



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

MOMBASA LAW COURTS

ELC CASE NO. 182 OF 2021

PROGRESSIVE CREDIT LIMITED.....PLAINTIFF

- VERSUS -

MOMBASA TRADE CENTRE LIMITED.....DEFENDANT

RULING

I. Preliminaries.

1. What is before this Honorable Court for determination is the Chamber Summons dated 31st August 2021 filed by the Plaintiff/Applicant. It is brought under the provision of Section 7 (1) of the Arbitration Act 1995, Rule 2 of the Arbitration Rules 1997, Sections 3 and 13 of the Environmental Land Court Act 2011, Order 40 Rule 1 of the Civil Procedure Rules, 2010.

II. The Plaintiff/Applicant's Case

2. The Plaintiff/Applicant sought for the following orders:-

a) Spent.

b) Spent.

c) Spent.

d) Pending reference of the dispute between the Plaintiff and the Defendant to the signaled arbitration and final determination by the arbitrator, the defendant whether by themselves, agents or servants or any other person acting on its instructions be restrained from denying the Plaintiff's egress or vacating the premises standing on title No. Mombasa/Block XXV/100 from 31st August 2021.

e) Pending reference of the dispute between the Plaintiff and the Defendant to the signaled arbitration and final determination by the arbitrator, the defendant be restrained from demanding any further rent, service charges or any other charges whatsoever or payments accruing over the premises standing on title No. Mombasa/Block XXV/100 from 31st August 2021.

f) The dispute between the Plaintiff and Defendant over the lease agreement in respect to title no. Mombasa/Block XXV/100 be referred to arbitrator for final determination in line with 3.18 of the lease agreement registered on 16 January 2018.

g) Costs be in the cause.

3. The application is founded on the grounds, testimony and averments in the 9th Paragraphed Supporting Affidavit of COLLIONS MUHIA sworn and dated 3rd September, 2021 and the Six (6) annexures marked as "CM-1to 6". The Plaintiff has been the tenant to the Defendant on the suit premises standing on all that parcel of land known as Land Reference No. Mombasa/Block XXV/100 from 31st August 2021, the suit property herein pursuant to a lease registered on 16th January 2018. That the global Covid - 19 pandemic had a negative impact on the Plaintiff's business who wished to vacate the suit premises, and issued the Defendant with a one month notice dated 30th July 2021. The notice informed the Defendant of the Plaintiff's intention to vacate the suit premises on 31st August 2021. However the Defendant declined to accept the notice. On 3rd August 2021 the Defendant wrote to the Plaintiff declining the notice to vacate on the ground that the lease had no termination clause, and that the cause could only be determined upon its completion on 31st March 2023. It is the Plaintiff's case that by doing so, the Defendant imposed punitive conditions for vacation of the suit property vide its letter dated 12 August 2021, the plaintiff paid

up the full rent for the remainder of the terms which was twenty (20) months.

4. That the Plaintiffs indicated that there existed a dispute between the Defendant and himself. He held that the said Lease Agreement contemplated on termination of the lease other than on the expiration of the lease, and the Plaintiff sought to invoke the Provisions under Clause 3.18 of the Lease Agreement that referred the dispute to an arbitrator. It is the Plaintiff's case that a landlord could not force a tenant to stay in a lease agreement they wished to terminate, yet the lease was on monthly basis with no rent arrears. That the Plaintiff could not afford to pay the rent beyond 31st August 2021 and was already in the process of restoring the suit premises for handover. That where the Plaintiff was in breach of the term and condition stipulated in the lease agreement the remedy lied in damages for breach of contract as determined in arbitration.

