



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA.

CIVIL SUIT NO. 11 OF 2019

BENVICK WAREHOUSE LIMITED.....PLAINTIFF

-VERSUS-

DCI, REGIONAL COORDINATOR COAST.....1ST DEFENDANT

KENYA BUREAU OF STANDARDS.....2ND DEFENDANT

KENYA REVENUE AUTHORITY.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

REITY COMPANY LIMITED.....5TH DEFENDANT

RULING

1) The Plaintiff instituted this suit vide a Plaint dated 27/2/2019. Concomitant to filing of the plaint, was the notice of motion dated 27th February, 2019. However, both the Plaint and the applications were amended on 2/4/2019 to include the 5th Defendant as a party to this suit.

2) The Amended Notice of Motion dated 2/4/2019 is the subject of this ruling. The same is expressed to be brought under order 40 Rule 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application seeks for orders that:

a) Spent

b) That an order do issue by this court directing the Defendants herein to move the suspected sugar to a smaller warehouse no. 1 which the Plaintiff shall provide pending the hearing and determination of this application interpartes.

c) That the Defendants their servants and or employees be restrained from and or continuing with such locking the warehouse no.3 to the detriment of the Plaintiff and or in any manner/way interfering with the operations of the Plaintiff in operating its warehouses and more so warehouse no.3.

d) That the actions by the Defendants their servants and or employees in locking the warehouse no. 3 be declared null and void abinitio.

e) That costs of this suit be provided for.

3) The application is premised on 9 grounds on its face and further supported by an affidavit sworn by Nicholas Otieno Ochuti, its Warehouse Manager, on 2/4/2019. By consent of the parties, the court directed that the application to be disposed of by way of written submissions.

The Plaintiff's Case

4) The Plaintiff's gravamen is that it entered into an agreement with the 5th Defendant for storage of 300metric tonnes of sugar in the Plaintiff's warehouse go-down No.3 situated on plot No. MN/V1706 and 1707. However, the Plaintiff was accosted by officers from the 1st to the 4th Defendants who locked the warehouse go-down No.3 in the guise that they were investigating the sugar which was stored therein. No notice of seizure of cargo or any reason for locking the warehouse was given by the Defendants as a result of which the Plaintiff has suffered immense loss of business.

5) The Plaintiff averred that the Defendants have refused to move the consignment to a smaller warehouse No. 1 which is likely to cause the Plaintiff further loss since there was a contract between the Plaintiff and third party intending to have its cargo stored in the locked go down. Request by the Plaintiff to have the sugar moved to a smaller go-down yielded no fruits hence necessitating the instant application to remove the cargo to a go-down/warehouse of their own choice. According to the Plaintiff, the sugar only occupies a very small area in the warehouse and the Plaintiff should not continue losing revenue due to wastage of space which is unoccupied.

6) In its submissions the Plaintiff/Applicant pointed out four issues for determination which are;

- a) *Whether the defendants have justified a reason to infringe on the Plaintiff's rights by locking the Plaintiff's warehouse no. 3;*
- b) *Whether the Plaintiff ought to be denied its right to access and use its premises especially warehouse No. 3;*
- c) *Whether there are any other investigations being carried out that could warrant the Plaintiff be denied access to her premises;*
- d) *Whether the application should be granted as prayed.*

7) On the first issue, it is argued that the Multi-Agency are bound by the Provisions of Sections 3,4,5&6 all of the Fair Administrative Action Act to give the Plaintiff reasons for intruding into its premises especially warehouse No.3, trespassing and locking the warehouse hence denying the Plaintiff the right to use its premises which right is protected under the Constitution. According to the Plaintiff, the multi-agency has no right to interfere with its right to property and must therefore be restrained.

8) On the second issue, the court is invited to find that the alleged investigations have already been done and a conclusive report made. Part of the cargo was deemed fit for human consumption while part of it condemned and decision passed that the unfit batches should be destroyed. As such, the only option pending for the Multi-Agency team is to comply with Section 14 of the Standards Act which provides provides that where goods are found to comply with the relevant Kenya Standard, they shall be released to the owner forthwith. The section further provides that if the goods fail to comply with the relevant Kenya Standards, they shall be destroyed. It is submitted that that the Defendants do not have a defence to the provisions of Section 14 of the Standards Act.

