



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Suit 140 of 1996

TIMOTHY NJOGU KANGARU.....PLAINTIFF

VERSUS

KENYA SHELL LIMITED.....DEFENDANT

RULING

This court is about to consider the application by the (defendant/applicant) dated 4.2.98. It was brought under 06 rr. 13 (1) (b) (c) (d) 16, 039 r4 CPR and s.3A CPA. The main orders sought are:

(1) That the plaintiff's suit be struck out with costs to the Defendant.(2) That the orders made herein on 27.9.96 and 25.10.96 be discharged.

The application, it was further averred, is based on the grounds:

- (a) That there is no factual or legal basis for this suit.
- (b) That the suit is therefore an abuse of the due process of court.
- (c) That based on (a) above, the orders made in the suit are unnecessary.²

It was added that this application was based on an affidavit of one Caroline Ngonyo Gachui and other grounds that would feature at the hearing of the application. The said affidavit shall be alluded to as and when it is necessary otherwise suffice it to say that other pleadings on record will also be referred to when necessary.

May the provisions of the law under which this application is brought excepting the well-worn S3A CPA be set out. Also to be set out are the orders of this court dated 27/9/96 and 25/10/96 before delving in the arguments for and against the application. Particular attention goes to: 06v.13 (l) (b) (c) and (d)

"R13 (l) At any state of the proceedings the court may order to be struck out or amended any pleading on the ground that -

- (a)
- (b) it is scandalous, frivolous or vexatious or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court.

and may order the suit to be stayed, or dismissed or judgment to be entered accordingly, as the case may be."

O39 r 4 is the provision of the law where under the defendant/applicant sought to have the orders of this court made on 27/9/96 and 25/10/96 discharged. It reads.

"O39 r 4: Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such orders".

And the orders of this court sought to be set aside are these:

The orders given on 27.9.96 and dated 30.9.97:-

- (1) By consent parties to maintain status quo.
- (2) Costs in the cause.

On 25.10.96 no orders were made by the court but the injunction application dated 24.5.96 upon which the consent orders of 27.9.96 were made, came up for hearing on that 25.10.96. The same was by consent moved to 29.11.96 and on that date the parties stood over the hearing of the application dated 25.5.96 generally with agreement that status quo as at 27.9.96 remains. In essence the injunction orders which the defendant/applicant desires to discharge are the consent orders which granted a status quo to be maintained in the issue of the plaintiff operating a petrol station at Plot No.27 Mukurweini market Nyeri, which he had claimed the defendant threatened to evict him from.

It may be of some enlightenment for an overview of the pleadings in this file to be briefly given.

On or about 24.5.96 the plaintiff sued the defendant company stating that since 1986 he had been operating a petrol station under an operator's licence granted by the defendant on the aforesaid plot at Mukurweini. Under it the plaintiff bought petroleum products from the defendant which he sold, and as it can be expected, he made profits and bought yet more products from the defendant which he sold so on and so forth. It was further averred that as at the time the suit was filed the defendant was claiming about shs. 0.7m from the plaintiff. The plaintiff denied owing such a sum but added that that was the basis on which the defendant was threatening to evict the plaintiff from plot 27. So he ran to court, not only to file the suit but to get a temporary order first, for the court later to permanently restrain the defendant from evicting him from plot 27 and that was the main prayer in the suit - a permanent injunction against the defendant.

For the interim orders until the suit is finally determined or otherwise, a temporary injunction was filed on the same 24.5.96 under O 39 rr 1, 2. It was supported by the plaintiff's sworn affidavit of even date which repeated the averments in the plaint about the operator's licence on plot 27 and that the defendant was threatening to evict him from that plot allegedly for owing it about shs. 0.7m which he did not. If evicted, the plaintiff desired to show, he could suffer irreparable loss and damage.

On 20.6.96 the defendant filed grounds of opposition to the injunction application along with an affidavit in reply by one Eliphias Miriti, the area representative of the defendant Co. Miriti deponed inter alia to the fact that:

"3..... I have never given any notice to evict the plaintiff/applicant from the said plot No.27 Mukurweini or even hinted to him that there was anybody in the defendant's company who was going to initiate any eviction process against him".

As said earlier with the injunction application and the response by the Defendant company, the two litigants by consent recorded orders aforesaid to maintain the status quo apparently until this suit is

determined finally.

Then on 6.2.98 a defence was filed in which the defendant denied the plaintiff's claims. It had never threatened to evict the plaintiff from plot 27 Mukurweini. That the two were governed by an agreement contained in an operator's licence they had, which licence also provided for the manner of termination of their business relationship. That accordingly, the plaintiff's suit was frivolous, vexatious and an abuse of the process of court. That suit was termed wholly baseless and worth only to be struck out.

Now we come to the application under review which Mr. Kairu argued and Mr. J.S. Mwangi opposed.

