



REPUBLIC OF KENYA



Ennio Limited v Kenya Revenue Authority & another (Civil Suit E018 of 2021) [2024] KEHC 8935 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT E018 OF 2021
SM GITHINJI, J
JULY 24, 2024**

BETWEEN

ENNIO LIMITED PLAINTIFF

AND

KENYA REVENUE AUTHORITY 1ST DEFENDANT

**GN MUIRURI T/A PHILIPS INTERNATIONAL AUCTIONEERS 2ND
DEFENDANT**

JUDGMENT

1. By way of a plaint dated 6th September 2021, the Plaintiff moved this court seeking the following orders;
 1. A permanent injunction restraining the defendants whether by themselves, their agents, employees, servants or any other person acting at their behest from seizing, removing, selling, disposing off, alienating or in any other manner interfering with the properties of the Plaintiff on account of tax arrears of Beechlane Holdings Limited.
 2. General damages for trespass to goods.
 3. Costs.
 4. Any other relief that this court may deem fit to grant.
2. The Plaintiff's case is that on 26/8/2021, the Defendants visited the Plaintiff's premises situated at LR Plot No. 20 Watamu and served the plaintiff with a notice of distress of even date addressed to a different entity known as Beechlane Holdings Limited for recovery of tax arrears of KShs. 23, 514,335 allegedly owed by Beechlane Holdings Limited to the 1st Defendant. It was averred that on the same day, the Defendants trespassed into the Plaintiff's offices and purported to attach the Plaintiff's assorted items for purposes of recovery of the tax arrears and auctioneer's charges. It was stated that



the distrained properties as per the Proclamation attachment belong to the Plaintiff and not Beechlane Holdings Limited.

3. In response, the 1st Defendant filed its statement of defence denying the plaintiff's claim. The 1st Defendant specifically denied the assertions itemized in paragraph 4 and 5 of the plaint. It was averred that in the alternative the 2nd Defendant visited the Plaintiff's premises on 26th August 2021 to enforce recovery of taxes due as per Sections 32 (1) and 42 of the [Tax Procedures Act](#). It was denied that the act was trespass as the 1st Defendant is empowered by statute to collect taxes. It was averred that the Plaintiff and Beechline Holdings are related entities under the same dictatorship and operating on the same premises.
4. The matter was set down for hearing with one witness testifying for the Plaintiff and one witness testifying for the 1st Defendant.
5. Pw1 Guiseppe Bonasera one of the Plaintiff's shareholder and a director adopted his witness statement dated 6th September 2021 as his evidence in chief. He produced as PEX 1-9 documents as per the list of documents. He added that on 26th August 2021 the 1st Defendant raided his property to recover a debt owed by Beechlane Holdings Limited to KRA.
6. On cross examination, he stated that he resigned as director of Beechlane Holdings on 13th January 2020. He stated that there is no nexus between Ennio Limited and Beechlane Holdings Limited. Further that he is not the only common director. He maintained that the Plaintiff does not operate on the same property as Beechlane.
7. On reexamination, he stated that the composition of the shareholders is not the same for both entities. He added that the lease contract clause 2.3 shows about the furniture and building's ownership and that the furniture is owned by the Plaintiff.
8. Dw1 Godfrey Wagai an employee of KRA domestic taxes department and debt unit adopted his witness statement dated 10th May 2022 as part of his evidence in chief. He produced as DEX documents as per the list of documents.
9. On cross examination, he stated that the Notice of Distress is addressed to Beechlane Holdings Limited. He stated that the two CR-12 documents show that the two companies are different.
10. On re - examination, he stated that they are not demanding payment by Ennio but Beechlane.

Analysis and Determination

11. Parties filed written submissions. I have considered the submissions and the authorities relied upon. The issue arising for determination is whether the Plaintiff is entitled to the Permanent injunction and general damages sought.
12. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunctions are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined. A Permanent Injunction fully determines the right of the Parties before the Court and is usually meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the [Civil Procedure Code](#), if it is satisfied that the right of a Party has been fringed, violated and/or threatened.



13. The circumstances under which the Court would grant a Mandatory Injunction was well pronounced by the Court of Appeal in the Case of *Malier Unissa Karim v Edward Oluoch Odumbe* (2015) eKLR as follows: -

“The test for granting a Mandatory Injunction is different from that enunciated in the *Giella v Cassman Brown* case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of *Kenya Breweries Ltd v Washington Okeyo* (2002) EA 109 had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 *Halsbury Laws of England* 4th Edition Paragraph 948 which states as follows: -

“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 ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

14. Further the same Court of appeal in the case of *Jay Super Power Cash and Carry Ltd v Nairobi City Council and 20 others* CA 111/2002 held that: -

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it”.

