REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 90 OF 2018

(FORMERLY MOMBASA CASE NO 71 OF 2018)

SULEIMAN ENTERPRISES LIMTED.....PLAINTIFF

VERSUS

KENSALT LIMITED.....1ST DEFENDANT

KEMU SALT PACKERS PRODUCTION LIMITED.....2ND DEFENDANT

HANDSHESWER TRANSPORTERS LIMITED.....3RD DEFENDANT

SHREEJI EXPRESS.....4TH DEFENDANT

RULING

1. Suleiman Enterprises Ltd filed this suit in Mombasa on 4th April 2018 praying for a permanent injunction to issue against the four Defendants restraining them jointly and severally from entering, trespassing onto, harvesting, transporting or carting away salt from, using machinery, equipment or any other facility erected on or within, interfering with and/or in any other manner whatsoever dealing with all those properties belonging to the plaintiff and known as land Reference No. 21918(Grant No. CR 28301) and Land Reference No. 21983 (Grant No. CR 28443) situated North of Malindi Municipality in Tana River County. In addition the Plaintiff sought an injunction restraining the Defendants from transporting and/or carting away salt harvested from the Plaintiff's said properties(the suit properties) and which salt was at the time of filing of the suit stored on all that property known as Land Reference No. 222138 and belonging to Kemu Salt Packers (the 2nd Defendant). The Plaintiff also seeks general damages and mesne profits.

2. The Plaintiff's suit is premised on its claim that it is the registered owner of the aforesaid two parcels of land measuring approximately 819.7 and 1440 hectares respectively. The suit properties are adjacent and neighbours the 2nd Defendant's Land Reference No. 222138 aforesaid.

3. It is the Plaintiff's case that prior to being placed under receivership on 6th September 2016, the 2nd Defendant was actively in the business of salt harvesting, processing and packaging. In this regard, the Plaintiff had given the 2nd Defendant a lease, consent and approval to harvest salt from the suit properties and to use the Plaintiff's plant and machinery sitting thereon for the said purpose in addition to the 2nd Defendant's own machinery.

4. The Plaintiff avers that after being put under receivership, and in particular on or about 1st November 2016, the 2nd Defendant through its named Receiver Managers granted a lease and consent to Messrs Kensalt Ltd (the 1st Defendant), to take over and carry on the salt harvesting business not only on the 2nd Defendant's property but also on the Plaintiff's properties. The salt so harvested is then temporarily stored on the 2nd Defendant's property before being carted away and transported to the 1st Defendant's premises by trucks owned by the 3rd and 4th Defendants.

5. Filed contemporaneously with the suit was a Notice of Motion application dated the same 4th day of April 2018 seeking temporary orders of injunction to restrain the Defendants from dealing with the land in the manner described in the prayers in the Plaint pending the hearing and determination of the suit. On that very day, this file was placed before the Honourable Yano J in Chambers under Certificate of Urgency and the Learned Judge granted orders at ex-parte stage as follows:-

1. ***That the application be and is hereby certified as urgent.***

2. That pending the hearing and determination of this application there be and is hereby issued an order of injunction for 14 days to restrain the Defendants either by themselves, officers, agents, employees, assigns or any person acting for them from carting away salt harvested from the Plaintiff's properties known as LR No. 21918(Grant No. CR 28301) and LR No. 21983(Grant No. CR 28443) and which salt is presently stored on the 2nd Defendant's property known as LR No. 222138.

3. That pending the hearing and determination of the application there be and is hereby issued an order of injunction for 14 days to restrain the Defendants either by themselves, officers, agents, employees, assigns or any person acting under them from entering, trespassing onto, harvesting, transporting or carting away salt from the Plaintiff's properties known as LR NO. 21918(Grant No. CR 38301 and LR No. 21983) (Grant No. CR 28443).

