



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
ENVIRONMENT AND LAND COURT
CIVIL SUIT NO. 240 OF 2014

JAGUAR PETROLEUM COMPANY LIMITED PLAINTIFF

- V E R S U S -

BRIGHTON FOODS LIMITED1ST DEFENDANT

FUSION FOODS LIMITED 2ND DEFENDANT

RULING

[1] On 4th September 2014 the applicant herein filed suit and prayed for judgment against the defendant in the following terms;

"(a) A permanent injunction restraining the defendants from trespassing, selling, transferring, charging, pledging or alienating the plaintiffs property known as Triton on Mombasa/BLK/XIII/206 and Mombasa/BLK/XIII/210 on Nyerere Avenue - Mombasa respectively.

(b) An eviction order against the defendants on L.R. NO. Mombasa/BLK/XIII/206 and Mombasa/BLK/XIII/210 on Nyerere Avenue - Mombasa respectively.

(c) The principal sum of Kshs. 5,303,219/- being arrears of rent and Kshs. 1,245,000/- for Mesne profits against the 1st Defendant in respect of Mombasa/BLK/XIII/206 and Mombasa/BLK/XIII/210 on Nyerere Avenue - Mombasa respectively.

(d) The Principal sum of Kshs. 3,526,219/- being arrears of rent and Ksh. 955,000/- for Mesne profits against the 2nd defendant in respect of Mombasa/BLK/XIII/206 and Mombasa/BLK/XIII/210 on Nyerere Avenue-Mombasa respectively.

(e) General damages for trespass

(f) Costs of this suit

(g) An order that in the event of any defiance of any court order on the part of the defendants the Kenya Police and in particular the OCPD Mombasa and OCS Mombasa do extend the necessary assistance for the enforcement of the Court Orders.

(h) Any other relief as this Honourable Court may deem fit and just to grant."

On the same day they filed a certificate of urgency under the court vacation rules and prayed that the Notice of Motion be certified as urgent and that the same be heard during the vacation. The application was under Section 1A.,1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya. Order 40 Rule 1(a), 3(3) and 4(2) of the Civil Procedure Rules, 2010 and Sec 63 of the Civil Procedure Act. In that motion the prayers were as follows;

"1. That the application be certified as urgent and be heard ex-parte in the first instance.

2. That pending the hearing and determination of this application interpartes;-

i. A temporary mandatory injunction do issue to and directed to the defendants and removing the defendants, their agents and/or employees from the plaintiffs leased properties known as Triton on Nyerere Avenue-Mombasa on L.R. No. Mombasa/BLK/XIII/206 and Mombasa/BLK/XIII/210.

ii. A temporary order do issue restraining the defendants whether by themselves,their agents and/or employees from trespassing, selling, transferring, charging, leasing, pledging or in any other manner alienating or disposing the plaintiff's leased properties and moveable therein known as Triton on Nyerere Avenue - Mombasa on L.R. No. Mombasa/BLK/XIII/206 and Mombasa/BLK/XIII/210

iii. An order that in the event of any defiance of any court order on the part of the defendants the Kenya police and in particular the OCPD Mombasa and OCS Mombasa do extend the necessary assistance for the enforcement of the Court Orders.

3. That pending hearing and determination of this suit;

(a) A temporary mandatory injunction do issue to and directed to the defendants and removing the defendants,themselves agents and/or employees from the plaintiffs lease properties known as Triton on Nyerere Avenue - Mombasa on L.R. No. Mombasa BLK/XIII/206 and Mombasa/BLK/XIII/210

(b) A temporary order do issue restraining the defendants whetherby themselves, their agents and/or employees from trespassing, selling, transferring, charging leasing, pledging or in any other manner alienating or disposing the plaintiff's leased properties and moveable therein known as Triton on Nyerere Avenue - Mombasa on L.R. No. Mombasa/BLK/XIII/206 and Mombasa/BLK/XIII/210.

(c) An order that in the event of any defiance of any Court Order on the part of the defendant the Kenya Police and in particular the OCPD Mombasa and OCS Mombasa do extend the necessary assistance for the enforcement of the court orders."

