REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(Milimani Commercial Courts, commercial and Tax Division)

CIVIL CASE 508 OF 2012

ALFAWAYS LIMITED.....PLAINTIFF

VERSUS

KOBIL PETROLEUM LIMITED.....DEFENDANT

R U L I N G

1. By its Amended Notice of Motion dated 9th August, 2012, the Plaintiff has sought various orders. Principal of them is attachment before judgment against the Defendant in respect of rental income due to the Plaintiff to be assessed by the court and an order restraining the Defendant from interfering with, subdividing or making any claim over L.R. No. 1/933 (hereinafter **"the Suit Property"**). The Plaintiff has also sought an order for rescission of the Agreement dated 22nd December, 2011, a declaration that the consent orders in HCCC No. EL652 of 2010 entered into on 30th September, 2011 has lapsed by effluction of time and for permanent injunction , general damages for loss of bargain and special damages. The application was expressed to be brought under Sections 1A, 1B and 3A, of the Civil Procedure Act, Order 39 (1) (a) (iii) and Order 40 Rules 1 and 2 of the Civil Procedure Rules.

2. The grounds upon which the application is made are that the Plaintiff is the registered owner of the property known as L.R. No. 1/933, the Defendant occupies a portion thereof, that the Defendant has attempted through deceit to subdivide and appropriate that property, that the Defendant is in the process of being taken over by Puma Energy Limited an Australian company and that the Defendant has included the Plaintiff's property in its schedule of assets to the said Puma Energy. The application was supported by the Affidavits of Thomas Kariuki sworn on 9th August, 2012 and 20th September, 2012, respectively.

3. The Plaintiff contend that it purchased the suit property from Posta Investment Co-operative Society for Kshs.200million, the property was divided into portions "A" and "B", portion A consisted of a Petrol Station, Pharmaceutical company and a bank, the Defendant had a lease over Portion 'A' for 13years from 1st July, 2000 under which the Defendant was entitled to the first option to purchase the property in case of a sale by the said Posta Investments. Although the Defendant was given the said option, it failed to exercise the same whereupon the same was sold to the Plaintiff, that when the Defendant was advised that the Plaintiff was the new landlord it paid the Plaintiff Kshs.132,250/= as rent for the month of September, 2010 and by a letter dated 9th September, 2010 and that it sought to know how the future rent

would be paid, that the Defendant thereafter reneged on this agreement and refused to pay any further rent. The Plaintiff further contended that upon inquiries it established that the Defendant had given licences to Family Bank, Edward Gatuku Mwaniki T/A Edwards Industrial and Training Enterprises and Equity Bank at a rental of Kshs. 500,000/- per month, that the said licences were in fact leases, that Family Bank subsequently became the Plaintiff's tenant whereby the Defendant threatened to evict them from the premises thereby triggering **HCCC No. 897 of 2010 Family Bank Ltd vs. Kobil Petroleum Limited** which was determined in favour of the said Family Bank. The Plaintiff produced a Certificate of Postal Search showing that it was the registered owner of the suit property and had created leases thereon in favour of the Defendant, Family Bank Ltd and Neem Pharmacy Company ltd.

4. That the Business Premises Rent Tribunal had found in favour of the Plaintiff as a landlord of the Defendant's Licencee in **BPRT Case No. 542 of 2011 Alfaways Limited vs. Edward Industrial and Trading Enterprises**. That in an about turn, the Defendant instituted **ELC HCCC No. ELC 652 of 2010 Kobil Petroleum Ltd vs. Posta Cooperative Society Ltd & Alfaways Limited** claiming that there was fraud in the sale and purchase of the suit property, that an offer by the Plaintiff to the Defendant to buy off the Plaintiff for a sum of Kshs.210,000,000/= was rejected by the Defendant, that subsequently a consent was entered in the said ELC NO.652 of 2010 for the Defendant to purchase the portion that is occupied by the Defendant for Kshs.80 Million, that the said consent was however not honoured by the Defendant, that a subsequent agreement was entered on 22nd December, 2011 between the managing directors of the Plaintiff and the Defendant but the Defendant failed to honour it. That on 16TH February, 2012, the Defendant commenced subdivision of the suit property whereby the Plaintiff obtained restraining orders in the said ELC 652 of 2010, that the Plaintiff has now learnt that the Defendant has sold or is in the process of disposing its assets to a foreign company called PUMA Energy.