9) The third issue is on whether the Plaintiff ought to be denied its right to access and use its premises especially warehouse No.3. Here the Plaintiff argues that the application seeks to aid the Defendants by providing a smaller warehouse for storing the consignment and release warehouse No. 3 to the Plaintiff. No prejudice has been shown to be suffered on the Defendants if the goods are transferred to a smaller warehouse and in any event it only demonstrates that the Plaintiff is acting bona fide.

10) Lastly, on whether the application should be granted as prayed it is submitted that the Plaintiff has established a prima facie case having shown that the investigations were concluded. The 5th Defendant has expressed its satisfaction on the findings of the 2nd Defendant and therefore the multi-agency team ought to comply with Section 14 of the Standards Act and desist from denying the Plaintiff the lawful access to its premises. The Plaintiff argues that no damages can compensate infringement of a Constitutional right given that no notice was ever served or any reason for sealing the warehouse communicated to the Plaintiff. The Plaintiff was never given any chance to defend itself before the decision to seal warehouse which was in contravention of Section 4 of the Fair Administrative Actions Act as well as Article 47 of the Constitution.

11) In conclusion, the applicant submitted that it has made a case to warrant the grant of injunction against the defendants. The court is invited to find that the Plaintiff's premises ought to have been vacated if the Defendants had complied with Section 14 Standards Act and the timelines set thereof. To buttress its submissions, the Plaintiff relied on excerpts from the cases of ***Maher Unissa Karim-vs-Edward Oluoch Odumbe [2015] eKLR, Breweries Ltd-vs-Washington Okeyo [2002] EA109, Locabail International Finance Ltd-vs-Argo Export & Another [1986] All ER 901 and Sharriff Abdi Hassan-vs-Nadhif Jama Adan [2006] eKLR.***

The 2nd Defendant/Respondent's Case

12) The 2nd Defendant/Respondent filed a Replying affidavit on 18/3/2019 in opposition of the application. The same is sworn by Augustine Wachira, the 2nd Defendant's Quality Assurance Manager. He deponed that the 2nd Defendant is empowered under the Standards Act to seize any goods in respect of which there is a reasonable cause to believe that an offence has been committed under the Act for purpose of testing. In exercise of those statutory powers, the 2nd Respondent on 28th July, 2018 took samples of the sugar belonging to the 5th Defendant/Respondent which was in the Plaintiff's warehouse for purposes of testing to ascertain its quality for human consumption. After testing, the sugar failed in some parameters but the 5th Defendant appealed for the sugar to undergo re-sampling and re-testing and the results were forwarded to the multi-agency team.

13) Once again, the 5th Defendant applied for yet another test to be done. Sample collected from the sugar for a second test were established several batches of the sugar failed in viable count, yeast and moulds and did not meet the legal standards. A conclusion was made that there were batches of the sugar unfit for human consumption. Copies for the test results were attached to the affidavit as "AW2".

14) It is deponed that there has been no malice on the part of the 2nd Respondent because it has been conducting a statutory function and has exercised its powers in accordance with the law. Also, that the 5th Respondent has the duty to ensure that the sugar it trades in meets the legal requirements and it is important that the sugar is not interfered with for security purposes. According to the 2nd Respondent, the Plaintiff/Applicant has a contract for the storage of the subject sugar with the 5th Defendant of which the 2nd Respondent is not privy to. Further, that the Applicant has not established irreparable loss which cannot be compensated by way of damages.

15) The 2nd Respondent seeks the court to dismiss the application since it does not establish a prima-facie case against it and no loss of

business has been proved since the Applicant has some other warehouses which have not been sealed off by the multi-agency team. The application is flouted for seeking prayers which will summarily determine the suit without full trial and for this reason the 2nd Respondent avers that its right to be heard will be hampered.

16) The 2nd Defendant/Respondent in its submissions, points out two issues for determination; that is,

a) *whether the Applicant has met the threshold in issuance of injunction*

b) *whether the application has met the threshold of granting mandatory injunction*

17) On the first issue, it is submitted the threshold is set in the case of **Geilla-vs-Cassman Brown & Co. Ltd [1973] EA** where the court held for grant of an injunction, the applicant ought to satisfy the court that; he has a prima facie case with probability of success, the applicant stands to suffer irreparable injury that cannot be compensated by an award of damages and lastly, if the court is in doubt then it shall decide the application on a balance of convenience.

