



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO.435 OF 2018

ECOTACT LIMITED T/A IKO TOILETS.....PLAINTIFF/APPLICANT

VERSUS

NAIROBI CITY COUNTY.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 8th October 2018 brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules as read with section 1A and B, 3A of the Civil Procedure Act.

2. It seeks orders:-

(1) Spent

(2) Spent

(3) Spent

(4) Spent

(5) Spent

(6) That pending the hearing and determination of the main case herein an order of injunction do issue to restrain the defendant herein acting through itself, its officers, elected leaders, agents, its affiliate youth groups or anybody claiming any right or interest through them from breaching the Public Toilets (Iko Toilets) Management contract entered into with the plaintiff on the 16th of May 2016 and from taking over or authorizing the takeover of the management of the said Iko Toilets from the plaintiffs before the expiry of the contract dated 16th May 2016.

(7) That costs of this application be borne by the respondent in any event.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 6.

4. The application is supported by the affidavit of David Kamau Kuria, a director of the plaintiff's company sworn on the 5th October 2018.

5. The application is opposed. There is a replying affidavit sworn by David Oseko, the acting County Attorney of the defendant, on the 6th November 2018.

6. The defendant also filed a notice of preliminary objection dated 7th November 2018.

7. On the 20th November 2018, the said application and the preliminary objection were canvassed by oral submissions.

8. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit and the preliminary objection. I have considered the oral submissions of counsel and the authorities cited. The issues for determination are (i) whether or not the preliminary objection is merited; (ii) whether or not the plaintiff's/applicant's application meets the criteria for grant of

temporary injunction and (iii) who should bear costs?

9. The notice of preliminary objection is dated 7th November 2018. The main ground is that this Honourable Court lacks the jurisdiction to hear and determine this matter. Also that the application and the suit do not disclose a cause of action against the defendant.

10. It is the defendant's/respondent's case that the agreement dated 16th May 2016 provides for arbitration in settlement of any disputes arising out of the said agreement.

11. Section 7(1) of the Arbitration Act 1995 provides that :-

“It is not incompatible with an arbitration agreement for a party to request from the High Court before or during the arbitration proceedings, interim measure of protection and for the High court to grant that measure.”

12. In the case of **CMC Holdings is Limited & CMC Motors Group Limited vs Jaguar Land Rover Exports Limited Nairobi Civil Case No. 752 of 2012**. The court in acknowledging that it had jurisdiction to grant interim relief for preservation of the subject matter of the contract pending reference to arbitration stated as follows:-

“...the measures are intended to preserve the assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.”

I am guided by the above authority in finding that this court has jurisdiction to hear and determine the application herein.

13. Article 50 of the Constitution of Kenya 2010, which enshrines the right to a fair hearing permits this court to hear any dispute. Also in the case of **Lease Company Limited & Vital Bio Energy (Kenya) Limited vs Agricultural Development Company Limited ELC Case No. 95 of 2014, Malindi**, the Court held that:-

“Where the court finds that an arbitral agreement between the parties exist and there is a dispute that should be determined by an arbitration the court is obligated to grant an interim order of preservation to ensure that the subject matter will be in the same state as it was at the commencement or during arbitration proceedings.”

I am satisfied that this court has jurisdiction to hear and determine the application and the suit herein.

14. I also find that the management contract is between the plaintiff/applicant and the defendant/respondent. The defendant/respondent is under a duty to protect the said agreement. I therefore find that the plaintiff/applicant has a cause of action against the defendant/respondent. In a nut shell I find no merit on the preliminary objection herein and the same is dismissed.

15. Let me now turn to the notice of motion dated 8th October 2018. It is the plaintiff's/applicants case that by an agreement dated 16th May 2016 between the plaintiff/applicant and the defendant/respondent, the plaintiff/applicant was allowed to manage and operate the four (4) public sanitation facilities for a period of three (3) years. The period would lapse on 16th May 2019. It is also the plaintiff's/applicant's case that other persons have forcefully moved in and chased away the plaintiff's employees from the said public sanitation facilities. It now seeks mandatory injunctive orders to protect the agreement dated 16th May 2016. The defendant/respondent has failed to protect the plaintiff/applicant and/or remove the said invaders.