5. In its Further Affidavit, the Plaintiff denied that it had concealed any facts or information, that the Defendant having acknowledged the Plaintiff as its landlord in its letter of 31st August, 2010 it is estopped from claiming otherwise, that the Defendant's Licencee Edwards Industrial and Trading Enterprises had paid rent to the Plaintiff but the Defendant evicted them from the premises, that the Defendant has not paid rent for 2 years and has no intention of paying rent for the premises, that the Plaintiff stands to suffer loss as the Defendant was now selling its assets to PUMA. Mr. Kibunja for the Plaintiff addressed the court at length reiterating the contents of the affidavits in support. He referred the court to newspaper cuttings which showed that the Industrial Court and the Civil Division of this Court had issued orders barring the sale of the Defendant's business to Puma Energy Limited pending certain disputes pending before those courts. Mr. Kibunja therefore urged the Court to allow the application.

6. In opposition, the Defendant filed a Preliminary Objection and a Replying Affidavits of David Ohana and Anthony Thuo Mathi. The Defendant contended that the court did not have jurisdiction to hear and grant the application ex-parte, that the ex-parte order was a nullity having been given for more than 14 days and for having been final in nature, that the suit was an abuse of court process for concealing material facts and for there being another order of injunction in HCCC No. ELC. 652 of 2010. That the suit property herein formed the subject matter in ELC No. 652 of 2010 wherein the injunction application is due to be heard on 9th October, 2010.

7. On the order for attachment before judgment, the Defendant contended that it is a public Company whose shares are traded at the Nairobi Stock Exchange and that its affairs are regulated by the Capital Markets Authority, that the said Authority ensures disclosures in the affairs of such companies for the benefit of its shareholders and interested investors, that the Defendant had in compliance therewith published information relating to the intended sale of shares held by the majority shareholders to Puma Energy Limited, that the said sale will not lead to the sale of the assets of the Defendant to Puma Energy, that there was no transfer of business of the Defendant, that if the Plaintiff's allegations were true the Defendant will be in breach of the law relating to the protection of the minority shareholders. That as regards the financial position of the Defendant, the Defendant had a net working capital of Kshs. 8.6 billion, that there was no evidence to show that the Defendant would be unable to satisfy the judgment amount. Mr. Oyatsi learned counsel for the Defendant submitted that the injunction prayed in the Plaint was interim thereby negating the application in the Motion and that the permanent injunction sought in the Plaint did not have particulars. He referred to the case of **Muriithi vs. The AG (1986) KLR 772** on

the proposition that final orders cannot be made without a hearing. He urged the court to dismiss the application.

8. I have carefully considered the Affidavits in support, submissions of counsel and the authorities cited. There being an injunction order sought, the principles applicable are well known. As set out in the **Giella vs. Cassman Brown case**, the Plaintiff must establish a prima facie case with a probability of success, that damages may not be an adequate remedy and that if the court is in doubt, it will decide the matter on a balance of convenience. Prima facie case was defined in the Court of Appeal case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 137** as a case in which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right of the Plaintiff which has been infringed by the Defendant as to call for an explanation or rebuttal from the latter. Is there any right of the Plaintiff that has been infringed by the Defendant?

9. The Plaintiff set out extensively in the Affidavits in support how the Defendant was a tenant of Posta Investment Co-operative Society Limited, the previous registered owner of the suit property, how the said owner had given the Defendant the first option to purchase the suit property but the Defendant failed to exercise that option, how the Plaintiff therefore purchased the suit property for a whooping sum of Kshs.200,000,000/-. The Plaintiff also established through a Certificate of Official Search that it was now the registered proprietor of the suit property and had leased out the various parts of the suit property to tenants including parties/entities that were previously Licencees of the Defendant. It was also established that in August, 2010, the Defendant had recognized the Plaintiff as its new landlord and had paid to the Plaintiff a sum of Kshs. 132,250/- as rent for the month of September, 2010. The cheque for the said amount was delivered to the Plaintiff vide a letter dated 6th September, 2010 signed by the Defendant's General Manager, Mr. D. S. Ohana. The Plaintiff also produced a letter written by the said Mr. Ohana dated 31st August, 2010 wherein he partly stated:-

"RE: LEASE OVER LR. NO. 1/933 – KILIMANI

KOBIL – YAYA SERVICE STATION

The above matter refers.

