REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 29 OF 2018

NANCY MWENDE KANG'ATA.....PLAINTIFF/RESPONDENT

VERSUS

KENOL KOBIL PLC.....DEFENDANT/APPLICANT

RULING

1. In the Notice of Motion dated 24th July, 2018, the Defendant/Applicant is seeking for the following orders:

> ***a. That pending the hearing and determination of this suit an injunction do issue restraining the Plaintiff whether by herself, servants, agents, contractors or assigns from leasing, operating, rebranding or otherwise whatsoever interfering howsoever with the station erected on the properties known as Machakos/Matuu/4816, 4817 and 4818 ("the Properties").***
>
> ***b. That the Chief Magistrate's Court Civil Case No. 22 of 2018 be transferred to this Honourable Court and consolidated with this suit for hearing and determination by this Honourable Court.***
>
> ***c. That the costs of this Application be awarded to the Applicant.***

2. The Application is supported by the Affidavit of the Defendant's General Manager - Kenya, who deponed that the Plaintiff/Respondent is the registered owner of land known as Machakos/Matuu/4816, 4817 and 4818 *(the suit Properties)*; that the Plaintiff /Respondent entered into an Agreement dated 17th August, 2017 with the Defendant/Applicant in which she agreed to lease the suit property to the Defendant/Applicant and that upon signing the Agreement, the Defendant/Applicant took possession of the same and commenced branding of the Petrol Station erected on the suit land.

3. The Defendant's/Applicant's Manager deponed that on 15th March, 2018, the Defendant/Applicant offered to the Plaintiff/Respondent dealership of the petrol service station subject to the Plaintiff/Respondent making payments of Kshs. 5,000,000 and that in breach of the Agreements between them, the Plaintiff/Respondent unilaterally purported to opt out of the Lease Agreement and the dealership arrangement and has threatened to remove the Defendant's/Applicant's branding on the suit properties.

4. According to the Defendant/Applicant, there is an imminent risk that the Defendant's investment in the suit properties will be put to waste contrary to the purpose for which it was acquired.

5. The Defendant's/Applicant's General Manager finally deponed that the Defendant/Applicant has filed a Defence and Counter-claim in which it is seeking, inter alia, damages to the tune of Kshs. 35,000,000 and that the Plaintiff has filed another suit in Machakos Chief Magistrate's Court Civil Suit No. 22 of 2018 seeking for an order for the surrender of the Title Deeds by the Defendant.

6. In response, the Plaintiff/Respondent deponed that sometimes in the year 2017, she entered into negotiations with the Defendant/Applicant seeking a license to sell the Defendant's fuel, lubricants and other services; that she offered to the Defendant to lease the suit properties for ten (10) years for the purposes of putting up the subject petrol station and that the Defendant and herself were to execute a Standard Dealers License Agreement and a formal Lease.

7. According to the Plaintiff/Respondent, it was a term of the Agreement that she deposits with the Defendant/Applicant Kshs. 5,000,000; that they signed a Memorandum of Understanding dated 17th August, 2017 detailing their preliminary negotiations and that the Memorandum of Understanding had no legal effect.

8. After paying the requisite Kshs. 5,000,000 to the Defendant, the Plaintiff deponed that she was dissatisfied with the contents of the draft Lease and the draft Standard Dealer License Agreement; that although she signed the Lease, the same was not attested by an advocate and that she sought for the refund of the money she had paid and a surrender of her title documents.

9. It is the Plaintiff's case that she declined to execute the Lease Agreement because it had conflicting, irrational, unconscionable and new clauses which they had neither agreed upon during negotiations nor when signing the Memorandum of Understanding, which included: The Agreement indicating that the underground tanks were to belong to the Defendant; prohibiting the Plaintiff/Respondent from carrying out other business in the premises and an undertaking for her to advertise the company's products only, amongst others.

10. According to the Plaintiff, the Defendant has not taken over the Petrol Station, neither has it invested any money in the station save for branding; that the signing of the Memorandum of Understanding and the purported Agreements was on a without prejudice basis and that her signature in the draft Lease having not been attested and or witnessed, the Lease Agreement is null and void.