4. That pending the hearing and determination of this application there be and is hereby issued an order of injunction for 14 days to restrain the Defendants either by themselves, officers, agents, employees, assigns or any person acting for them from using the pump station, refinery, crystallizers and machinery equipment or any other facility erected on or within the Plaintiff's said properties and from interfering with and/or in any other manner whatsoever dealing with the Plaintiff's properties known as LR No. 21918(Grant No. CR 28301) and LR No. 21983(Grant No. CR 28443).

5. That the interim injunction is granted on condition that the applicant shall file an undertaking as to damage within three days from the date hereof.

6. That the applications be fixed for hearing on priority basis and in any event within the next 14 days from the date hereof.

6. According to the Plaintiff the said Orders together with other pleadings were extracted and served upon the Defendants on 6th April 2018 but they did not heed the same. As a result, the Plaintiff filed its 2nd Application dated 10th April 2018 seeking the following orders:-

1. That Mansukh Kasangra and Peri Mansukh, the 1st Defendant's Directors and Shareholder, be detained in prison for six months for disobeying the Court Order made on 4th April 2018.

2. That the costs of this application and the main suit be borne by the Plaintiff.

7. When the parties appeared before the Honourable Yano J on 11th April 2018 for inter-partes hearing of the application dated 4th April 2018, the Advocates for the 1st Defendant pointed out that the parcels of land in dispute are located in Tana River County and he accordingly sought to have the matter tried in Malindi. The Learned Judge accordingly directed that the matter be mentioned in Malindi on 3rd May 2018.

8. But before then and by a Notice of Motion application dated 27th April 2018 and filed herein on 30th April 2018, the 1st Defendant sought orders to set aside or discharge the orders of injunction granted by Yano J. on 4th April 2018 ostensibly on the basis that the same were obtained through misrepresentation and/or concealment of material facts.

9. When the parties appeared before me on 3rd May 2018, I directed the three applications dated 4th April 2018, 10th April 2018 and 28th April 2018 be respectively heard and disposed of together. The parties thereafter filed written submissions which they proceeded to orally highlight before me.

10. I have considered the three applications and the responses thereto. I have equally taken a keen look at the submissions made herein by the Learned Advocates for the parties. In my considered view, two main issues stick out for my determination. These are:-

i) Whether the 1st Defendant's Directors disobeyed the Orders of this Court as granted by Yano J on 4th April 2018, and

ii) Whether the Plaintiff is entitled to the Orders of injunction as sought herein.

(i) <u>Whether the 1st Defendant's Directors are in contempt of the Orders of 4th April 2018.</u>

11. I think it is now well settled that it is a fundamental tenet of the rule of law that Court Orders must be obeyed and that it is not open to any person(s) to choose whether or not to comply with or to ignore such orders as directed to him by a Court of law. As was stated by the Court of Appeal in ***Wildlife Lodges Ltd –vs- County Council of Narok & Another (2005) 2 EA 244:-***

"It was the Plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the Court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…

It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to Court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed…."

12. In the matter before me, the 1st Defendant does not deny that the order was served upon them. The said order was issued by the Court on 4th April 2018 and according to the Plaintiff; it was served upon an authorized officer of the 1st Defendant on 6th April 2018 at about noon. It is the Plaintiff's case that once the order was served, compliance therewith was mandatory and immediate and the fact that the 1st Defendant continued to harvest and cart away salt and to use the machinery on the suit properties was utter disobedience of the Court Orders.

13. On behalf of the 1st Defendant, it was admitted that the Court Order was served upon a secretary at the 1st Defendant's premises on the said 6th April 2018. It was however the 1st Defendant's case that the orders were only received by their Finance Manager the following day on 7th April 2018 and immediately thereafter, they commenced the process of shutting down their operations. While they admit that there were some lapses, the 1st Defendant submitted that they were able to stop work within 24 hours from the time the Court orders were served upon them.