We have been informed by the Lawyers of the previous Lessors that the Property has been transferred to you.

……
……

We note that the transfer was effected on 26th July, 2010 and hence the effective change and transfer of the Lessors/Lessee's obligations.

In view of the above we would wish to have a meeting with you at your own convenience for purposes of a formal introduction as new landlords. The undersigned will be glad to fix an appointment with you at your convenient time and place soon you receive this letter.

Meanwhile we shall appreciate the details on how to make the rent payment which is paid every month in advance. .. . ." (Emphasis supplied)

10. That letter was addressed to the Plaintiff. Shortly after that letter the Defendant sent the Plaintiff the aforesaid cheque of Kshs. 132,250/- for September, 2010 rent. However, to-date the Defendant has not paid any further rent and has frustrated the Plaintiff and continues to operate from the petrol service station free of charge. In February, 2012 the Plaintiff discovered that the Defendant was in the process of subdividing the suit property without the knowledge and/or consent of the Plaintiff, that the consents recorded in ELC No. 652 of 2010 and the subsequent agreements for sale of some parts of the suit property had lapsed by effluxion of time. All these matters were not denied by Mr. David Ohana, the General Manager of the Defendant who swore one of the Replying Affidavits in opposition to the

application. That being the case, those averments in the Affidavits of Thomas Mwaura remain uncontroverted and they are therefore prima facie true. I have also seen the Certificate of Official search for the suit property which confirms that the Plaintiff is the registered proprietor thereof.

11. What is the Defendants answer to all these? As set above, the Defendant raised preliminary objections that the court had no jurisdiction to give ex-parte orders that were in breach of Order 40 Rule 4(2), that the orders were final in nature and that similar orders had been made by Hon Kimondo J in ELC No. 652 of 2010 and that the Plaintiff was guilty of material non disclosure. On material non-disclosure, I think this point was not well taken. This is because in paragraphs 30 and 40 of the Affidavit in support, Thomas Kariuki did disclose the existence of ELC No. 652 of 2010 and the Orders of Hon. Kimondo J made on 17th May, 2012. He exhibited a copy of the Plaint in that suit as well as the said order of 17th May, 2012. The Plaintiff is therefore absolved from that accusation.

12. As regards the jurisdiction of this court to hear the motion, I see nothing in Order 40 Rule 4(2) that bars this court from hearing the motion. I have seen the ruling of Hon. Mutava J made on 10th August, 2012. The court did give reasons why it certified the matter as urgent and why the court was inclined to grant the orders it gave ex-parte. I see nothing so materially irregular that can affect the jurisdiction of this court from entertaining the substantive application at the inter partes stage. However, I agree with Mr. Oyatsi that an ex-parte order under Order 40 of the Civil Procedure Rules can only be given once and for a period of 14 Days. I also agree that orders should not be given in the nature of finality before the hearing. Indeed the case of **Muriithi vs. AG** relied on by My. Oyatsi is clear authority on this issue. However, the issue that arise is whether the two missteps, i.e. on the length of the order made on 10/8/12 and the finality of the interim orders takes away the jurisdiction of this court from entertaining this application. To my mind it does not for two reasons. Firstly, the Court that heard the matter ex parte did give a return date for the inter partes hearing, and secondly, what the Defendant should have done was to apply and vacate those orders. Now that the Defendant is before court and has been heard on the application, my view is that the court has the jurisdiction to and can deal with the merits of the said application. The irregularities alluded to by the Defendant, if any has in my view been cured by the inter-partes hearing of the application.

