



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC APPEAL NO. 54 OF 2016

NATIONAL OIL CORPORATION OF KENYA.....APPLICANT

VERSUS

REAL ENERGY LIMITED.....RESPONDENT

RULING

Background

1. The Appellant/Applicant is the registered owner of **LR No.209/7753** situate at Ngong Road in Nairobi. By a Dealer Licence Agreement dated 1st April 2014, the Applicant agreed with the Respondent to operate, sell, display and advertise exclusively for the Applicant at the Applicant's service station the said property at a fixed period of two (2) years.
2. In the year 2015, the Respondent filed a case against the Applicant at the Business Premises Rent Tribunal (BPRT) No. 720 of 2015 . The Respondent was granted an injunction against the Applicant. The Applicant moved to the High Court and filed an application seeking Judicial Review orders seeking to quash the injunction which had been granted and prohibiting the Tribunal from proceedings with the matter before it. In a ruling delivered on 30th October 2015, Justice Odunga declined to grant leave to Applicant.
3. The Applicant then moved back to the Tribunal where it argued a preliminary objection which had been filed on the ground that the Tribunal had no jurisdiction to grant injunction as there was no Landlord/Tenant relationship between the two. The preliminary objection was dismissed in a ruling delivered on 29th April 2016.
4. The Applicant then preferred an appeal to this court against the ruling of the Tribunal. The Applicant thereafter filed an application for stay of proceedings which was granted vide ruling of 12th June 2017. In this ruling, the Court made an observation that the appeal needed to be disposed of expeditiously. There was a delay in getting the file from the Tribunal. When the file from the Tribunal was finally received, this court gave directions on filing of written submissions in respect of the appeal. The matter was set down for mention on 2nd December 2019 for confirmation of compliance with the directions of the court.

The Application.

5. Before the mention date, the Applicant filed a Notice of Motion dated 9th October 2019 which seeks the following orders:-

1. Spent

2. Spent

3. Spent

4. Spent

5. Spent

6. Pending the hearing of the appeal herein, this honourable court issues an order varying the temporary injunction issued by the Business Premises & Rent Tribunal in BPRT No. 720 of 2015 in the Business Premises Rent Tribunal: Real Energy Limited Versus national Oil Corporation on 19th October 2015 to enable possession of Petrol Station known as Ngong Road Petrol

Station situated on LR No. 209/7753 Ngong Road in Nairobi comprised in IR No. 24759 to the Applicant herein who is the registered owner thereof.

7. Pending the hearing of the appeal herein, this Honourable Court directs that National Oil Corporation of Kenya takes over immediate possession of Petrol Station known as Ngong Road Petrol Station situated on LR No.209/7753 Ngong Road in Nairobi comprised in IR No.24759 for purpose of preserving the equipment and other assets it owns on the site and to secure the subject property from encroachment or trespass by third parties.

8. Pending the hearing of the appeal herein, this Honourable Court issues an order the National Oil Corporation of Kenya takes over immediate possession of Petrol Station known as Ngong Road Petrol Station situated on LR No.209/7753 Ngong Road in Nairobi comprised in IR No.24759 for purpose of checking the structural integrity/safety and effecting urgent repairs and maintenance as a safety precaution to protect customers and other members of the public who access the Petrol Station.

9. This Honourable Court directs the officer commanding Kilimani police station to provide society to the Applicant to enforce the orders granted in this application.

10. Such further and other relief be granted to the Applicants as this Court deems fit.

11. Costs of this Application be provided for.

6. The Applicant contends that while the Appeal was pending further directions on 2nd December 2019 there were new developments which came up necessitating the filing of this Application taking into account the fact that the Tribunal file had been forwarded to this court. The Applicant argues that the directors of the Respondent have been charged in Kibera Chief Magistrates' Court Criminal case No.767 of 2019 for operating a Petroleum facility contrary to the law and that the Respondent forged a lease dated 28th May 2019 purporting that the petrol station was owned by a company known as Moroni Supplies Ltd in a bid to dupe the regulator to grant it a licence.

7. When the forgery by the Respondent was reported to the Directorate of Criminal Investigations to investigate, the Respondent abandoned the Petrol Station due to lack of a licence leaving the station in a dilapidated and sorry state. As a result of this, there is imminent danger that the Applicant's assets at the petrol station are likely to be vandalised as there is no one operating the service station and there are injunctive orders prohibiting the Applicant from accessing the Petrol station.

8. The Applicant further contends that there have been complaints from other licensees who are threatening to move out as the petrol station which is in a sorry state and the Energy and Petroleum Regulatory Authority has already closed the Petrol Station and this is likely to make the Applicant lose on revenue. It is on this basis that the Applicant is seeking the orders herein above.

Respondent's Response

9. The Respondent has opposed the applicant's application based on a replying affidavit sworn on 25th November 2019. The Respondent contends that it had raised a number of issues which were to be addressed by the Applicant but which were not addressed. When the dealership agreement was determined, the Applicant continued to receive rent from the Respondent which then brought in the issue of tenancy. The Respondent continued to pay rent until the Applicant's lawyer advised the Applicant not to receive rent.

10. The Respondent denies the Applicant's allegation that it had abandoned the Petrol Station. Contrary to the allegations by the Applicant, the Respondent states that other services like a service bay, carwash and tyre centre are operating and that its employees are on the ground. The Respondent states that it does not know of the alleged forgery of a lease and for the criminal offence, the Respondent contends that its directors are innocent until proven guilty.

11. The Respondent states that there is no loss which the Applicant will suffer which will not be compensable as the Applicant is having security in the sum of Kshs.5,000,000/=and continues to receive monthly rent of Kshs.200,000/= . The Respondent further argues that the Applicant's application is only meant to delay the finalization of the Appeal.

Analysis.

12. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. The Applicant is seeking variation of the orders of the Tribunal which were granted on 19th October 2015 and mandatory orders which seek to hand possession of the Petrol Station to the Applicant. There are only two issues which lie for determination. The first is whether this court can properly vary the injunctive orders which were granted by the Tribunal. Secondly, whether the Applicant can be granted mandatory order granting possession of the Petrol Station to it.

13. The orders which are being sought are sought pending hearing and determination of the Appeal. In considering whether to vary the terms of the injunction, I have to give the position where the pending Appeal had reached. As I have already stated hereinabove, the court had given directions as to filing of submissions. The Appellant/Applicant filed its submissions on 11th October 2019. The Respondent filed its submissions on 18th October 2019. Were it not for this application, the Court would have given a date for judgement in the main appeal which will have been delivered by now.

14. This Application was brought solely to delay the finalization of the Appeal. There are absolutely no grounds shown for varying the injunctive orders which were granted way back in 2015. There was an attempt to have them quashed which did not succeed when the Applicant was denied leave to bring judicial review. Considering the stage at which the appeal had reached, there was absolutely no need for filing of this application. This application is meant to go round the pending appeal and render the same an academic exercise. I therefore find

that there is no basis for varying the injunctive orders which were granted in 2015.

15. On the mandatory order which seek possession of the patrol Station, the principles for granting mandatory orders are clear. These orders can only be granted in the clearest of cases. There is a pending Appeal which is yet to be determined. The court has to consider it and see whether the Tribunal was seized with jurisdiction or not. To grant any mandatory orders will be tantamount to determining the Appeal before judgement is rendered.

Conclusion.

16. Mr Wanyama submitted that this is a unique application which was brought due to the unique circumstances. To me this is not the case. This application is actually an abuse of the process of the Court given the stage which the Appeal had reached. I therefore dismiss the application by the Applicant with costs to the Respondent.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **20th** day of **February 2020**.

E.O.OBAGA

JUDGE

In the Presence of :-

Mr Ndege for Respondent

Mr Wanyama for Applicant

Court Assistant: Hilda

E.O. OBAGA

JUDGE