Mr. Kairu pointed out that the orders sought namely under 06 r 13 were drastic. They could only issue in the clearest and plainest of cases which in this case fell under r. 13(1) (b) (c) and (d). He went over the plaint (see above) and what it sought. He moved to the affidavit in support of the injunction application dated 24.5.96 wherein the plaintiff had plainly claimed that he had been threatened with eviction. Mr. Kairu referred to the operator's licence (annexture CNG-1 to the current application). Clauses 9 and 17 read together stated that to terminate that licence a notice in writing was required and yet such had not issued from the defendant he drew the courts attention to the denial of threat to evict plaintiff as contained in the defence, the affidavit in reply to the injunction application and indeed in the affidavit in support of this application (para. 6 of annexture CNG 1). Mr. Kairu posed the question:

Where is this threat complained of?

That without exhibiting the notice to terminate so that this court is called upon to inquire whether or not the operator's licence was about to be breached, the plaintiff's suit was unnecessary and the court could not have a basis to issue a permanent injunction. Accordingly he desired the suit to be struck out. Mr. Mwangi on his part rose to reiterate that Miriti referred to earlier had on several occasions threatened the plaintiff with eviction from plot 27 Mukurweini. He would have wished to cross examine this Miriti and he hoped he could do that at the trial of this suit. Yet he did not move to cross examine him now. Mr. Mwangi alluded to matters not clearly featuring in the pleadings or at all to be determined by this court at this time that his client's operator's licence had not been renewed after 30.4.97 and that the defendant was no longer supplying him with petroleum products. This implied that it wanted the plaintiff to vacate the plot No.27.

The court then adjourned to consider its decision. During that deliberation it took recouse to carefully digest the points of law enunciated in the case of D.T. DOBIE & CO. (KENYA) LTD.

VS

JOSEPH MUCHINA & ANOTHER

CIVIL APPEAL NO. 37 OF 1978 NAIROBI

That case concerned a certain mercedes benz car which went between the parties hands ending with a seizure whereupon a suit was filed claiming it. The question of striking out under 06 r 13 arose and went all the way to appeal. The learned Judges Madan, Miller and Potter considered anxiously the status and impact of granting orders under those provisions of the law. The appeal was dismissed but the central point laid down and repeated from many past cases was that a court should give orders to strike out a pleading under 06r 13 in plain and clear cases only. That that discretion should be exercised with utmost care otherwise the best course to adopt is to let a case be disposed of by way of inquiry on evidence at a trial. A very noble stance indeed.

When that test is applied to this case, it does not pass it. The case filed by the plaintiff is here considered scandalous, frivolous and vexatious. It may as well be otherwise an abuse of the court process. Without wishing to get into what each phrase or adjective in 06r 13 (1) (b) and (d) is, the plaintiff is not justified to bring this suit. He prayed for a permanent injunction against the defendant on the ground that the defendant was threatening to evict him from plot 17 Mukurweini. He did not tender evidence of such a

threat. He merely claimed and Miriti denied that the latter had regularly threatened to evict the defendant. Unless the plaintiff demonstrates the threats beyond were allegations which allegations mere denied then he intents this court to act in vain and in a vacuum. But he could avail such threat of eviction by exhibiting for instance a written notice or any other manner by which the binding operator's licence was being or about to be breached. There was no such demonstration.

The operator's licence (ann. CNG 1) signed on 20.7.95 between the plaintiff and the defendant said as part:

"CLAUSE 9 TERMINATION

This licence may be terminated as follows:-

(a) By the Company on –

(i) Giving the license (sic) not less than thirty (30) days notice if the Company is not satisfied with the licensee's operation of the station during the probation period.

(ii).....

(b).....

(c).....

(d)..... Etc.

On termination by either side a notice needs issue. Indeed in cl. 9 (d) it speaks of termination by service of a letter. A letter is normally written in these parts of the word. Similarly the notice under this clause is said to be in writing.

"CLAUSE 17 NOTICES

Any notice under this licence shall be in writing..... "

So has the plaintiff shown this court a notice or letter to terminate which he considers a threat to evict him? None at all. Then what is the court left to make of his cause based on a non-existent threat to evict? Nothing at all. A threat to evict is denied and none is presented to court by the plaintiff. In such circumstances is one not left to conclude that the plaintiff filed a frivolous suit to vex or scandalize the defendant or otherwise constitute an abuse to the due process of the court? Certainly. Or why was the suit brought?

To constitute an abuse of the process of court, the plaintiff all the time knew that he had nothing to demonstrate that he was being threatened with eviction. Yet he filed a temporary injunction dated 24.5.96 and got orders which in essence told the defendant that it should not threaten to evict the plaintiff. But there was no such a threat. Such orders cannot be maintained, though they were recorded by consent.

In the result the suit is struck out as prayed and the orders of 27.9.96 and 29.11.96 are discharged. The defendant gets the costs in the suit and this application. As and when the plaintiff feels or demonstrates that their operator's licence is about to or is being breached by the defendant or its agents etc., only then will he move to court for relief That is not the position now and what has been said of it above suffices.

Orders:

(i) The suit herein is struck out with costs.

(ii) This application is allowed with costs.

Orders accordingly. Delivered on 20.5.98.

J.W. MWERA JUDGE