REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL SUIT NO. 11 OF 2014

Nairobi Kiru Line Services Ltd.....Plaintiff/Applicant

Versus

County Government Of Nyeri.....1ST Defendant/Respondent

Sub-County Othaya.....2nd Defendant/Respondent

Mawati Nissan Sacco.....3rd Defendant/Respondent

RULING

By a plaint dated 12th May 2014, the plaintiff (hereinafter referred to at the applicant) instituted these proceedings against the defendants (hereinafter referred to as the Respondents) seeking orders that an injunction do issue against the Respondents restraining them and heir servants/agents from harassing, intimidating, threatening, interfering, and or impounding any vehicles operating under the applicant at Othaya Matatu/ Bus Terminus at Othaya Town, a determination that the applicant is the legal occupant/owner of the Othaya bay Matatu/Bus Terminus allocated to the applicant by the defunct Othaya Town Counsel, Special damages, general damages and costs of the suit.

The plaint was accompanied by a Notice of Motion dated the same day expressed under the provisions of Order **40** Rules **1, 2, 3** and **4** and Order **50** Rule **1** of the Civil Procedure Rules, 2010 and Sections **3, 3A** and **63 (3)** of the Civil Procedure Act[1] and all other enabling provisions of the law seeking orders *inter alia* that:-

> *a. **That** the Respondents be restrained from harassing, interfering, intimidating, threatening, and or impounding any vehicles operating under the applicant at Othaya Matatu/Bus Terminus also known as Othaya Sub-County ticketing offices at Othaya Town pending the hearing and determination of this suit.*

The crux of the applicants case against the Respondents is enumerated in the plaint referred to above and can be summarized as follows, that sometimes in April 2014, the 3rd Respondent raised a claim on the terminus the applicants were allocated and have been operating from since 1995, that on 29. 10. 2014 the second respondent wrote to the applicant demanding documents and a meeting over the said terminus yet they knew the said terminus belonged to the applicant, that the said terminus was allocated to them in 1997 and then the applicant was trading under the name Kiru Line.

The grounds in support of the application are stated on the face of the application and the supporting affidavit.

The affidavit in support of the application sworn by a one **Edward Ndingui Rukwaro** reiterates the averments in the plaint and states *inter alia* that the applicant has a fleet of 53 motor vehicles, that the third Respondent is its business rival, that unless the Respondents are restrained by an order of this court they are likely to do irreparable harm, that the applicant has more than 26 franchise holders who have signed binding legal agreements and the activities complained of do threaten livelihoods of many Kenyans.

The applicant filed a further affidavit on 22 May 2014 sworn by a one **James Njuguna Muhuria** stating *inter alia* as follows:-

i. That under instructions from the applicants chairman, he forwarded a list of all their vehicles plus log books and other relevant documents marked JNM 1 in the said affidavit to the sub-county administrator which he did who promised to call a meeting involving the persons listed in paragraph 4 of the said affidavit but in the meantime stated that he would ban the said vehicles from operating at the said terminus.

ii. That the sub-county administrator started threatening the chairman of the applicant over the phone prompting these proceedings and thereafter the vehicles were banned from using the said terminus.

The third Respondent filed a Replying affidavit dated 4th June 2014 sworn by a one *Anthony Wangura Ikiki* stating *inter alia* that:-

i. That the application against the third Respondent is misconceived, and that the third Respondent is a recipient of the first Respondents services just like the applicant.

ii. That the third Respondent denied committing any of the alleged acts and insisted it has no power to do so.

iii. That the third Respondent was allocated space by the same council and annexed a sketch showing the two spaces are metres away, and that they have not taken any space allocated to the applicant.

iv. That the case was filed prematurely, and that the problem could have been solved.