16. It is the defendant's/respondent's case that the plaintiff/applicant has failed to demonstrate that it has a cause of action against the defendant hence the plaintiff/applicant have failed to establish a prima facie case with a probability of success at the trial.

17. At this juncture, it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & co. Ltd [1973] EA 358**. In the case of **Mrao Limited vs First American Bank of Kenya Limited & 2 Others [2003]**. The Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

18. I have gone through the management contract between the plaintiff/applicant and the defendant/respondent dated 16th May 2016. Clause 2 provides that:-

“Operation of existing Iko Toilets

The County Government hereby grants to the operator (plaintiff/applicant) an extension of the period of operation of some Iko Toilets already constructed at the sites set below for a further term of three (3) years. The toilets include

1. Uhuru Park

2. National Archives – Moi Avenue

3. *Aghakhan Walk*

4. *Old Nation round About*

19. There is a valid management contract existing between the plaintiff/applicant and the defendant/respondent. The same is due to lapse on 16th May 2019. The same has not been denied by the defendant/respondents. Paragraph 9 of the replying affidavit sworn by David Oseko, acting County attorney for the defendant/respondent provides that:-

“To the best of my knowledge, the 4 public toilets and showers, subject of this suit and the application remain under the management of the plaintiff pursuant to the management contract dated 16th May 2016.”

Paragraph 10 provides that:

If the plaintiff has ceded or subcontracted management of the public resources entrusted to them by the Nairobi City County Government, or in any way allowed or permitted the operation thereof to be undertaken by third parties, this would constitute a direct breach of contract and is a recipe for civil unrest and insecurity within the city”

Paragraph 23 provides that:

“Save that the plaintiff constructed 10 public ablution facilities within Nairobi City County I aver that the defendant currently owns, manages, and operates 6 of the 10 public facilities whilst the plaintiff is responsible for the management and operation of 4 of the facilities pursuant to a management agreement dated 16th May 2016 (See annex DKK – 7 at paragraph 54 of the application) which remains public resources and the property of the defendant, County Government”

20. These preceding paragraphs confirm that the plaintiff/applicant is the one mandated with the management of the 4 public sanitation facilities. In the case of **Kenleb Cons Limited vs New Gatitu Service Station Limited & Another [1990] KLR 557** Bosire J (as he then was) 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 show he has a right, legal or equitable, which requires protection by injunction”.

21. I am satisfied that the plaintiff/applicant deserves this kind of protection. I also find that it has established a prima facie case with a probability of success at the trial.

22. I have considered the fact that the plaintiff/applicant seeks order of injunction which are mandatory in nature. I have considered that there exists a valid management contract between the parties which gives the plaintiff/applicant the mandate to manage the 4 toilets. This has not been disputed. I find that the plaintiff/applicant’s case is a clear one.

23. In the case of **Locabaill International Finance Ltd vs Agro export {1986} 1ALL ER 901, Mustil, LJ** held that:-

“The matter before court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to grant of a major part of the relief claimed in the action, such an application should be approached with caution and the relief granted only in a clear case”.

24. I am satisfied that the circumstances prevailing in this case warrant the grant of orders of mandatory injunction. I also rely on the case of **Muchuha vs Ripples Limited 1990 -94 EA 388**.

25. All in all I find merit in this application and grant the orders sought namely:-

(a) That an order of temporary injunction be and is here by issued restraining the defendant/respondent herein acting through itself, its officers, elected leaders, agents, its affiliate youth groups or anybody claiming any right or interest through them from breaching the public toilets (Iko Toilets) management contract entered into with the plaintiff on the 16th May 2016 and from taking over or authorizing the take over of the management of the said Iko toilets situated at Tom Mboya round about near Old Nation House, National Archives on Moi Avenue, the Agha Khan Walk and Uhuru Park within the City of Nairobi, before the expiry of the contract dated 16th May 2016 pending the hearing and determination of the main suit herein.

(b) That the officer commanding police division, Nairobi Central and the Officer Commanding Police Station Central Police and the Kenyatta International Conference Center (KICC) do ensure compliance of the above orders.

(c) That the costs of this application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 4TH day of DECEMBER 2018

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for Plaintiff

.....Advocate for Defendant

.....Court Assistant