[2] This matter was filed at the Milimani Law Courts Nairobi Environment and Land division as ELC Case No. 1187 of 2014. I came before, the Honourable Lady Justice Gacheru on the same day of filing on 4th September, 2014. The Learned Judge found that the subject matter falls under Mombasa ELC which was on vacation and she held that the High Court Practice and Procedure Rules do not apply. The Judge certified the application urgent and allowed it in interim basis for fourteen (14) days in terms of prayer no 2 (ii) on the following terms;

"A temporary order to issue restraining the defendants whether by themselves their agents or employees from selling, transferring, pledging or in any other manner alienating disposing the plaintiffs leased properties and moveable therein"

[3] She then ordered the file to be transferred to Mombasa Environment and Land Court. These are the orders that the honorable Lady Justice Gacheru made. The orders were interim, they were for fourteen (14) days and the judge specifically made herself clear on what orders she gave and highlighted them in her handwritten ruling. The order was given under hand and seal of the court on 4th September 2014 and was issued on 8th September 2014 and signed by the Deputy Registrar of the High Court at Nairobi. The order that was issued was as follows;

"It is hereby ordered;

- 1. That this application be and is hereby certified as urgent and admitted for hearing during this court vacation.*
- 2. That a temporary order be and is hereby issued for 14 days only restraining the defendants whether by themselves, their agents and/or employees from trespassing, selling, transferring, charging, leasing, pledging or in any other manner alienating or dealing with the plaintiff's leased properties and moveable therein known as Triton on Nyerere Avenue - Mombasa on L.R. No. Mombasa/BLK/XIII/206 and Mombasa/BLK/XIII/210.*
- 3. That this file be and is hereby transferred to Mombasa Environmental and Land Court for inter partes hearing on 18th September 2014.*

Given under my hand and the seal of this honourable Court at Nairobi this 4th day September 2014. Issued at Nairobi this 8th day of September 2014.

Signed

Deputy Registrar

High Court of Kenya, Nairobi."

[4] The extracted order differed with the order made by the Judge in one respect. The judge's order did not include the word "trespassing" which was included in the extracted order. Pursuant to the order as extracted (in the words of the respondent) the applicants on 16th September 2014 accompanied by the Officer Commanding Central Police Station Mombasa accompanied by the employees of a private security firm together with unknown individuals visited the suit premises and forced the respondents to close down the Petrol Station and Restaurant. They put their own locks blocking access to the suit premises effectively shutting down and paralyzing the defendants business. The respondent has in fact annexed a CCTV footage on his replying affidavit showing the presence of policemen and other persons in the petrol station.

[5] The affidavit of one George Dicks Atetwe admits that his company Jaguar Petroleum Company leased the petrol station and restaurant to the defendant Brighton Limited and Fusion Foods Limited. He deposes that the lease was to expire on 28th February, 2014. That there were various notices demanding payment of rent from the defendants who were called to owe to his company Kshs. 5,303,518 and Ksh. 1,245,000 and mesne profits amounting to Kshs. 3,526,219 and Ksh. 955,000 respectively for the period the respondent have occupied the premises.

[6] Mr Manoj Shah a director of the respondent companies deposed that the relationship between the applicants and the respondents was that of Landlord and tenant. He averred that they had paid rent and annexed various petty cash vouchers allegedly showing payment of money to a Director of the applicant. He alleged that the rent was paid in full. The respondents raised various issues as to the lease between the applicant and Triton and whether the same was valid or not. In the final analysis the respondents claimed Kshs. 12,850,212 from the applicants exclusive of other costs and interest therein.

[7] It is therefore apparent there were many issues between the plaintiff/applicant herein and the defendant respondents. This is the reason why Gacheru J gave the restraining orders that she did. Unfortunately someone somewhere added in the court orders the words trespassing, this word had the effect of turning the respondents trespassers in the premises they were occupying and doing business. As a result they were bundled out of the suit premises even before the application filed in Nairobi on 4th of September 2014 was even heard inter partes. The trial judge was careful to give temporary orders. The orders were for fourteen (14) days only, they were specified and well tabulated. The extracted order is illegal and without any force of law. The applicant cannot be allowed to continue enjoying it. It is extremely oppressive on the respondents. It facilitated the applicants to close down the business of the

respondents without the sanction of the court.

[8] At the moment I have not been made aware of who did it. This matter cannot rest there. The premises of the respondent shall be opened forthwith. Both the petrol station and the restaurant. The respondent shall comply with the orders issued by Gacheru J until further orders of this court. As the respondents count their loses over the period they were illegally forced to close and consider their next option in this matter, this file shall be forwarded to the Provincial Director of CID Nairobi in-charge of investigations and fraud, to find out if there was anyone to blame for deliberately extracting this unlawful order. He shall file this report in this court within 45 days from todays date. Anyone found to have done so shall be charged and prosecuted forthwith. In the meantime pending the result of CID the status quo as appertaining on 16th September 2014 shall be maintained. Once the report is brought this application and suit shall proceed on merits.

Dated and delivered in open court at Mombasa this 30th day of October 2014.

S. MUKUNYA

JUDGE

30.10.2014

In the presence of:

Mr Kalove advocate for the applicant

Mr Oloo advocate for the respondent