The first and Second Respondent filed the replying affidavit of **Nelson Mbekenya** dated 5th June 2014 in which he avers *inter alia* as follows:-

i. That the first Respondent allocated a bay to the applicant next to Sarafina Hotel and also allocated a bay to the third Respondent within the existing Othaya Bus Stage.

ii. That he received complaints from the third Respondent against the applicant and he promptly called for a meeting in which the applicant sent only one person why the third Respondent was represented by 4 persons and the meeting was moved to another date after the applicants representative voiced his concern that he was out numbered.

iii. That he asked both parties to avail documents pertaining to their vehicles and the applicant failed to comply. That the applicant did not attend the re-scheduled meeting and instead he was served with court papers for this case.

iv. That the applicant persisted with his misconduct prompting his letter marked JNM2 annexed to his affidavit.

v. That the applicant has abused court processes and obtained court orders dishonestly and that his application is tainted with falsehoods, that he came to court with dirty hands.

vi. That the affidavits in support of the application have been sworn by persons who are not directors.

There is also on record a supplementary affidavit filed by a one **James Njuguna Mahuria** sworn on 7th July 2014, the operations manager of the applicant who reiterated the contents of the earlier affidavits and refuted the allegations in the replying affidavits.

Parties opted to file written submissions. The applicants' counsel submitted that the applicant had satisfied the tests for granting of injunctions as laid down in the case of *Giella vs Casman Brown*[2] while the counsel for the first and second respondent submitted that the suit is not properly before the court since the affidavits in support of the plaint and the application were sworn by unauthorized persons and pointed out that the applicant is a limited liability company. In support of this position counsel cited the case of *East Africa Portland Cement Company Ltd vs The Capital Markets Authority & Others*[3] where **Ngugi J** citing decided cases struck out a petition which was premised on affidavits signed by unauthorized persons.

Counsel also submitted that the suit was pre-maturely filed in court and also insisted that the tests for granting injunctions as enunciated in the above cited case of *Giella vs Cassman Brown*[4] have not been satisfied.

Counsel for the third Respondent submitted that the suit is not properly before the court, that the conditions for granting of injunctions have not been satisfied and urged the court to dismiss the application.

At this juncture, it is necessary for this court to briefly examine the legal principles governing applications of this nature. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles.

In the celebrated case of *Giella Vs Cassman Brown and Co .Ltd****[5]*** which has been cited by all the parties in their submissions the Court set out the principles for interlocutory Injunctions. These principles are:-

*i. The Plaintiff must establish that he has a **prima facie** case with high chances of success.*

ii. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.

iii. If the court is in doubt, it will decide on a balance of convenience.

The above principles were authoritatively captured in the famous Canadian case of *R. J. R. Macdonald vs. Canada (Attorney General)****[6]***where the three part test of granting an injunction were established as follows:-

i. Is there a serious issue to be tried?;

ii. Will the applicant suffer irreparable harm if the injunction is not granted?;

iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").

Also of useful guidance in the application before me is the criteria considered in granting an injunction laid down in the decision in *American Cynamid Co. vs Ethicom Limited*[7]which established the test in the English courts in deciding if an injunction should be granted. This test was followed in Ireland in the case of *Camus Oil vs The Minister of Energy*[8]. The test has three elements:-

i. there must be a serious/fair issue to be tried,

ii. damages are not an adequate remedy,

iii. the balance of convenience lies in favour of granting or refusing the application.

The said principles have been reiterated in numerous cases in Kenya. In *Mbuthia vs Jimba Credit Corporation Ltd*[9] **Platt JA** echoed the position adopted in the *American Cyanamid* case cited above and

stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only *needs to weigh the relative strength of the parties cases.*

In *Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others* **[10]** the court while making a determination on the issue of a *prima facie* case with a probability of success cited the Court of Appeal decision in the case of *Mrao Ltd Vs First American Bank of Kenya and 2 others* **[11]** where the Court of Appeal held that:-

> *"A Prima facie case in a civil application includes but 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 later".*

I stand guided by the said passage. **Steven Mason & McCathy Tetraut** in their well researched article entitled *"Interlocutory Injunctions: Practical Considerations"*[12]have authoritatively stated as follows:-