14. As Lord Deming MR stated in ***Re Bramblevale Ltd (1969) 3 All ER 1062***:-

> ***"A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence."***

15. While the words of the Learned Master of Rolls may not be taken literally at face value, I think they are consistent with the generally accepted position in this Country as expressed for instance in ***Mutititka –vs- Baharini Farm Ltd (1985)eKLR,*** that proof in contempt proceedings is above the balance of probabilities but below that of 'beyond reasonable doubt' as required in criminal cases.

16. That being the case, I take note that the process server who delivered the impugned orders avers that he served the same upon an authorised officer of the 1st Defendant at 12.00 p.m. on 6th April 2018. As it turned out, the person so served was neither a director nor even a principal officer of the 1st Defendant. It was an Office Secretary who was served and there is no telling whether the 1st Defendant's Directors and/or Principal Officers were available at the time. It is not therefore very clear to me the exact time when the 1st Defendant had knowledge or proper notice of the terms of the order. Whenever it was, they were able to stop the operations within the suit property by 7th April 2018 at around mid-day. That does not appear to me to have been willful disobedience of the orders as to amount to contempt of Court.

17. In the circumstances I did not find merit in the application dated 10th April 2018.

(ii) **<u>Whether the Plaintiff is entitled to the Orders of Injunction Sought</u>**

18. The threshold for the grant of injunctions was set by the Locus Classcus case of ***Giella –vs- Cassman brown Company Ltd (1973) EA 358***. Recently in ***Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR***, the Court of Appeal restated the threshold as follows:-

> ***"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-***
>
> **(a) *Establish his case only* at a prima facie level;**
>
> **(b) Demonstrate irreparable injury if the temporary injunction is not granted, and**
>
> **(c) Allay any doubts as to (b) by showing the balance of convenience is in his favour."**

19. The Appellate Court went further to add the following:-

> ***"These are the pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and tests are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Company Ltd –vs- Afraha Education Society (2001) Vol 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction. The Court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, is irreparable, in other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If a prima facie case is not established, then irreparable injury and balance of convenience need no considerations. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."***

20. In ***Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125,*** a prima facie case was described in the following words:-

> ***"In civil cases a prima facie case is a case which on the material presented to Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter."***

21. In the matter before me, it is the Plaintiff's case that it is the leasehold title holders of the properties known as Land Reference No.

21918(Grant Number CR 28301) and Land Reference No. 21918 (Grant Number CR 28443) which parcels of land are adjacent to and neighbour Land Reference No. 222138 which is owned by the 2nd Defendant.

22. The Plaintiff avers that it had given the 2nd Defendant consent, lease and approval to harvest salt from the suit properties. The 2nd Defendant was also at liberty to use the machinery located on the 2nd Defendant's property for the harvesting of the salt from the Plaintiff's premises. However, unbeknown to the Plaintiff, the 2nd Defendant through its Receiver Managers proceeded to grant their own lease and consent to the 1st Defendant to take over and carry on the salt harvesting business not only on the 2nd Defendant's property but also on the suit properties.

23. It is the Plaintiff's case that it has not given its consent and/or approval to the 1st Defendant to take over its properties. The Defendants are thus according to the Plaintiff, using the Plaintiff's suit properties without its consent. They are therefore trespassers on the said suit properties.

24. In the Replying Affidavit filed herein on 30th April 2018 and sworn by its General Manager Wilfred Kibiti Mbogori Kimiri, the 1st Defendant denies that the 2nd Defendant through its Receiver Manager granted them a lease and consent to take over and carry on salt harvesting on the 2nd Defendant's and the Plaintiff's property. Instead, the 1st Defendant avers that by a Licence Agreement dated 7th June 2017, the 2nd Defendant granted to the 1st Defendant a Licence to use the salt works, plant, machinery and other specified assets together with the adjacent land for harvesting, refining and packaging salt and connected purposes.