III. The Defendants/Respondents Case

5. The application is opposed by the Defendant/Respondent's 11 Paragraphed annexed herein Replying Affidavit sworn by its accountant Mr. Abdulkader Mohamed Sale Mohamed and four (4) annexures marked as "AMSM 1 to 4" annexed herein. The Defendant termed the application as malicious and one which did not disclose material facts pertaining to the Plaintiff's obligations under the Lease agreement registered on 16th January 2018; with a fixed term of 6 years running from 1st April 2017 to 31st March 2023. That the lease provides that in the event of vacating from the suit premises prior to the determination of the term of the lease and in the absence of a negotiated surrender of the term of the lease, the Plaintiff shall be liable for the rentals accruing until the determination of the term of the lease or until such time as Defendant would secure another tenant. It was the Defendant's case that the said lease was not capable of being terminated by either party unless a surrender of the remainder of the term of the lease was negotiated. That the Plaintiff's suit contradicted the terms and condition stipulated under Clause 3.18 of the lease agreement which required all disputes concerning the lease to be referred to arbitration. The Defendant further averred that the Plaintiff had not issued the Defendant with an arbitration notice declaring the existence of a dispute, hence contradicting the provisions set out Under Sections 6 and 10 of the Arbitration Act 1995.

III. Submissions

6. On 12 October 2021, court directed that the application to be disposed by way of written submissions. All parties fully complied a ruling dated was reserved thereof.

A. The Plaintiffs/Applicants Written Submissions

7. The Learned Counsel for the Plaintiff/Applicant filed his submissions on 2nd November 2021 in support of the application. The Learned Counsel submitted that the Plaintiff had come to court under the provisions of Section 7 of the Arbitration Act that allowed a party to seek interim measures before or during arbitrary proceedings. The Learned Counsel denied that the Plaintiff had not issued the Defendant with an arbitration notice. He argued that even though Clause 3.18 of the lease agreement did not describe any format for the notice, that the Plaintiff's letter dated 7th August 2018 declared a dispute and the intention to refer the matter to arbitration.

8. The Learned Counsel maintained that the Plaintiff could not financially sustain the lease terms anymore and the Defendant could not compel the Plaintiff to continue occupying the suit premises any further. The Learned Counsel to support its point relied on the case of **Chimanlal Meghji Naya Shah & Anor - Versus - Oxford university Press (EA) Limited (2007)eKLR** where it was stated that *'no landlord can force a tenant to stay in his premises for a particular period whether a lease exists or otherwise. The situation depends on many issues that would determine the relationship either way. In my view, there is no termination clause and the lease is terminated before its period of expiry, the situation that obtains is a breach of contract. In essence my position is that a lease agreement properly registered is a form of contract and therefore when there is a default, the terms of breach of a contract aptly applies. The landlord cannot perpetually wait and waste the premises simply because he had a fixed lease with no termination clause.'* The Learned Counsel argued that there was no justification why the Defendant should prevent and/or restrict the Plaintiff from vacating the suit premises after all, he averred where there was breach of lease, the Defendant's remedy lied in damages determined in arbitration. The Learned Counsel further contended that the Defendant could not hold the Plaintiff hostage in the suit premises, in a lease that neither compelled the Plaintiff to pay rentals accruing until its expiry or until an alternative tenant was found nor obligated the Plaintiff to negotiate a surrender the term.

B. The Defendants/Respondents Written Submissions

9. On 10th November 2021 the Learned Counsel for the Defendant/respondent filed his submissions in opposition of the application. The Learned Counsel submitted that the six (6) year lease's rent was payable quarterly in advance until 31st March 2023 unless the terms of a surrender were negotiated. They argued that in default of an express surrender, the Plaintiff was liable to pay rent accruing until the premises are rented out to an alternative tenant. The Counsel's contention was that the Plaintiff had breached the lease and was now seeking injunctive orders in an attempt to frustrate the Defendant from exercising its statutory right to levy for distress for rent. The Learned Counsel relied on the case of **Samuel Kipkorir Ngeno & Another - Versus - Local Authorities Pension Trust (Registered Trustee) & Another (2013) eKLR** where the court held that a tenant first and main obligation was to pay rent as and when it became due for the landlord had the right to an income from his investment. The Learned Counsel urged court not to grant the orders sought as they would restrain the Defendant from exercising its right as a landlord in a contract that executed by both parties.