11. The Plaintiff/Respondent finally deponed that the Defendant/Applicant has not demonstrated how it will suffer irreparable damage its claim being a liquidated sum and that the Application should be dismissed with costs.

12. In his Further Affidavit, the Defendant's/Applicant's General Manager- Kenya, deponed that the Plaintiff entered into an Agreement to Lease with the Plaintiff; that the business relationship between the parties was created and was not dependant on signing of the Standard Dealer Licence Agreement; that the branding of the Petrol Station was based on the duly signed Memorandum of Understanding and that the lack of attestation of the Lease by the Respondent's advocate does not render the Lease null and void.

13. The Defendant's advocate submitted that the parties herein entered into an Agreement dated 17th August, 2017 for a period of ten (10) years commencing on 1st October, 2017; that the Memorandum of Understanding allowed the Applicant to take over the station, commence branding and begin operations and that subsequently, the Plaintiff/Respondent paid the requisite sum of Kshs. 5,000,000 to the Defendant/Applicant.

14. Other than the Memorandum of Understanding, the Defendant's counsel submitted that the Plaintiff/Respondent signed the Lease Agreement and deposited with the Defendant the Title Deeds for the suit properties; that the Plaintiff unilaterally opted out of the Lease Agreement and that the parties had valid Agreements which the Respondent could not arbitrarily and unilaterally terminate without involving the Defendant.

15. The Defendant's counsel submitted that damages would not be adequate to compensate the harm that would be caused to the Applicant by the Plaintiff's/Respondent's arbitrary and unilateral acts. Counsel relied on several authorities which I have considered.

16. The Plaintiff's/Respondent's advocate submitted that the Memorandum of Understanding dated 17th August, 2018 provided that the Applicant's dealer for the service station was subject to signing the Applicant's Standard Dealer License Agreement; that the terms of the Memorandum of Understanding were not intended to have any binding effect of their own and that the Memorandum of Understanding did not create any binding contractual commitment.

17. Counsel submitted that although the Agreement for Lease was executed, a formal Lease was never executed; that the same cannot be a basis for a suit of specific performance and that the Lease Agreement having not been executed in the presence of a witness, it offends the provision of Section 3(3) of the Contract Act.

18. The Plaintiff's counsel submitted that in any event, the Applicant has failed to establish that he is likely to suffer irreparable loss which cannot be compensated by way of damages; that the Defendant has quantified the damages in his Counter-claim and that the Application should be dismissed with costs. Counsel relied on numerous authorities which I have considered.

Analysis and findings:

19. This suit was commenced by way of a *"Miscellaneous Civil Application."* The Miscellaneous Civil Application is the Notice of Motion dated 24th July, 2018 which is the subject of this Ruling. Although this *"suit"* was filed by Kenol Kobil PLC, the said party is indicated to be the *"Defendant/Applicant."*

20. In the said Miscellaneous Civil application, the *"Defendant/Applicant"* is seeking for orders of injunction restraining the Plaintiff/Respondent from leasing, operating, rebranding or otherwise whatsoever interfering howsoever with the station erected or parcel of land known as Machakos/Matuu/4816, 4817 and 4818 *"pending the hearing of this suit."*

21. Now, there is no suit before this court, the basis of which the injunctive order is based. Indeed, as I have stated above, the suit was commenced by the Notice of Motion which is the subject of this Ruling, meaning that nothing will be left for determination after the Ruling is delivered, whether in favour of the Applicant or the Respondent. The order as framed by the Applicant cannot therefore issue until there is a suit that is pending before me, either by way of a Plaint, a Petition, an Originating Summons or a Counter-claim.

