



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, OUKO & KIAGE, JJ.A.)**

**CIVIL APPEAL NO. 190 OF 2011**

**BETWEEN**

**EXPORT PROCESSING ZONES AUTHORITY ..... APPELLANT**

**VERSUS**

**KAPA OIL REFINERIES LIMITED..... 1<sup>ST</sup> RESPONDENT**

**NATION MEDIA GROUP LIMITED..... 2<sup>ND</sup> RESPONDENT**

**SANPAC AFRICA LIMITED.....3<sup>RD</sup> RESPONDENT**

**ALLPACK INDUSTRIES LIMITED.....4<sup>TH</sup> RESPONDENT**

**ORBIT CHEMICALS LIMITED..... 5<sup>TH</sup> RESPONDENT**

**MABATI ROLLING MILLS LIMITED.....6<sup>TH</sup> RESPONDENT**

**DOSHI ENTERPRISES LIMITED.....7<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Ruling of the High Court of Kenya at Machakos (P. Kihara Kariuki, J.) dated 12<sup>th</sup> July, 2010*

*in*

*H.C.C.C. NO. 35 OF 2010)*

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**JUDGMENT OF THE COURT**

This is an interlocutory appeal against the exercise of the discretion of the learned Judge **P. Kihara Kariuki, J.** (as he then was) granting the respondents' application for a temporary injunction to restrain the appellant from stopping, suspending or restricting the use of and discharge of effluent into the appellant's sewer line by the respondents, until the suit brought by the respondents is heard and determined. Ordinarily this court would not express any concluded view on the dispute between the parties and must not form a distinct impression as to the merits of the suit at this stage, for the obvious

reason that any such determination would not only be premature but also may embarrass the trial court where the dispute will be determined on merit and with finality once this appeal is disposed of. See **Trade Agrain Limited v. Awal Limited** Civil Appeal No. 269 of 2002 Eklr 2004. It is for this reason we pleaded with Mrs. Nzei, learned counsel for the appellant who addressed us for over 1 hour on the appeal, to limit herself to the question whether or not the learned Judge of the High Court failed to exercise his discretion judicially in allowing the respondents' application for an order of temporary injunction.

Before advertent to the background of this appeal, it is appropriate to remind ourselves of our function in an appeal of this nature. It is elementary learning that before this Court can interfere with the exercise of a discretion of a Judge, it must be shown that the Judge has either erred in principle in his approach or has left out of account or has taken into account some factors that he should, or should not have considered or that his decision was wholly wrong, or that the decision was so aberrant that no reasonable judge aware of his duty to act judicially could have reached it. See **Mbogo & Another V. Shah** [1968] E.A. 93 at page 95 where Sir. Charles Newbold P. stated the law as follows:-

**“.....a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”**

This dictum underlines what is well settled in our law, namely, that as an appellate court this Court has a limited function in an appeal from the grant or refusal of an injunction granted under **Section 63(c) and (e)** of the Civil Procedure Act and **Order 40** of rules (1) and (2) of the now Civil Procedure Rules, 2010. It has no jurisdiction to exercise an independent original discretion of its own. It must defer to the High Court Judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of this Court would have exercised the discretion differently. From our reading of the memorandum of appeal and listening to Mrs. Nzei, it is clear that the appellant accepts those principles but argues that this Court should interfere with the exercise by the learned Judge of his discretion to grant an order of injunction in favour of the respondents.

Pending before the High Court is Civil Case No. 35 of 2010 which was filed simultaneously with the application whose determination has given rise to this appeal. In that suit the respondents, a consortium of companies, were granted permission by the appellant to connect their 15 km sewer pipe (from Kapa Oil Refineries to Mlolongo) to the latter's existing sewer system upon payment of charges for connection and subsequent discharging of effluent by the respondents. This arrangement subsisted until Mavoko Water & Sewerage Co. Limited and Tanathi Water Services Board, (the Board) the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the main suit, who are not named in this appeal, took over the management and operation of the sewer system. With that change the respondents began to pay the sewer discharge charges to the Board, an agent of Mavoko Water & Sewerage Co. Limited. The appellant on their part continued to demand that payment be made to it.

On 29<sup>th</sup> January, 2010 the appellant wrote to the 1<sup>st</sup> respondent expressing some difficulties in achieving the desirable waste water treatment quality due to, among other reasons, failure by the discharging entities to pay against the volumes and quality of waste water discharged. The letter concludes by directing all the entities connected to the sewer line to stop discharge through the line with effect from 5<sup>th</sup> February, 2010, a week from the date of the notice, prompting the respondents to institute the action in the High Court.

It is apparent that there was a tussle between the appellant and the Board during the period preceding the issuance of the above letter. This is manifested by another suit, Machakos High Court Civil Case No. 315 of 2009, in which the Board seeks to permanently restrain the appellant from providing water and sewerage services outside the Export Processing Zone Area. The appellant has in that suit brought a counter-claim seeking to also permanently restrain the Board from taking over or interfering with the appellant's water supply and sewerage treatment facilities, or from receiving payment from the

appellant's clients or customers. It is that dispute and the threat by the appellant to cut off the respondents that the latter wishes to forestall in the suit and in the application determined by the Judge.