10. The Learned Counsel directed court to the provision of Clause 3.18 of the lease agreement and relied on the case of **Coast Apparel EPZ Limited – Versus - Mtwapa EPZ Limited & Another (2017)**, where the court quoted **Safaricom Limited – Versus - Ocean View Beach Hotel Limited (2010) eKLR**, the Court of Appeal outlined the nature of interim protective measures and factors to be taken into consideration before granting an interim protection order. The court stated that: *'Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are, the existence of an arbitration agreement and whether the subject matter of the arbitration is under threat, in the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application and for what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal decision making power as intended by the parties.* The Learned

Counsel submitted that the Defendant had been open to any arbitration proceedings but the Plaintiff had acted in bad faith and contrary to the provisions of Sections 6 and 10 of the Arbitration Act for failing to issue the Defendant with any notice or evidence of its intention to commence arbitrary proceedings.

It is not an order issued in vacuum as it is premised on intended on ongoing arbitration proceedings. Section 10 of the Arbitration Act, was said to be mandatory. The Plaintiff had not issued notice or commenced any arbitration proceedings and hence the suit herein cannot be sustained.

11. The Learned Counsel urged court to dismiss the application with costs.

IV. Analysis and Determination

12. I have read and considered the pleadings and submissions made, the issues before me for determination are:-

a) Whether the court ought to issue interim measures pending the reference of the dispute to arbitration.

b) Whether the dispute between the parties should be referred to arbitration for final determination in line with Clause 3.18 of the Lease Agreement.

13. The facts giving rise to the application herein is the lease agreement duly executed between the Plaintiff and Defendant. The Defendant as the Landlord leased the to the Plaintiff as a Tenant to the suit premises on the suit property Mombasa/Block XXV/100 for a six (6) years term running from 1st April 2017 to 31st March 2023. On 30th July 2021 the Plaintiff notified the Defendant through a letter of its intention to terminate the lease and vacate the premises. The Defendant responded by rejecting the notice and indicated that the lease had no termination clause and the Plaintiff could not vacate the premises until the expiry of the lease on 31st March 2023. The only option available to the Plaintiff, according to the Defendant was negotiation of surrender to the remainder of the term of the lease. The Plaintiff reacted to the Defendant vide a letter dated 7th August 2021, to the effect that the lease intimated the possibility of terminating the lease before its expiry; and further gave notice of intention to refer the dispute to arbitration as per the terms of the Lease agreement Clause 3.18.

14. The Plaintiff moved court under the provisions of **Section 7 of the Arbitration Act**, seeking interim measure of protection against the Defendant from denying presenting and/or restraining the Plaintiff from vacating the premises as well as to restraining the defendant from demanding any further rent pending arbitration. The lease agreement provides for arbitration of any dispute arising between the parties hence the Plaintiff's invocation of **Section 7 of the Arbitration Act** for interim relief pending arbitration is extremely plausible in the given circumstances. The Provisions of Clause 3.18 of the Lease agreement states *Inter alia*:-

'all disputes and questions whatsoever which shall arise between the parties hereto touching this lease or the construction or application thereof or any clause of thing contained or to the rights or liabilities of any party under this lease shall be referred to the decision of a single arbitrator to be appointed by the parties...'

15. The power of court to intervene and give an interim measure of protection is provided by **Section 7 of the Arbitration Act**, Subsection 1 states, **'It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.'** The purpose of the interim measure orders are to preserve evidence, to protect assets or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. As much as the arbitrator has powers to issue orders, it cannot issue interim measures until the arbitration proceedings are commenced, hence under the provisions of **Section 7 of the Arbitration Act** precedes it. The **Court of Appeal in Safaricom Limited – Versus - Ocean View Beach Hotel Limited & 2 others (2010)eKLR** stated:-

'It takes time to establish an arbitral tribunal and during the time between the arising of the dispute and the tribunal's establishment vital evidence or assets may disappear unless a national court (in our case, the High Court) is urgently asked to intervene. Moreover even where an arbitral tribunal has the power to issue interim measures such powers are generally restricted to the parties involved in the tribunal itself.'