18) Basing those principles to the circumstances of the instant case, it is submitted that the Plaintiff has not established a prima-facie case for among other reasons that the Plaintiff has a contract with the 5th Defendant for storage of the consignment for which the 2nd Defendant is not privy to. The suit, as well as the application, seeks the Defendant to bear responsibilities that they do not have under law. The case of **Savings and Loan Ltd-vs-Kanyenge Karangait's Gakombe & another [2015] eKLR** was relied on to explicate on the core of the doctrine privity of contract.

19) On the substratum of the case, the 2nd Respondent submitted that it is only mandated to test the products the subject of investigations and provide the results to the multi-agency team. The results from the test it conducted reveal that there is a batch of the consignment whose suitability is still in contention and should not be released to the unsuspecting public.

20) Secondly, it is submitted that the applicant has failed to establish irreparable loss since any loss the applicant might suffer can be compensated by way of damages. That being the case no injunctive orders can issue hence the application must fail. This is assertion is buttressed by excerpts from the case of **Vivo Energy Kenya Limited & 3 others [2015] eKLR**.

21) Lastly, it is submitted that the balance of convenience does not favour the Plaintiff since the application does not meet the threshold of granting mandatory injunction. A mandatory injunction ought not to be granted on interlocutory in absence of special circumstances but only at the clearest of the case. In the instance case, it is submitted that the Plaintiff has not shown any special circumstances.

The 3rd Defendant/Respondent's Case

22) The 3rd Respondent in response to the application filed a Replying affidavit sworn on 8/3/2019 by its Assistant Manager in the Investigation and Enforcement Department. He deponed that pursuant to a Presidential directive, a multi-agency team comprising the 1st to 3rd Respondents was formed to combat illicit trade and contraband products from being dumped in Kenya. The multi-agency team then visited many go-downs and warehouses with a view to take samples for testing to ascertain whether the goods stored therein comprised of authentic or contraband goods fit for human use and consumption. The 2nd Respondent then took samples for testing and ascertaining whether the goods stored in the Plaintiff's premises for scientific examination. It is averred that only the 2nd Defendant/Respondent can avail the results then a collective decision by the multi-agency can be made once the results are availed.

23) The 3rd Respondent in its submissions argued that the prayers in the application cannot be granted at an interlocutory stage a decision can only be reached after evidence is tendered and subjected to cross examination. It submitted that the applicant intends to steal a march upon the Defendants by seeking final orders at an interlocutory stage. However, since the Applicant has not exhibited special circumstances, the court cannot issue mandatory injunction as sought for by the Plaintiff/Applicant. The argument is supported by excerpt from the case of **Lucy Wangui Gachara –vs-Minudi Okemba Lore [2015] eKLR**.

24) It is submitted that Order 40 of the Civil Procedure Rules provides that an applicant must prove that the property in question is in danger of being wasted, damaged or alienated by a party to a suit. In the circumstances of the instant case, none of those issues is even remotely present and therefore the court cannot issue the orders based on Order 45 as the orders sought are not contemplated in the rules. The 3rd Respondent further asserts that Sections 1, 1B and 3 all of the Civil Procedure Act cannot be invoked to seek the court to allow the move of consignment unfit for human consumption which would pause danger to the general public.

The 5th Defendant/Respondent's Case

25) The 5th Respondent filed a replying affidavit sworn by its Director Eusilah Ngeny on 18/4/2019 in opposition of the application. It is admitted that the 5th Respondent is the owner of the consignment of sugar at the Plaintiff's warehouse. The consignment is 6000kgs bags (each 50kgs) of sugar imported from Zambia. It is deponed that there is an agreement for storage of the consignment between the Plaintiff and the 5th Defendant and no breach has been pleaded by the Plaintiff. According to the 5th Defendant, any loss arising out of the agreement can be redressed by claim for damages and therefore the instant application is premature.

26) It is contented that the warehouse was sealed without any notice from the multiagency team after which samples were collected from one batch of the consignment for testing by officers from the 2nd Defendant and a report of the findings was prepared. Dissatisfied with the findings, the 5th Defendant appeal for a second test vide a letter dated 31.1.2019. According to M/s Eusilah, the sugar met the required health standards after issuance of a health permit from Zambia, a COMESA certificate of origin and Diamond mark of quality by the 2nd Defendant.

Nonetheless, the 2nd test revealed that several batches of the consignment were viable and fit for human consumption. Subsequently, by a letter dated 3/4/2019 the 5th Defendant sought the release of the batches established to fit and further pleaded with the multi-agency team to make a vast decision to avoid protracted costs.