The learned Judge after evaluating the material presented in the application and obviously relying on the celebrated case of **Giella v Cassman Brown** [1973] EA 358 cited to him by counsel in their submission but without specifically saying so, drew the conclusion that the respondents had made out a *prima facie* case with a probability of success and further that the balance of convenience was in favour of the respondents.

According to the appellant the learned judge erred in that conclusion as, *inter alia*,

- i. the respondents had not demonstrated a *prima facie* case
- ii. there was no contractual relationship between the appellant and the 2<sup>nd</sup> to the 6<sup>th</sup> respondents, who did not deserve an order of injunction
- iii. the 1<sup>st</sup>, 7<sup>th</sup> & 8<sup>th</sup> respondents had breached the terms of the agreements signed between them and the appellant
- iv. the appellant's sewer and sewerage facilities could not be transferred to the Board or to any other body.
- v. the prayers granted were in general and unspecific terms which would amount to an unlawful taking over of the appellant's trunk line and sewerage facilities within Athi River/Mavoko Municipality areas.

Both Mr. Mogeni and Mr. Mulekyo (holding brief for Mr. Mwinzi) for the respondents opposed the appeal and submitted that in view of the threats faced by the respondents, the learned Judge properly exercised his discretion in their favour to preserve the subject matter of the dispute pending determination as to the proper body to make payments to; that in the absence of a temporary injunction the respondents, and not the appellants, stood to suffer more.

In our own assessment, bearing in mind the jurisdiction of this Court as earlier on outlined, and the settled legal position, that in granting an interlocutory injunction, the learned Judge exercised a discretion that resided in him, the only broad issue for our determination is whether the learned Judge acted upon wrong principles in the exercise of that discretion; misdirected himself in some matter; and whether it is manifest from the case as a whole that he was clearly wrong. See **Mbogo & Another v Shah** [1968] EA 93. It is now firmly established that the guidelines to be applied in an application for an interlocutory injunction are those laid down by Spry, V.P in the **Giella** case (supra) in the following words:

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

Those are the three-stage sequential enquiry that the learned Judge was expected to test against the facts before him.

If the answer to the question whether the respondents had a *prima facie* case was yes, then the enquiry moves to the second stage – whether damages would be an adequate remedy. If the answer to this second question is no, then the enquiry becomes one of deciding where the balance of convenience lies. These stages are applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society & Others**, Civil Application No. 142 of 1999 [2001] 1 EA 86.1

We have noted that the respondents were in a dilemma as to who, between the appellant and the Board, to make payment to. In the words of Mitul Shah, the Environment Manager of the 1<sup>st</sup> respondent (Kapa Oil Refineries Limited) expressed in the affidavit in support of the application “...*the plaintiffs are caught in the struggle for control between the defendants...*”

As the struggle persists the respondents have sought in the plaint a

**“...declaration ...as to who between the Defendants is entitled to receive charges, fees or otherwise from the plaintiffs for the usage of the sewer line.”**

That, in our view is a genuine and reasonable concern.

The grant of an injunction is ultimately a matter of statutory discretion. As such attention must therefore turn to the relevant statutory and procedural provisions on injunctions, starting with **section 63(c) & (e)** of the Civil Procedure Act.

**“63. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed..**

.....

**(c) grant a temporary injunction and in case of disobedience convict the person guilty thereof to prison and order that his property be attached and sold;**

.....

.....

**(e) make such other interlocutory orders as may appear to the court to be just and convenient.”**

Order XXXIX rules 1, 2 & 3 of the repealed Civil Procedure Rules under which the application was brought provides, on the other hand, in the relevant part, that:

**“2. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, ... the plaintiff may, at any time after the commencement of the suit, ... apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”** (emphasis supplied).

As the name suggests, an interlocutory injunction is an order aimed at maintaining or preserving the *status quo*, to prevent hardship or prejudice to a party, to preclude one party from overreaching or outwitting the opposite party and to preserve a fair balance between the parties and to give them due protection while awaiting the finality of the proceedings.

The dispute between the Board and the appellant as demonstrated in the plaint and defence and counterclaim in Machakos H.C. Civil Case No. 315 of 2009 is with regard to who between them has the mandate to provide sewerage services within the former Mavoko Municipality and its environs and to receive tariffs for that service; whether the Board can take over a private sewerage infrastructure constructed by the appellant. The learned Judge considered the unique position of the respondents – facing imminent shut down of the sewerage system supporting over 2,600 employees with considerable environmental consequences, and not knowing who between the Board and the appellant to make payment to. As a result he concluded the ruling by stating:

**“For those reasons, I am persuaded that the plaintiffs have made out a *prima facie* case with a probability of success and given that their respective operations would shut down in the event**

**of any disruption in use of the sewer facility, the balance of convenience lies with the plaintiff...”**

Although the learned Judge did not engage in a discussion of adequacy, if at all, of damages, it is nonetheless clear that he adopted the general accepted approach and ultimately reached the correct decision in the circumstances of the dispute before him. Accordingly this appeal is dismissed with costs.

**Dated at Nairobi this 24<sup>th</sup> day of January 2014.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**

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