25. The 1st Defendant asserts that the said licence was rightfully granted by the 2nd Defendant over land in relation to rights that the 2nd Defendant already enjoyed over the Plaintiffs properties, machinery and other assets. They further contend that the Plaintiff has failed to prove that the 2nd Defendant and/or its Receiver Managers were under any obligation to seek the approval or consent of the Plaintiff before granting the licence.

26. On that account, the 1st Defendant avers that its actions of ingressing and egressing over the suit properties, using the land and machinery thereon and producing, harvesting, collecting and transporting the salt therefrom were carried out pursuant to the licence Agreement and therefore do not constitute acts of trespass over the suit properties or the Plaintiff's Plant, machinery and other chattels.

27. The 2nd Defendant has equally opposed the Plaintiff's application. In a lengthy Replying Affidavit sworn by one of its Joint Receiver Managers Anthony Muthusi and filed herein on 3rd May 2018, the 2nd Defendant avers that the decision to place the 2nd Defendant under Receivership was made by Dubai Bank Kenya Ltd because the 2nd Defendant owed the Bank the sum of Kshs 271,909,664.34/-

28. The 2nd Defendant further asserts that both the Plaintiff herein and the 2nd Defendant are sister companies which share a common Director in the name of Hassan Zubeidi. According to the 2nd Defendant, both the Plaintiff herein and themselves are indebted to the said Dubai Bank Kenya Ltd (In Liquidation) and the debt owed is secured by the suit properties as well as the 2nd Defendant's aforesaid property.

29. The 2nd Defendant further avers that the 1st Defendant herein was brought in by the sister companies to generate income to pay the Bank which had lost money on account of mismanagement and malpractices at the Bank by one of the main shareholders of the Plaintiff and the 2nd Defendant. The engagement of the 1st Defendant was therefore informed by the need to generate income to pay the Bank as the principal creditor and to service the indebtness of the 2nd Defendant. The Bank would then according to the 2nd Defendant, utilize the proceeds "to pay its innocent depositors who lost their hard earned money on account of the mismanagement and malpractices at the Bank which were actuated by the said Hassan Zubeidi who also doubled up as the Executive Chairman and Principal Shareholder of the Bank".

30. The 2nd Defendant further asserts that the Plaintiff's conduct in these proceedings has made it reasonably apprehensive that the Plaintiff has brought this claim solely to frustrate their company in its debt repayment process, and that it is just, equitable and in the interest of justice that the Plaintiff's application be swiftly dismissed for being an abuse of the Court process.

31. From the foregoing, it is evident that the Defendants do not deny that the suit properties belong to the Plaintiff. Similarly, the Defendants are not denying that they are using the Plaintiff's suit properties as well as the Plant and machinery to undertake salt extraction works and other related purposes. It is however their case that their actions of ingress and egress over the suit property, using the land and machinery thereon as well as producing, harvesting, collecting and transporting the salt therefrom do not constitute acts of trespass over the same.

32. This is because according to the Defendants, the 1st Defendant entered into a Licence Agreement dated 7th June 2017 which Agreement related to the exercise by the 1st Defendant of rights that the 2nd Defendant already enjoyed over the suit properties, the machinery thereon and other assets.

33. A copy of the Licence Agreement dated 7th June 2017 is attached to the Replying Affidavit sworn by Anthony Muthusi on behalf of the 2nd Defendant. I have perused the Licence Agreement clearly between the 2nd Defendant (referred to therein as "the Licensor") and the 1st Defendant. The said Licensor is in the preamble therein described as the duly registered owner of that parcel of land known as Plot No. 22138 Kilifi CR 28851/1 upon which there are amongst other developments a Salt Plant and Salt Works. As it were, I did not find any mention therein about the suit properties. Indeed paragraph 1(ix) therefore provides as follows:-

> ***"1. In this Licence, where the context so admits:-***

(i)……

ix) "The property" means Land Reference Number 22138 Malindi in Kilifi County."