> *"With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald Vs. Canada (Attorney General)* **[13]** *"Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits."* **[14]** *It is usually a brief examination of the facts and law.*
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> *In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a more strong prima facie case. If the injunction will likely end the dispute between the parties, then the court may hold the plaintiff to this higher standard. Similarly, where the nature of the relief sought is mandatory, or when the question is a question of mere law alone, then this higher standard will apply..."*

In *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another*[15] *Bosire J* 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 also show he has a right legal or equitable, which requires protection by injunction."*

Also *Bosire J in Njenga vs Njenga*[16] held that *"an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles."*

I have reviewed the facts and the law and considered the submissions by all counsels on this point and I am not satisfied that the applicant has satisfied the first test. First, there is a real challenge as to whether the case is properly before the court since the supporting affidavits were signed by persons who were not authorized to act for the company in instituting these proceedings. This is a serious point of law which goes to the root of the case and on this ground alone, I am afraid, it cannot be said that the applicant has a *prima facie* case with a probability of success. Similarly the facts as pleaded, do not in my view disclose a *prima facie* case as defined above, namely:-

> *"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 later".*

The second test for determination is whether the applicant will suffer irreparable loss. The following paragraph in *Halsbury's Laws of England*[17] is instructive. It reads:-

> *"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal*

remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.[18] But what exactly is *"irreparable harm"?*. **Robert Sharpe**, in *"Injunctions and Specific Performance,"**[19]* states that *"irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."*

In the present case the applicant has even included a prayer for special and general damages in the plaint. The is also a report filed in court authored by Komu & Associates which has computed loss incurred for the alleged period and has even given a figure of Ksh.63,773,000/= a confirmation that the alleged loss can be quantified. That in my view is the applicants undoing in this application. The applicant has not only included a relief for damages in the plaint but has gone further to compute the loss, a confirmation that his claim if any can be compensated by way of damages, thus effectively confirming that the application does not satisfy the second test.

On the third test, where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, 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 other hand, would suffer if the injunction was granted and he 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.[20] 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.[21]

Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction.[22]The court will seek to maintain the *status quo* in determining where the balance on convenience lies.

As for the balance of convenience, I reiterate what I stated above, *"the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction.**[23]**The court will seek to maintain the status quo in determining where the balance on convenience lies."* Considering the facts of this case in totality, I find that the balance of convenience is not in favour of the applicant.

An injunction is an equitable remedy, meaning the court hearing the application has discretion in making a decision on whether or not to grant the application. The court will consider if it is fair and equitable to grant the injunction, taking all the relevant facts into consideration. After carefully analysing the facts and documents filed herein and upon due consideration of the rival arguments advanced by the counsels for the parties herein, I am persuaded that applicant has not satisfied the tests for granting injunctions as enumerated above.

Consequently, I find that the application has no merits and that the applicant has not satisfied the tests for granting the injunction sought as laid down in the above cited authorities. Accordingly, I dismiss the application dated 12th May 2014 with costs to the Respondents.

Right of appeal 30 days.

Dated at Nyeri this **9th** day of **March** 2016.

John M. Mativo

Judge

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[1] Cap 21, Laws of Kenya

[2]{1973} E.A. 358

[3] Pet No. 600 of 2013

[4] Supra

[5] {1973}{EA358

[6] {1994} 1 S.C.R. 311

[7] {1975} A AER 504

[8] {1983} 1 IR 88

[9] {1988} KLR 1

[10]High Court ELC case Number 514 of 2013

[11]{2003} KLR125

[12] www.mccarthy.ca/.../interlocutory_injunctions_practical_considerations.pdf

[13] Supra

[14] Dole Food Co. Vs Nabisco Ltd {2000}, 8 C.P.R. (4TH) 461, (F.C.T.D.)

[15] {1990} K.L.R 557

[16]**{1991} KLR 401**

[17]Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.

[18] Supra note 3

[19] Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Cananda Law Book, 1992), P 2-27

[20] See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

[21] Ibid

[22] Supra note 6

[23] Supra note 6