22. From the wording of the Applicant's fourth prayer, it would appear that there is a pending suit in the Chief Magistrate's Court Civil Case No. 22 of 2018 in which the Applicant is the Defendant. The said prayer is worded as follows:

> ***"4. That the Chief Magistrate's Court Civil Case No. 22 of 2018 be transferred to this Honourable Court and consolidated with this suit for hearing and determination by this Honourable Court."***

23. As I have stated above, there is no *"suit"* before this court. That being the case, the Chief Magistrate's Court Civil Case No. 22 of 2018, even if it is transferred to this court, cannot be consolidated with that that does not exist. Was the Applicant's intention to have the lower court matter transferred to this court, and then argue the Application for injunction as an Application in that suit? If that was so, then the prayer for the transfer of the lower court should have come first, and then the prayer for injunction would have followed. The issue of consolidating two *"suits"* does not exist, because there is none in this court.

24. That being the case, and in light of the provision of Article 159 (2) (d) of the Constitution, which requires justice to be administered without undue regard to procedural technicalities, I shall allow the transfer of the Chief Magistrate's Court Civil Case No. 22 of 2018 to this court, and deal with the prayer for injunction in the current Application as though it is an Application in that suit.

25. In the Plaint that was filed in Machakos CMCC No. 22 of 2018, the Plaintiff/Respondent averred that in the year 2017, she entered into negotiations with the Defendant, whereby the Defendant/Applicant was to grant her a licence to sell its fuel and other products.

26. It is the Plaintiff's/Respondent's case that they signed a Memorandum of Understanding (MOU) detailing their preliminary negotiations to enter into a formal business relationship. During the signing of the Memorandum of Understanding, the Plaintiff gave to the Defendant/Applicant the four Title Deeds for Machakos/Matuu/4816, 4817 and 4817 and also paid a sum of Kshs. 5,000,000, half of which was to be the initial purchase price of the Defendant's/Applicant's products and the remaining half was to be held as security deposit for the payment of any amount which would be owing to the Defendant/Applicant.

27. It is the Plaintiff's/Respondent's deposition that when the Lease and the draft Standard Dealer License Agreement was forwarded to her, she was dissatisfied with the terms therein. The Plaintiff/Respondent is now seeking in the Plaint for the surrender of the titles that she handed to the Defendant and for a refund of Kshs. 5,000,000 that she paid to the Defendant.

28. The Defendant/Applicant filed a Defence and Counter-claim. In the said Defence, the Defendant has averred that there is a valid and enforceable Lease between the parties; that the decision by the Plaintiff to unilaterally opt out of the Agreement is illegal and unlawful and that the Defendant is entitled to damages to the tune of Kshs. 35,000,000.

29. In the Counter-claim, the Defendant has not prayed for the performance of the Lease Agreement or the Memorandum of Appearance. Instead, the Defendant has only prayed for Judgment of Kshs. 35,000,000 and interest on the above amount. Indeed, the Defendant/Applicant has not even prayed for an order of permanent injunction to issue restraining the Plaintiff from re-entering, leasing, operating, rebranding or interfering with the Petrol Station erected on the suit properties.

30. The decision in the case of ***Giella vs. Cassman Brown (1973) EA 358*** has settled the principles that an Applicant must prove to be entitled to an injunctive order, which are: Has the Applicant established a prima facie case with probability of success? Will the Applicant suffer irreparable damages if the injunction is not granted? And where does the balance of convenience lie?

31. It is not in dispute that the Plaintiff/Respondent is the registered proprietor of parcels number Machakos/Matuu/4816, 4817 and 4818. It is also not in dispute that on 17th August, 2017, the Plaintiff/Respondent entered into a Memorandum of Understanding with the Defendant/Applicant. According to Clause 8 of the Memorandum of Understanding, the Plaintiff/Respondent allowed the Defendant/Applicant to take over the station on 1st October, 2017 and commenced branding the Petrol Station, testing of the equipment and thereafter commenced operations.

32. Clause 4 of the Memorandum of Understating provided that the Plaintiff was to be their dealer subject to signing their Standard Dealer License Agreement. This Standard Dealer License was never signed by the Plaintiff despite a draft having been sent to her. The Plaintiff however signed the Lease over parcel numbers 4816, 4817 and 4818 although her signature was never attested.