16. The Court of Appeal further discussed what court must consider before issuing interim measures of protection as such.

'Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-'

a) The existence of an arbitration agreement.

b) Whether the subject matter of arbitration is under threat.

c) In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application"

d) For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making powers as intended by the parties.'

17. In the matter before me, the Plaintiff prays for the Defendant to be restrained from demanding rent or any related charges pending the final determination by the arbitrator. Going by the requirements meted out by the Court of Appeal, both parties are in agreement there exists an arbitration clause in the lease agreement, and the subject matter of the arbitration which is the suit property is, in my view under threat. For the reason that, the Plaintiff's notice to terminate the lease and vacate the suit premises has been denied by the Defendant, who may proceed and distress for rent. This court is called to make a tentative assessment of the merits on whether the Plaintiff's case is strong enough to merit protection, at the same time not taking out of the hands of the arbitrator the power to decide. The court is reluctant at making any finding whatsoever that would risk prejudicing the outcome of the arbitration and which ultimately has the jurisdiction to determine the dispute between the parties.

18. The roadmap to arbitration has been invoked by the Plaintiff in its letter to Defendant dated 7th August 2021, which says, 'Take Notice that if you fail to accede to our notice we will have no option other than to refer this dispute to arbitration as per clause 3.18 of the lease agreement. For the avoidance of doubt, consider this as our notice to intent to refer this dispute to arbitration under the aforesaid clause.' Clause 3.15 of the lease provides for Service of Notices under the lease; in my view, the plaintiff's letter dated 7th August 2021 was in accordance with the clause and suffices as duly served notice. I find that the letter was the first avenue, stem and clear "Modus Operandi" in commencing the process of putting in place an arbitration process.

19. The parties agreed to have all their disputes, questions touching on the lease its construction or application or their rights and liabilities towards it be heard and determined by a single arbitrator, whose decision shall be final, conclusive and binding on the parties. I find that the dispute on how to terminate the lease and the rights and liabilities of either parties during termination can only be determined by a single arbitrator pursuant to the terms under Clause 3.18 of the Lease Agreement.

V. Determination

20. The upshot of the above detailed analysis and looking at the material presented before this Honorable Court by the Plaintiff, I am persuaded that the conditions for grant of a protective measures pending arbitration have been well established. Unfortunately, though there seem to be a consensus on referring the dispute for arbitration, by the parties hereof but the parties have not proposed the timeline in which they wish to commence the arbitration proceedings. Apparently they have left it to the discretion of court. Therefore, I do hereby proceed to make the following orders:-

a) THAT interim measures of protection for a period of THE NEXT FOURTY FIVE (45) DAYS from the date of this ruling is hereby granted restraining the Defendant whether by themselves, agents or servants or any other person acting on its instructions from demanding any further rent, service charges or any other charges whatsoever or payments accruing over the premises standing on title No. Mombasa/Block XXV/100 pending the reference, commencement and final determination of the Arbitration proceedings before a single Arbitrator to be agreed upon by the parties in line with Clause 3.18 of the Lease Agreement registered on 16 January 2018.

b) THAT the order of interim measure of protection is strictly only granted WITHIN THE NEXT FOURTY FIVE (45) DAYS from the date of this ruling to enable the parties institute the necessary arbitral proceedings, in default this conditional order shall automatically cease to operate.

c) THAT costs shall be in the Cause.

IT IS ORDERED ACCORDINGLY.

RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JANUARY 2022.

HON. JUSTICE L. L. NAIKUNI JUDGE

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:-

M/s. Yumna the Court Assistant

Mr. Murithi Advocate for the Plaintiff/Respondent

Mr. Saka Advocate for the Defendant/Respondent