15. Moreover, based on a passage from 24 *Halsbury Laws of England*, Page 248, the case of *Locabail International Finance Limited v Agro Export and others* (1986) All ER 906, the court held thus: -

“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 ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempted to steal a match on the Plaintiff a Mandatory injunction will be granted on an interlocutory application.”

16. The reason for this rule on granting of Mandatory Injunction is plain. Megarry J put it succinctly in a subsequent passage in the case of *Shepard Homes Case (supra)* as follows: -

“.... if mandatory injunction is granted on motion, there will be normally be no question of granting a further mandatory injunction at the trial; what is done and the Plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained”

17. The Plaintiff’s prayer for injunction is anchored on the basis that the Proclamation and levying of distress on its items was wrongful on grounds that the same was addressed to Beechlane Holdings Limited and not to itself. The plaintiff maintained that the two companies are separate entities and



despite directorship being the same, the shareholding composition is not the same. On its part, the 1st Defendant maintained that the two entities are related and operate on the same premises. From the evidence before me specifically the two CR-12 forms and the testimony of the witnesses, it is vivid that the two companies are different entities. While it is true that the companies share directors, it is very clear that the composition of shareholding in the two companies is distinct. It is trite that he who alleges must prove, it was incumbent upon the 1st Defendant to prove that these two companies are one and the same entity. However, Dw1 admitted that the two companies are not the same.

18. With that said, the question then is whether the Defendants were right in proclaiming the assets of the plaintiff. In this regard, it was admitted by Dw1 that the tax arrears were in respect of Beechlane Holdings Limited and not the plaintiff. Further, by the Lease contract on Clause 2.3 of the same, it is evident that the Plaintiff maintained the ownership and the furniture together with equipment. In the circumstance, it is safe for me to make an inference that the Defendants had no business attaching the Plaintiff's assets noting their admittance that the tax arrears were in respect of Beechlane Holdings Limited and not the Plaintiff. In so finding, I am guided by the finding in *Five Forty Aviation Limited v George N. Muiruri t/a Leakey's Auctioneers & Another* [2021] eKLR as cited to me by the Plaintiff where the court held;

“The record shows, the tax decision was made against EASAEL. As has been stated by the 2nd Respondent, the tax payer is EASAEL. It has not been demonstrated that any such tax decision has been made against the Applicant, to warrant attachment of its goods...”

19. In addition, it is not lost on me that an auctioneer is under an obligation to ascertain ownership of property to be proclaimed to avoid personal liability for wrongful attachment. This was the holding in the case of *Kuronya Auctioneers v Maurice O. Odhoch & another* [2003] eKLR where the Court of Appeal stated:

“The question that falls for our consideration in this aspect of the appeal is this:

“If an auctioneer attaches the goods of a wrong party when he is armed with a warrant to attach the goods of a specified party can he claim the immunity given to him by section 6 of the *Judicature Act*?”

That issue was decided in the case of *Simiyu v. Sinino* [1982-88] IKAR 630. That case decided that a party who sets in motions the process of execution against a wrong person, even though not maliciously, becomes liable at common law for damages for trespass and wrongful execution.”

20. Flowing from the foregoing, it is my finding that the Defendant wrongfully proclaimed the Plaintiff's assets and a permanent injunction is hereby issued restraining the defendants whether by themselves, their agents, employees, servants or any other person acting at their behest from seizing, removing, selling, disposing off, alienating or in any other manner interfering with the properties of the Plaintiff on account of tax arrears of Beechlane Holdings Limited.
21. On the issue of general damages, the Plaintiff pleaded for the same but there was no evidence adduced to persuade me into assessing the same. The claim for general damages is therefore hereby declined.
22. In a nutshell, judgment is entered in favour of the Plaintiff on the following terms;
1. A permanent injunction is hereby issued restraining the defendants whether by themselves, their agents, employees, servants or any other person acting at their behest from seizing,



removing, selling, disposing off, alienating or in any other manner interfering with the properties of the Plaintiff on account of tax arrears of Beechlane Holdings Limited.

2. Costs of the suit.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 24TH DAY OF JULY, 2024.

S.M. GITHINJI

JUDGE

In the presence of; -

1. Mr Sitonik for the Appellant
2. Ms Wambui for the 1st Defendant,
2nd Defendant did not participate.

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S.M. GITHINJI

JUDGE

24/7/2024

