief Executive Officer of the plaintiff/applicant sworn on the 17<sup>th</sup> November 2017.

15. The application is opposed. There are grounds of opposition filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents dated 15<sup>th</sup> January 2018. There is a replying affidavit by Elisha Cherono the Administration Police Sub-county Commander-Mvita Sub-county sworn on the 23<sup>rd</sup> January 2018. There is also a notice of preliminary objection dated 16<sup>th</sup> January 2018, filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents.

16. On the 5<sup>th</sup> December 2017, the court directed that the two applications be canvassed together.

17. I have considered the notice of motions, affidavits in support, the replying affidavits and grounds of opposition. In their oral submissions counsel substantiated their clients' respective positions stated in their respective affidavits.

18. The issues for determination are:

**(i) With respect to the Notice of Motion dated 2<sup>nd</sup> November 2017, whether or not the plaintiff's application meets the threshold for grant of temporary injunction.**

**(ii) With respect to the Notice of Motion dated 17<sup>th</sup> November 2011 Whether or not there are sufficient grounds to cite Mr. E. K Cherono for contempt.**

**(iii) Who should bear costs?**

19. I will first deal with the notice of motion dated 2<sup>nd</sup> November 2017. It is now appropriate to consider the facts that have emerged and the legal principles applicable.

20. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Company Limited [1973] EA 358**. First, the applicant must show a prima facie case with a probability of success. Secondly, that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it should act on a balance of convenience.

21. In the case of **Mrao Limited vs First American Bank of Kenya Limited & 2 others [2003] KLR 125** the Court of Appeal in determining what amounts to a prima facie case stated:

**“A prima facie in a civil application includes but is not confined to a “genuine and arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”**

I am guided by the above authorities.

22. It is the plaintiff's/applicant's case that the certificate of lease issued on 4<sup>th</sup> July 2003 and the certificate of official search both confirm that the plaintiff/applicant is in occupation of the suit property that is Mombasa/Block/XVII/1457. I note that the certificate of lease issued on 4<sup>th</sup> July 2003 is in respect of Mombasa/Block XVII/1457 while the transfer of lease from the previous owner refer to

Mombasa/Block/XVII/1457. I believe this is an issue which will be dealt with at the trial.

23. In the case of **Njenga vs Njenga [1991] KLR 401. Bosire J** (as he then was) held that;

**“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.”**

I am persuaded by the facts presented by the plaintiff/applicant that it deserves the orders sought. I find that it has demonstrated a prima facie case with probability of success at the trial.

24. In **Kenleb Cons Limited vs New Gatitu Service Station Limited & Another [1990] KLR 557 Bosire J** (as he then was) held that:

**“to succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction”**

I find that the plaintiff/applicant deserves this kind of protection.

25. I also find that the plaintiff/applicant has demonstrated that it is likely to suffer irreparable loss which cannot be compensated by an award of damages if these orders are not granted. It risks losing a portion of the suit property.

26. In the case of **Paul Gitonga Wanjiku vs Gathuti Tea Factory Company Limited & 2 others [2016] eKLR Mativo J** held;

**“The court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the respondent on the one hand would suffer if the injunction was granted and it should ultimately turn out to be right and that which injury the applicant on the other hand might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant”.**

I am of the view that the applicant has discharged this burden to the required standard. I find that the balance of convenience tilts in favour of the plaintiff/applicant who risks losing a portion of the suit property.

27. At this point it is important to note that the 3<sup>rd</sup> defendant/respondent cannot be barred from carrying out its mandate of investigating acts of corruption and economic crimes as the mandate arises from the constitution and statute. I therefore find that no orders can lie against the 3<sup>rd</sup> defendant/respondent. Otherwise I find merit in this application.

28. Let me now turn to the notice of motion dated 17<sup>th</sup> November 2017. In response to this application, the 1<sup>st</sup> and 2<sup>nd</sup> respondent filed a notice of preliminary objection dated 16<sup>th</sup> January 2018 and a replying affidavit sworn by Elisha Cherono the Administration Police County Commander Mvita sub-county, on the 23<sup>rd</sup> January 2018.

29. It is the plaintiff/applicant's submissions that this court can give directions as to why show cause proceedings may issue against the contemnor.

30. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents' case that no court process was effected upon Mr. Elisha K. Cherono. Further that no court process or order was served upon Mr. Nelson Masengeli the Mombasa Administration Police County Commander on 6<sup>th</sup> November 2017 as alleged. That the averments in his affidavit were not rebutted. The alleged contemnor Mr. Elisha K. Cherono is the Sub-county Commander Mvita and not the in-charge Tononoka Administration Police Camp. The application ought to fail as no notice was issued under Section 30 of the Contempt of Court Act, 2016 hence it should be dismissed.

31. I have considered the rival submissions. The plaintiff/applicant's counsel admitted that no notice was served as required by Section 30 of the Contempt of Court Act. For this reason I find that this application is premature.

32. I also had the opportunity of seeing the process server Stanley Aura, when he was cross examined by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. I came to the conclusion that Mr. Elisha Cherono, the contemnor had not been served with any court process and/or order. I find that the contemnor had no knowledge of the court order. I am guided by the holding in **Justus Kariuki Mate & Another vs Martin Nyaga Wambora & another Civil Appeal No 24 of 2014** in which the Court of Appeal held that:

**“It is important that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves deprivation of a person liberty”.**

33. The question is whether the contemnor is guilty of contempt of the court order. The standard of proof in matters of contempt is well settled. The Court of Appeal in **Civil Appeal No 39 of 1990 Refrigeration & Kitchen Utensils Limited vs Gulbachand Porpatal Shah & Others** in approving the standard of proof in contempt cases as set out in the case of **Gatharu Mitika & Others vs Bahari Farm Limited Civil Appeal No 24 of 1995** held:

**“that in case of alleged contempt, the breach for which the contemnor is cited must not only be precisely defined but proven on standard which is higher than proof of a balance of probabilities but not as high as proof beyond reasonable doubt. This is because the charge of contempt of court is an offence of a criminal character and a party may lose his liberty.”**

34. It would therefore mean before a court cites a contemnor for contempt there must be sufficient evidence to prove that he has knowledge of the court order and has wilfully disobeyed it. It was incumbent upon the applicant to prove that the acts complained of were committed by the contemnor herein. I find that the applicant has failed to discharge the burden as required by law.

35. I find that the notice of motion dated 17<sup>th</sup> November 2017 lacks merit and the same is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents.

36. As I stated earlier, I find the notice of motion dated 2<sup>nd</sup> November 2017 is merited and I grant the orders sought namely:-

**(a) That an interlocutory injunction be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents whether by themselves and/or their officers, servants, agents or other persons under their control or otherwise howsoever from entering upon the suit property being Mombasa/Block XVII/1457 demolishing or further demolishing or destroying any wall, building or other structure or structures on any part of the suit property or otherwise trespassing onto the suit property pending the hearing and determination of this suit.**

**(b) That an interlocutory injunction be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents whether by themselves and/or through their officers, servants, agents or other persons under their control or otherwise howsoever from harassing, intimidating or otherwise preventing the plaintiff or its servants, agents, or licensees from entering, occupying or using any part of the suit property or constructing the boundary wall or any other structures thereon pending the hearing and determination of this suit.**

**(c) The costs of this application do abide the outcome of the main suit.**

It is so ordered.

Dated and signed in Nairobi on this.....day of.....2018

L. KOMINGOI

JUDGE

Dated and delivered at Mombasa on this 5<sup>th</sup> day of October 2018.

JUDGE