13. The Defendant's other contention is that there is another suit pending before the Environment and Land Division of this court being ELC No. 652 of 2010 and that therein the Plaintiff had obtained a similar injunction application. I have seen the Plaint in the said ELC No. 652 of 2010 ("TK11"). That is a suit filed by the Defendant on 13th June, 2011 seeking a declaration that the sale of the suit property to the Plaintiff herein by the said Posta Investments was fraudulent and that the Defendant was not given the first priority to purchase the suit property in terms of the Lease between it and the said Posta Investments. While that suit does not affect this suit since the present suit is purely commercial for nonpayment of rent, to my mind that suit is a very good example how the legal process can be used to frustrate commerce in this country. My view is that that suit cannot be a satisfactory answer to the Plaintiffs present application for the following reasons:-

a) the Defendant seems to have been given the first option to purchase the suit property in December, 2009 (see "TK4"),

b)the Defendant had acknowledged the Plaintiff as having purchased the suit property from the said Posta Investments and that the Plaintiff was its landlord in August, 2010 (see "TK2" in the Further Affidavit),

c) the Defendant had paid the Plaintiff Kshs.132,250/- as rent for September, 2010 thereby acknowledging the Plaintiff as its Land lord. (See "TK8")

d)the Defendant was given the option to buy the property from the Plaintiff at Kshs. 210million, which was the purchase price paid by the Plaintiff to the said Posta Investments, stamp duty and other expenses. This offer was made to the Defendant on 4th October, 2010 immediately after the filing of ELC No. 652 of 2010 but the Defendant declined that offer for no sound reason (see "TK12" and "TK13"),

e) the Defendant failed to comply with the consent order recorded before Hon. Warsame J on 30th September, 2011 which would have seen the Defendant purchase the portion of the suit property it is occupying for Kshs. 80million. The consent order had time lines which the Defendant failed to adhere to. In my view therefore, that consent lapsed may now be as dead as a dodo.

14. All the foregoing facts were sworn to by the Plaintiff and none was denied by the Defendant in these proceedings. With such admissions by the Defendant of the Plaintiff's ownership of the suit property in July, 2010, the payment of rent in September, 2010 acknowledging the Plaintiff as the new landlord and refusal to purchase the suit property and the portion agreed to, of what use and benefit is the suit in ELC No. 652 of 2010. At best ELC No.652 of 2010 in my view may be non starter. How can a party confirm in writing a fact (i.e. the Plaintiff being the owner of the suit property and a landlord) and thereafter seek to challenge that fact in a court of law? Won't estoppel apply and non-suit such a party? Can the Defendant properly renege on and/or rescile from the position it had taken in its letters of 31st august, and 6th September, 2010? In my view therefore, that suit may be a mere supplasage.

15. Further, when one looks at the foregoing uncontroverted facts, one will question the Defendant's intention in filing that suit. Is the Defendant desirous of the suit property or some other undisclosed intention? Why did it refuse to purchase the suit property when it was offered to it by the Plaintiff in October, 2011? My reading of it is that ELC No.652 of 2010 is being used by the Defendant as a red herring to keep the Plaintiff away from enjoying the fruits of its investment. Whilst the Defendant continue occupying and using the portion of the suit property for free. Why then is it not paying rent which it had started paying in September, 2010? It is not denied that the Plaintiff did part with Kshs. 200million to acquire the suit property, that the Plaintiff continue to suffer loss of opportunity so long as it is not making use of the space occupied by the Defendant. Despite all the foregoing, can a court of equity or even law permit a scenario where the Defendant is to continue occupying the suit property for free? I do not think so. The law and so called principles of law must operate within the social and economic dynamics of society. Where a principle of law if applied will lead to an injustice it stops being of any use to society. No court in my view should accept to be used by a party to further what is clearly a fraud or a useless litigation only meant to vex the opposing parties.

16. I think I have said enough to show that the existence of ELC No.652 of 2010, is not a bar to the application before me. In **Kwanza Estates Ltd vs. National Bank of Kenya HCCC No. 547 of 2011** Hon Odunga J held that:-

"However, it is now well established that the considerations in an application for interlocutory injunction are not limited to the ones enumerated in Giella –vs- Cassman Brown case. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the Respondent whether or not he has acted with impunity. The court is also by Section 1A (2) of the Civil Procedure Act enjoined to give effect to the overriding objective as provided under Section 1A(1) of the said Act in exercising of the powers conferred upon it under the Civil Procedure Act or the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to Court on equal footings". (Emphasis mine)

In my view, not only has the Plaintiff established a strong prima facie case with a probability of success, but the conduct of the Defendant militate towards the granting of the orders sought. In view of this, I need not consider the other limbs of **Giella vs. Cassman Brown case**.