34. In his oral submissions before me, Mr. Noorani Learned Counsel for the 1st Defendant, however drew the attention of the Court to the definition of the premises in the same section which according to Counsel authorizes the 1st Defendant to use land adjacent to the 2nd Defendant's property. While indeed it is true that the definition of the word" premises" at paragraph 1 includes "adjacent premises", it was not clear to me how the parties to the Licence Agreement intended to include in their definition of the leased premises land whose owners were not part of the Agreement.

35. The Plaintiff vehemently denied in the Supplementary Affidavit of Mohamed Ali filed herein on 6th June 2018 that the 2nd Defendant had its authority to grant the 1st Defendant licence to use the Plaintiff's properties. At it were I was not shown anything that indicated that the rights that the Plaintiff had granted to the 2nd Defendant over its properties were transferable and/or could be assigned to the 1st Defendant. Indeed, there is nowhere I could find in the Licence Agreement where it is mentioned that the 2nd Defendant was assigning the rights it already enjoyed over the Plaintiff's properties to the 1st Defendant.

36. The Defendants further justified their occupation and use of the Plaintiff's properties by alluding to the fact that the Plaintiff and the 2nd Defendant are related companies with a common shareholding. In this regard, the Defendants contended that one Hassan Zubeidi was a director of both the Plaintiff and the 2nd Defendant. However other than extracts of alleged testimony of the said Zubeidi made in some Court Proceedings, there was no formal search emanating from the Registrar of Companies exhibited to demonstrate that indeed the said individual was a director of both the Plaintiff and the 2nd Defendant.

37. In my mind, even if the said Hassan Zubeidi was a director of both the Plaintiff and the 2nd Defendant, the two companies would still remain distinct and separate legal entities and the 2nd Defendant would still not be entitled to grant any rights over the Plaintiff's property without its concurrence. As the Court of Appeal stated in ***Riccattii Business College of East Africa Ltd –vs- Kyanzavi Farmers Company Ltd(2016) eKLR***:-

> ***"A (Company) as a body Corporate, is persona jurisdica, with a separate independent identify in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."***

38. In the proceedings before me, the Plaintiff has denied that it has a common directorship with the 2nd Defendant. With that kind of denial having been made, I think it was again incumbent for the Defendants to put some evidence before me of the alleged relationship. As it were, nothing was placed before me in proof of their assertion other than the Court proceedings which I have alluded to.

39. As was stated in ***Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (Supra):-***

> ***"The Party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent irreparable damage that may result from the invasion."***

40. In the matter before me, it is not in dispute that the Plaintiff granted the 2nd Defendant a licence over the suit properties. That license was however limited to the benefit of and use by the 2nd Defendant. The said 2nd Defendant had no authority to transfer the same to any other person unless with the express authority, consent and sanction of the Plaintiff. The Plaintiff did not give its consent for the transfer and assignment and the 1st Defendant therefore has no legitimate basis to be on the Plaintiff's land.

41. As it were, the salt on the suit properties is a resource that gets depleted over time. If the 1st Defendant is permitted to continue harvesting salt from the suit properties, then the Plaintiff stands to lose the vital resource on its properties. The salt harvested therefrom will go to the benefit of other persons and I am satisfied that it may not be possible to quantify the value and amount of salt that will have been harvested from the suit properties if the orders sought are not granted.

42. The upshot is that I find merit in the Plaintiff's application dated 4th April 2018. In the circumstances, I make the following orders in regard to the three applications that were before me:-

i) The Plaintiff's Application dated 10th April 2018 is dismissed with no order as to costs.

ii) The 1st Defendant's Application dated 27th April 2018 is dismissed.

iii) The Plaintiff's Application dated 4th April 2018 is hereby allowed in terms of Prayers 5, 6 and 7 thereof.

iv) The Plaintiff shall have the costs of both the application dated 27th April 2018 and the one dated 4th April 2018.

Dated, signed and delivered at Malindi this 14th day of December 2018.

J.O. OLOLA

JUDGE