27) The 5th Defendant/Respondent further asserts that the consignment should not be moved from the warehouse or interfered with pending the issuance of collective decision of the multiagency team which has completed the investigations. The transfer of the goods to a different warehouse would be an interference with the ongoing investigations and the 5th Defendant stands to suffer irreparable loss for possible loss of the goods. In the long run, a permanent solution lies in speedy conclusion of the investigations by the multi-agency and for that reason the court should not grant the prayers sought by the Applicant.

28) The 5th Defendant in the submissions filed on 18/4/2019, submitted that for grant of interlocutory injunction the Plaintiff out to satisfy the threshold set in the case of ***Geilla-vs-Cassman Brown Ltd (1973) EA 358***. However, the applicant has failed to satisfy the legal precept for grant of interlocutory injunction. Firstly, because the Plaintiff/Applicant has not established a prima facie case with a probability of success. It is argued that the Plaintiff's case is premised on a need to make room for its business yet it has not been revealed that the warehouse was found to be infected and the prayers sought are schemed to conceal that fact. The application is therefore premature since evidence has to be adduced on a full trial. The argument is buttressed by excerpts from the case of ***Simon Mwangi Ndung'u & another-vs-Director of Criminal Investigations & 5 others [2018] eKLR***.

29) Secondly, the Plaintiff has not committed to prove that he stands to suffer irreparable loss which cannot be compensated in damages to warrant the grant of an injunction. That there exists an agreement for storage of the consignment whereas the Plaintiff/Applicant has not pleaded any breach thereof. After the investigations, the cost for storage will easily be ascertainable and claimed. If the Plaintiff will be further aggrieved after the release of the consignment by the multi-agency team, then he can institute legal action for wrongful closure of its warehouse against the 1st to 3rd Defendant/Respondent who concealed the warehouse. Reliance is placed on the case of ***Hassan Huri & another -vs-Japhet Mwakala[2015] eKLR***.

30) Thirdly, on a balance of convenience, the 5th Respondent submitted that it has endured the rigorous testing process for a lengthy period of time which outweighs the Plaintiff's inclination for expansion of its business. The court is invited to consider the case of ***American Cyanamid Co. -vs-Ethicon Ltd [1975] 1 ALL ER 504***.

31) Fourthly, on the prayer for mandatory orders to remove the sugar if granted would interfere with and delay the pending collective decision of the Multi-agency team to the prejudice of the 5th Respondent. Nonetheless, the Plaintiff has not established the existence of special circumstances to warrant the grant of mandatory injunction as espoused in the case of ***Kenya Breweries Ltd-vs-Washington Okeyo [2002] 1 EA 109***.

32) In conclusion, it is submitted that the ultimate solution to the instant dispute lies on speedy collective decision of the multi-agency team. Though the test results have been availed, the 1st Defendant Respondent has failed to respond which has significantly contributed to the instant litigation and further delay with increased costs in the matter. The 5th Respondent therefore seeks the court to exercise its discretion in furtherance of Article 159(2) of the Constitution of Kenya and the Oxygen principle under Sections 1A, 1B and 3A all of the Civil Procedure Act to make orders necessary for expeditious disposal of the suit without further delay.

Analysis and Determination

33) I have considered the application, the affidavit in support, the grounds of opposition and submissions by counsel for the respective parties. I have also taken into account the authorities by counsel in support of their respective positions in this matter.

34) The first two prayers in the application have been spent, having been overtaken by events leaving prayers c, d, and e for determination by this honourable court. In essence the application seeks a restraining order against the Defendants from continuing with locking its warehouse No. 3 or otherwise interfering with the operation and management of the said warehouse. The applicant further seeks a declaration that the locking of the warehouse was null and void.

35) A close consideration of the prayers sought in the further amended Plaint filed on 24/5/2019 and the prayers sought in the Notice of Motion dated 2nd April 2019 will reveal a remarkable similarity.

36) I have set out the prayers sought in the application in the preceding paragraphs. In the Plaint the Plaintiff/Applicant seeks:

a) An order of mandatory injunction to the Defendants herein to move the suspected sugar to a ware house of their own choice or into warehouse No. 1 which the Plaintiff shall provide so far as the Defendants do pay for the warehouse charges that shall accrue there from.

b) That the Defendants their servants or employees be restrained from and or continuing with such locking the warehouse no.3 to the detriment of the Plaintiff and or any manner/way interfering with the operations of the Plaintiff in operating its warehouses and more so warehouse No. 3.

c) That the actions by the Defendants their servants and or employees in locking the warehouse No. 3 be declared null and void abinitio.

d) General damages for unlawfully locking the warehouse No. 3.

e) *Costs and interests.*

37) It is therefore clear that the Plaintiff, by its Notice of motion dated 2/4/2019, it sought for final orders as sought in the Plaintiff.

38) In the case of **Oksana Investment Supplies Ltd v Alice Wanjiru Wamwea [2019] eKLR**, the court cited with approval a persuasive Indian decision on issuance of final orders at interlocutory stage and stated; “**Ashok Kumar Bajpai V Dr. (Smt) Ranjama Baipai, AIR 2004, All 107, 2004 (1) AWC 88**, at paragraph 17 of the decision the Indian Court expressed as follows:

“... It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order to make it clear as what are the special circumstances for which such a relief is being granted to a party”.

39) The Court of Appeal in the case **OLIVE MWIHAKI MUGENDA & ANOTHER V OKIYA OMTATA OKOITI & 4 OTHERS [2016] eKLR**, expressed its jurisprudence on the issue as follows:-

“...Applying the decisions of this Court in *Vivo Energy Kenya Limited -V- Maloba Petrol Station Limited & 3 Others (2015) eKLR* and *Stephen Kipkebut v/a Riverside Lodge and Rooms -V- Naftali Ogola (2009) eKLR* it has been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage. We have compared and contrasted the ruling and orders delivered on 18th December 2015 with the prayers in the Petition dated 21st October 2015. The Ruling of 18th December 2015 effectively granted final prayers in paragraph 62 (c), (d), (f), (g), (h) and (j) of the petition”

40) In the instant case, the Plaintiff filed a suit seeking for a restraining order against the Defendants from continuing with locking its warehouse No. 3 and a declaration that the action of locking the warehouse was null ab initio. It cannot be entitled to seek the very same orders at interlocutory stage unless the Plaintiff invokes the Rules of procedure which entitle a party to enter judgment. What is it that would justify the issuance of final orders at interlocutory stage, in view of the instant applicant?

41) The argument by the Plaintiff that it is running a contract with a third party for storage of its cargo which is likely to arrive in Kenya on the 28th February, 2019 cannot stand since the dates contemplated in the contract have already passed. The court is of the view that the said contract has been frustrated and it would be moot to consider the said contract as a special circumstance to warrant the grant of the final orders at this stage.

42) The arguments that the Defendants have violated the Plaintiff's right to property by trespassing to its warehouse and whether there has been delay on part of the Defendants cannot be considered merely through evidence from the Bar. The Court needs to be moved in that regard.

43) To this end, the application by Notice of Motion dated 2nd April, 2019 fails. It fails because the Plaintiff, by that application, seeks final orders at an interlocutory stage.

44) The 5th Defendant/Respondent in its submission did request the Court to consider that the delay which substantially contributed to the present litigation was necessitated by the inaction of the 1st Defendant/Respondent even after the test results were availed by the 2nd Respondent. In **Civil Appeal No. 67 of 2017, Krish Commodities Limited –v- Kenya Revenue Authority**, the Court of Appeal held that:

‘It is settled that every person has the right to fair administrative action which is expeditious, efficient, lawful and procedurally fair’.

45) It is clear from the record that the ware-house was concealed on 28/8/2018. Samples from the batches of the sugar were collected for test by 2nd Respondent and results upon a second test prepared on 21.2.2019. Since then there has been no further action undertaken by the multi-agency task force. As a result, the 5th Defendant wrote to the DCI, the 1st Respondent herein seeking for further direction on the release of the sugar that had been found fit for human consumption.

46) This Court is alive to the fact that sugar is a perishable product and a swift conclusion ought to be arrived at to circumvent the risk of having all the sugar getting wasted since the results show that some of the batches of the sugar are fit for human consumption. In my view, the interest of justice would be best served by prompting the multi-agency task force to make a speedy collective decision on disposal of the sugar.

47) In the end, and in the interest of justice, the orders of the court therefore are as follows:-

a) The Notice of Motion dated 2/4/2019 is dismissed.

b) The Director of Criminal Investigation (the 1st Respondent) is hereby directed to coordinate the making of a speedy conclusion by the multi-agency team.

c) In the meantime, the Plaintiff is at liberty to fix the matter for mention before the Deputy Registrar to confirm compliance with Order 11 and for purposes of fixing a hearing date.

d) Costs of the application shall be in the course of the main suit.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 15th day of July 2020.

D. O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O CHEPKWONY