17. As regards the issue of attachment before judgment, I am aware that such orders can only be made on the basis of the grounds set out in Rule 1 of Order 39. Such orders are not dependent on the Plaintiff establishing a strong and indefensible case but on proof of the grounds under that rule. See **Jiwaji –vs- Saheb & Another (1990) KLR 732**. The Plaintiff has alleged that the Defendant is about to sell its assets or business to a company known as Puma Energy Ltd, it produced newspaper cuttings as the source and basis of its fears. Indeed two cases were referred to in those newspaper cuttings wherein two different courts had restrained the Defendant from proceeding with the intended sale pending further orders. The Defendant on its part contended that what was being sold was the shares of the majority shareholder, that

the sale would not lead to the change in the legal status of the Defendant or its assets and that the sale was being undertaken under the direction and supervision of the Capital Markets Authority with a view to safeguard the interests of the minority shareholders and other investors. My take of it is that the statements by Mr. Ohana are bare without any accompanying evidence. It must be remembered that the transaction of some 'sale' is being undertaken by the Defendant, it is the Defendant who has all the evidence regarding the nature of the transaction being undertaken. **Why was the sale agreement or terms or memorandum** not produced to help the court ascertain the nature of the transaction? Without hard evidence how will the court believe Mr. Ohana **who in August – September, 2010 had acknowledged the Plaintiff as owner of the suit property and the landlord of the Defendant, then in ELC No. 652 of 2010 he turned around and swore affidavits that were completely the opposite of what he had stated and done in the said August – September, 2010**? My take of it is that, when a party is in possession of evidence which he fails to produce the presumption is that if he had produced that evidence the same would have been against him. The Defendant withheld from court the sale agreement between itself and the said Puma Energy.

18. As regards the contention that the transaction of the alleged sale of shares is being undertaken under the supervision of the Capital Market Authority, whilst no evidence of the same was produced, my view is that the Plaintiff is neither a minority shareholder nor investor of the Defendant to be protected by the Capital Markets Authority. The Plaintiff is a creditor of the Defendant!

19. That the Defendant has a sound financial and asset base is not in question. However, if the business is sold or the assets are, that position will not be of any benefit to the Plaintiff. In a similar case where it was not clear as to the sale of shares or assets of Chevron Kenya Ltd, the High Court ordered security of Kshs.45 million. On appeal the Court of Appeal in **Chevron Kenya Limited (Caltex) and Kanyotta Holdings Limited** held that:

"On the other hand the uncertain nature of the transaction admittedly in the process of conclusion by the Applicants gives no comfort to the Respondents. Whether Chevron will disappear from the scene after conclusion of the transaction and whether Total will definitely take on the responsibility of discharging any liability that the Applicants may owe to the Respondents remains moot. In those circumstances, the order that commends itself to us is to grant a conditional stay of execution. Accordingly, as a condition for grant of prayer 3 of the application, the Applicants shall provide a bank guarantee from a reputable bank in Kenya or an Insurance Bond from a reputable insurance company in the sum of Kshs.24million. The said bank guarantee or insurance bond shall be provided within 21 days of this order and in default, the application shall stand dismissed with costs without further recourse to court. The costs of the application shall otherwise be in the main appeal."

On my part, due to the uncertain nature of the transaction admittedly in the process of conclusion, the Plaintiff is entitled to some security.

20. In view of the foregoing, I am satisfied that the Plaintiff has established that it is entitled to the orders of injunction and security prayed for. I assess the amount of security to be offered at Kshs. 3,174,000/- being an amount equivalent to rent for 24 months. Since that rent continues to accrue monthly and applying Sections 1A and 1B and keep the parties on equal footing, the Defendant shall continue to deposit in court each month commencing 1st November, 2012 the monthly rent of Kshs.132,250/- until the conclusion of this suit. The said amount of Kshs.3,174,000/- is to be deposited in court within seven (7) days of the date of this ruling. Accordingly, I grant prayer numbers 1 and 4 of the Amended Notice of Motion dated 9th August, 2012. The injunction order is to remain in force until the suit is heard and determined.

21. As regards prayer Numbers 2, 3, 5, and 6, I decline them because they cannot be granted at an interlocutory stage but at the trial. However, I award the costs of the application to the Plaintiff.

DATED and DELIVERED at Nairobi this 4th day of October, 2012.

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A. MABEYA

JUDGE