



**Sofi's Gallery Limited v Ananas Consolidated Group Ltd (Environment & Land
Case E037 of 2023) [2023] KEELC 16916 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16916 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E037 OF 2023
EK WABWOTO, J
APRIL 17, 2023**

BETWEEN

SOFI'S GALLERY LIMITED PLAINTIFF

AND

ANANAS CONSOLIDATED GROUP LTD RESPONDENT

RULING

1. This ruling is in respect to two applications filed by the Plaintiff. The first application being a Notice of Motion Application dated March 8, 2023 which was accompanied by a Supporting Affidavit sworn by Amir Yusuf. In the said application, the Plaintiff sought the following orders:
 - i. Spent.
 - ii. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendant by itself, agents, servants or anybody acting on its behalf from selling, auctioning, disposing of, advertising for sale or in any way divesting the belongings or any other property in the premises pending the hearing and determination of this Application.
 - iii. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendant by itself, agents, servants or anybody acting on its behalf from selling, auctioning, disposing of, advertising for sale or in any way divesting the belongings or any other property in the premises pending the hearing and determination of this suit.
 - iv. That this Honourable Court be pleased to issue orders compelling the 1st and 2nd applicants itself, agents, servants or anybody acting on its behalf to release and grant access of the premises to the Tenant/Applicant.
 - v. The costs of this Application be provided for.
2. The Application was made on the grounds that:



- i. On January 1, 2020, the parties entered into a Tenancy Agreement with respect to a shop at Ananas Mall in Westlands, Nairobi.
 - ii. The Applicant incurred a substantial amount in improving the premises, including furniture and fittings, all of which are still in the Respondent's premises and which the Applicant has no access to.
 - iii. The Respondent has unlawfully, irregularly and un-procedurally advertised the Tenant/Applicant's properties for auction vide People's daily scheduled March 9, 2023 at 11.00am.
 - iv. A substantial loss will result to the Tenant/Applicant unless the order sought are granted.
3. On March 2, 2023, the Court granted Prayer 2 on condition that Plaintiff would make a payment of Ksh 500,000 to the Defendant before 10.30am. Default of compliance to the orders would lead to automatic dismissal of the application.
4. In Grounds of opposition and a Replying Affidavit dated March 17, 2023, sworn by Yaacov Maimon, it was argued that the process could not be unprocedural since the defendant instructed M/s Garam Auctioneers to levy distress for rent after the plaintiff failed several times to pay the agreed rent.
5. The Plaintiff had also filed the application dated February 7, 2023 wherein the Plaintiff sought for the following orders;
 - i. Spent ..
 - ii. That this Honourable court be pleased to issue and order granting access to the Applicant into the premises located at Ananas Mall, Ground Floor for the purposes of taking an inventory.
 - iii. That in the alternative, the applicant be allowed to break in, enter the premises under the supervision of the Respondent, take inventory and thereafter restitute the premises to its original condition.
 - iv. That this Honourable Court do issue such orders as it deems fit in the circumstances that will allow the Applicant access into the suit premises for taking an inventory.
 - v. Costs.
6. Both applications were opposed by the Defendant/Respondent. The Defendant contended that they had patiently accommodated the Plaintiff until sometimes in January 2023 when the Plaintiff closed the premises and later stopped picking calls and responding to their Whatsapp messages. In the further supplementary affidavit dated March 21, 2023, it was submitted that the Plaintiff had not attached any Statement of Account which showed the rent arrears.
7. On March 23, 2023 during the plenary hearing of the application. The Defendant reiterated that there was no dispute with regard to a sub-lease since the lease was for 5 years. It was argued that access to the premise had not been denied and hence no prima facie case had been established.
8. In response to the Defendant's averments, the Plaintiff submitted that the Defendant was misleading the Court. Moreover, it was emphasized that the Defendant/Respondent's action led to the point of denying them access to the premise.
9. I have considered the plaintiff's applications together with the supporting affidavits filed in support. I have also considered the affidavits that were filed by the Defendant and grounds of opposition to the application. Finally, I have considered the oral submissions made by the advocates for the parties during the plenary hearing of the application and the main issues for determination is whether the



Plaintiff had made out a case for grant of the injunctive orders sought together with other prayers in respect to both applications.

10. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. As was stated in *Giella v Cassman Brown & Co. Ltd.* [1973] E.A 358, an applicant for interlocutory injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.
11. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the court of Appeal adopted the definition of a prima facie case that was given in the case of *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125 and went further to state as follows:

“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 necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation... The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

12. In the instant case, am not satisfied that the plaintiff has established a prima facie case with a probability of success against the defendant. It is evident that the Plaintiff breached its obligations to pay rent on the due dates and has fallen into arrears to the tune of Ksh 9,793,930/= as at March 9, 2023 and continues to accumulate at the rate of Ksh 1,316,635/= plus VAT as monthly rent as per paragraph 3.2 of the lease agreement between the parties. The last payment made by the Plaintiff was on July 29, 2022 for Ksh 400,000/- and a further payment of Ksh 500,000/- made on March 9, 2023. The Plaintiff was unable to adduce any evidence to the contrary.
13. Section 3 and Section 5 of the *Distress for Rent Act* outlines a landlord’s right to recover rent arrears:

“Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case.

- (2) No distress shall be levied between sunset and sunrise or on any Sunday...Any person having rent in arrear and due upon a demise, lease or contract after the ending or determination of the demise, lease or contract, may distrain for the arrears after the ending or determination in the same manner as he might have done if the demise, lease or contract had not been ended or determined: Provided that distress under this section shall be made within the space of six months after the determination of the demise, lease or contract and during the continuance of the landlord’s title or interest, and during the possession of the tenant from whom the arrears became due.”[Emphasis Mine]



14. Additionally, Section 15 of the aforementioned Act also provides a remedy for tenants when distressed in an irregular manner:

“Where distress is made for any kind of rent justly due, and any irregularity or unlawful act is afterwards done by the party distraining, or by his agents, the distress itself shall not be therefore deemed to be unlawful nor the party making it be deemed a trespasser ab initio, but the party aggrieved by the unlawful act or irregularity may recover full satisfaction for the special damage he has sustained thereby in a suit for that purpose: Provided that— (i) when the plaintiff recovers in that suit, he shall be paid his full costs of suit and have the same remedies for them as in other cases of costs; (ii) no tenant or lessee shall recover in any suit for any such unlawful act or irregularity, if tender of amends has been made by the party distraining or his agent before the suit is brought.”

15. Being guided by the above provisions and having made a finding that the plaintiff has failed to establish a prima facie case, it is not necessary for me to consider whether the plaintiff will suffer irreparable harm which cannot be compensated in damages.

16. Due to the foregoing, the orders sought in the plaintiff's applications are not for granting. I wish to add that even if I had found that the plaintiff had established a prima facie case, I would still not have granted the orders sought since the Court is of the view that the Plaintiff has not come to this court with clean hands having been in breach.

17. The upshot of the foregoing is that the Applications dated March 8, 2023 and February 7, 2023 are without merit. The same are accordingly dismissed with costs to the Defendant.

12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF APRIL 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

N/A for the Plaintiff/Applicant.

Mr. Gitonga Mutegi for the Defendant/Respondent.

Court Assistant; Caroline Nafuna.