33. The law governing the passing of interest in land, whether by way of a Lease or Transfer, is governed by Section 3(3) of the Contract Act and Section 47 of the Registered Land Act *(repealed).*

34. Section 3(3) (a) and (b) of the Law of Contract Act provides as follows:

> ***"3. No suit shall be brought upon a contract for the disposition of an interest in land unless—***
>
> ***(a) the contract upon which the suit is founded—***
>
> ***(i) is in writing;***
>
> ***(ii) is signed by all the parties thereto; and***
>
> ***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party."***

35. Section 47 of the Registered Land Act *(repealed)* provides as follows:

> ***"A lease for a specified period exceeding two years, or for the life of the lessor or of the lessee, or a lease which contains an option whereby the lessee may require the lessor to grant him a further term or terms which, together with the original term, exceed two years, shall be in the prescribed form, and shall be completed by –***
>
> ***(a) opening a register in respect of the lease in the name of the lessee; and***
>
> ***(b) filing the lease; and***
>
> ***(c) noting the lease in the encumbrances section of the register of the lessor's land or lease."***

36. The mandatory requirement for registering a Lease which is for more than two years was addressed by the Court of Appeal in the case of ***Chon Jeuk Suk Kim & Another vs. E.J. Austin & 2 others (2013) eKLR.*** In the said case the court held as follows:

> ***"However, the learned Judge erred in law by applying herein the equity of Walsh v. Lonsdale (supra) and in treating an Agreement for a lease is as good as a lease. As the President said in Souza Gigueiredo (supra) an unregistered to lease where there is statutory requirement for registration is not capable of conferring legal or equitable estate in the land- see also Said Ben Sultan Bin Mohamed v. Jokha Binti Sultan Bin Sahim EL Muisking (1955) 1 EACA 273. In Rogan-Kamper v. Lord Grosvenor (No. 2) (1976-80) 1 KLR 558, the court declined to apply the equitable principle holding in essence that the operation of equitable principle was excluded by the statutory requirement for registration. However, it is worth repeating that covenants and stipulations in such documents are enforceable inter parties."***

37. The *"Lease"* before the court between the Plaintiff/Respondent and the Defendant/Applicant can only amount to an Agreement for a Lease, and not a formal Lease. That Agreement can only be enforceable as between the parties, but cannot create an interest in land. That is the position that was taken by the court in the case of ***Garibi Limited vs. Ogilvy East African Ltd (2014) eKLR*** where the court held as follows:

> ***"With respect to the second issue it is clear from the evidence on record that the said agreement was neither translated into a formal lease nor registered. The consequences of the failure to register a lease whose term is for more than one year where the property is governed by the Transfer of Property Act as is the case in the present case were enumerated by the Court of Appeal (Wambuzi, P, Mustafa JA & Platt, J on 7th July, 1977) in Rogan-Kamper vs. Lord Grosvenor (No. 2) [1977] KLR 123; [1989] KLR 367; [1976-80] 1 KLR 558. In that case the Court recognized that an agreement for a lease is not a lease and therefore cannot be a basis for a suit for specific performance and cannot itself be regarded as a lease. It was further the Court's view that a contract for a lease is different from a lease and each has different incidents attaching to it, and one cannot be substituted for the other."***

38. The *"Lease"* and the Memorandum of Understanding that the Defendant is relying on offends the provisions of Section 3(3) of the Law of Contract Act and Section 47 of the Registered Land Act. The *"Lease"* can only be enforced *inter se* but cannot create an interest in the suit land. That being the case, the Plaintiff has not established a prima facie case with chances of success viz-a-viz the suit land.

39. In any event, the Defendant is not claiming for the suit land, or for specific performance of the *"Lease"* that was signed by the parties. The Defendant is only seeking for damages which it has assessed. Consequently, the issue of the Defendant suffering irreparable injury that cannot be compensated by way of damages does not arise.

40. For those reasons, I find and hold that the Defendant/Applicant is not entitled to an order of injunction. Save for the order transferring Machakos CMCC No. 22 of 2018 to this court, the Application dated 24th July, 2018 is dismissed with costs to the Plaintiff.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE