



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

ELC CASE NO. 3 OF 2017

LIBYA OIL KENYA LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

JOEL KIPKORIR SIELE.....1ST DEFENDANT/RESPONDENT

ORYX ENERGIES KENYA LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 23rd July 2018 the Applicant moved this court seeking the following Orders:

1. That Oryx Energies (Kenya) Limited be joined as a 2nd Defendant in this suit.
2. That the Honourable Court be pleased to grant leave to the Plaintiff to amend its Plaint in the terms of the Draft “Amended Plaint” filed herewith.
3. That this Honourable Court be pleased to grant an order for injunction to restrain the 2nd Defendant/2nd Respondent from disposing of, appropriating, using or in any other manner whatsoever interfering with the Plaintiff’s assets on the suit property pending the inter-partes hearing and determination of this Application.
4. That this Honourable Court be pleased to grant an order for injunction to restrain the 2nd Defendant/2nd Respondent from disposing of or in any other manner whatsoever interfering with the Plaintiff’s assets on the suit property pending the hearing and determination of this suit.
5. Any other or further relief that this Honourable court may deem fit and just and convenient to grant in the circumstances.
6. The costs of this Application be awarded to the Plaintiff /Applicant.

2. The Application is based on the grounds stated on the face of the Notice of Motion and the Supporting affidavit of Benedicta Karimi, the in-house counsel of the Plaintiff/Applicant company sworn on the 23rd July 2018.

3. The application is opposed by the Replying affidavit of the 1st Defendant sworn on the 23rd August 2018 as well as the affidavit of Samson Ng’ang’a, the Retail Manager of the intended 2nd Defendant sworn on the 24th August 2018.

Background

4. A brief background of the case is that the Plaintiff entered into a ten -year lease in respect of the 1st defendant’s property known as L.R NO. 631/1199 IR. 48960 situated in Kericho town. The said lease expired on 31st December 2016. On or about the 26th December 2016, the Plaintiff was in the process of removing its assets from the suit premises when the 1st Defendant sent its agents to stop them. The Plaintiff then moved to court and obtained an ex- parte order of temporary injunction restraining the 1st Defendant from interfering with the Plaintiff’s assets on the suit property pending the hearing of the application inter partes.

5. The Plaintiff subsequently filed the current application in which it alleges that despite being served with the said court order, the 1st Defendant entered into a lease with the intended 2nd Defendant which carries on a similar business to that of the Plaintiff of selling and

marketing petroleum products and converted the Plaintiff's assets and equipment that remained on the suit property to its own use. The Plaintiff contends that as a result of the actions of the 1st and intended 2nd Defendants the Plaintiff has suffered great loss. It is against this background that the Plaintiff seeks to have the intended 2nd Defendant enjoined in the suit.

6. The application was canvassed by way of written submissions and each of the parties filed their submissions.

Issues for Determination:

7. Arising from the pleadings, Notice of Motion, affidavits and rival submissions, the following issues fall for determination:

1. Whether the application for leave to amend the Plaint to enjoin the intended 2nd defendant should be allowed.
2. Whether injunctive orders should be issued against Oryx Energies, the intended 2nd Defendant.

Analysis and determination

8. With regard to the first issue, the law governing joinder of parties is set out in Order 1 Rule 10 of the Civil Procedure Rules, 2010 which provides as follows:

“ The Court may at any stage of the proceedings , either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added”

9. The principle underlying the amendment of pleadings and joinder of parties was set out in the case of **Central Kenya Limited V Trust Bank & 5 Others (2000) eKLR** where the Court of Appeal held as follows:

“The guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot be compensated for in costs.”

10. In the instant case, learned counsel for the Plaintiff has submitted that the intended 2nd Defendant is a necessary party to the suit as it entered into a lease agreement with the 1st Defendant in respect of the suit property soon after the plaintiff's lease expired and it has not adduced any evidence to show that the assets on the suit property belong to it.

11. Learned counsel for the intended 2nd Defendant has submitted that the intended 2nd Defendant should not be enjoined in the suit as the Plaintiff had removed its equipment including signage, pumps, generators and shop equipment. Counsel has also submitted that the intended 2nd Defendant is not privy to the agreements and arrangements entered into between the Plaintiff and the 1st Defendant and it denies appropriating any of the Plaintiff's assets.

12. Learned counsel for the 1st Defendant has similarly raised the fact that the intended 2nd Defendant is not privy to the contract between the Plaintiff and the 1st Defendant. He has also submitted that the Plaintiff has not proved that he owns the assets on the suit property.

13. While I agree with both counsel on the issue of privity of contract, the issue of ownership of the assets and whether they have been appropriated by the intended 2nd Defendant can only be determined at a full hearing. These are issues that can only be determined if the intended 2nd Defendant is enjoined in the suit. I therefore find and hold that it is necessary for the Plaint to be amended to enjoin the intended 2nd Defendant in order to facilitate the effectual, complete and just adjudication of the Plaintiff's suit.

14. The second question to be answered is if the Plaintiff is entitled to injunctive relief against the intended 2nd Defendant.

15. Counsel for the intended 2nd Defendant has submitted that no orders of injunction can issue against it as it is not yet a party to the proceedings between the Plaintiff and the 1st Defendant and that for that reason the application for injunction is fatally defective. I agree with counsel that the prayer for injunction is premature and on that ground alone the application for injunction fails. However, assuming that the Plaintiff had already been enjoined, the court would have to satisfy itself that the Plaintiff has met the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

16. The first issue that the court must determine is whether the Plaintiff has established a prima facie case with a probability of success.

17. In explaining what constitutes a prima facie case, Bosire JA (as he then was) in **Mrao V First American Bank of Kenya Limited (2003) eKLR** stated as follows:

“A prima facie case is... one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

18. The Plaintiff's contention is that upon expiry of its lease agreement with the 1st Defendant it left some of its assets on the suit property which the intended 2nd Defendant has unlawfully converted to its own use. This has been denied by both the 1st Defendant and intended 2nd Defendant. This shows that even though the Plaintiff is alleging that its rights have been infringed, it will have to adduce evidence to prove the same.

19. Furthermore, it has been submitted on behalf of the intended 2nd Defendant that the Plaintiff has not come to equity with clean hands as it did not disclose that at the time the intended 2nd Defendant entered into the lease with the 1st Defendant, the Plaintiff had removed most of its assets and that the petrol station was no longer operational. Against this background, it is not possible for the court to conclude that the Plaintiff has established a prima facie case with a probability of success.

20. The second condition that the Plaintiff was required to satisfy is that has it has suffered irreparable loss which cannot be compensated by damages. The Plaintiff has quantified its loss at approximately Kshs. 30,000,000 thus negating the argument that damages would not be an adequate remedy. The case of **Muiruri V Bank of Baroda (Kenya) Ltd (2001) 1 KLR** in which the court held that damages cannot adequately compensate a party for loss of land is distinguishable from this case as the Plaintiff is not claiming land per se.

21. Lastly, with regard to the balance of convenience, the intended 2nd Defendant has been carrying on business on the suit property under a new lease for the last one year and it would not serve the interests of justice to restrain it from carrying on its business at this point. The Plaintiff is solely responsible for failing to move with the necessary speed to have this matter heard at the earliest possible opportunity. This leads me to the conclusion that the balance of convenience does not tilt in the plaintiff's favour. The Plaintiff has therefore not satisfied the conditions for temporary injunction set out in the Giella case.

22. The upshot is that the application succeeds only in terms of prayers 2 and 3 and I direct as follows:

- a. The Plaintiff is granted leave to enjoin Oryx Energies (Kenya) Limited in this suit as a 2nd Defendant.
- b. The Plaintiff is granted leave to amend its plaint in terms of the Draft Amended Plaint.
- c. The Amended Plaint shall be filed within 21 days.
- d. The costs of this application shall be in the cause.

Dated, signed and delivered at Kericho this 6th day of February, 2019.

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J. M. ONYANGO

JUDGE

In the presence of:

1. Mr. C. Koech for Mr. Muthui for the Intended 2nd Defendant
2. Mrs. Cheruiyot for Mr. Nyadimo for the 1st Defendant.
3. Court Assistant - Rotich