



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 183 OF 2019

ZOHARI LEASING LIMITED.....PLAINTIFF/APPLICANT

VERSUS

NAKS SUPERSTORES.....DEFENDANT/RESPONDENT

RULING

1. The application for determination is the Notice of Motion dated 4th July, 2019 filed by the Plaintiff. It is brought under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 40 Rule 10 and 50 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the Law. The main prayers are that:

a. This honourable court be pleased to issue an order of preservation in form of a temporary injunction restraining the Defendant/Respondent either by itself, its servants, agents, or employees from selling, alienating, disposing off, or dealing in any manner with a Generator set model Pramac Generator together with 3 tanks, which are the subject matter for this suit, for purposes of preserving the same, pending the hearing and determination of the suit.

b. This Honourable court be pleased to order that Generator set model Pramac Generator GSW80 and one stainless steel triple Unit Milk Dispenser with auto refill pump together with 3 tanks, which are the subject matter be safely stored at Leakey's Storage Limited Warehouse for safe custody pending hearing and final determination of the suit.

c. Cost of this application be paid to the Plaintiff/Applicant.

2. It is premised on the grounds on the face of the application and the Supporting Affidavit of Irene Karuga, the Chief Executive Officer of the Plaintiff company sworn on 4th July, 2019. It is averred that through a Master Rental Agreement dated 13th June, 2016, the Applicant contracted on the following terms:

a. That the Applicant shall purchase and lease to the Respondent certain equipment as described in the sale agreement at a fee.

b. The Respondent to pay to the Applicant rental installment payable monthly in advance as and when they become due and payable on time.

c. The Respondent to return to the Applicant at the place specified by the Applicant equipment at the expiration of the terms and upon termination of the agreement.

d. The Respondent to meet the costs of returning the equipment to the Plaintiff.

e. The Respondent shall pay the Applicant a total of 100 percent of the remaining rentals from the date of termination.

3. It is deposed that upon execution of the agreement, the Applicant delivered to the Respondent's supermarket the leased equipment in Soweto and Corner Areas both within Kayole Estate in Nairobi County. The Applicant used a third party known as Nairobi Kitchen Care to supply and deliver the said equipment upon which the Respondent signed receipt of the same in good condition. Delivery notes in that regard were exhibited.

4. Additionally, the Applicant further delivered a generator model Set Pramac Generator GSW80 which was installed at the Respondent's Soweto branch in Kayole.

5. It is averred that the total value of the equipment delivered was Kshs. 50,665,241.75 for which the Respondent was to pay through agreed monthly rentals at an agreed interest rate of 3 percent per month from date the account between the parties became due, which was on 31st October, 2017 until payment in full.
6. The Applicant avers that contrary to the agreement, the Respondent fell into arrears which prompted the Applicant to make demands for payment including a demand to return the generator and one stainless steel Triple Unit Milk Dispenser with auto refill pump together with three tanks at the Applicant's preferred storage facility as agreed between the parties.
7. It is stated that upon the Respondent's failure to deliver back the equipment, the Respondent repossessed some of the equipment and stored them in its preferred warehouse and in the process of repossessing the said equipment incurred a loss of Kshs. 140,000/=.
8. Further, due to the non-performance of the contract on the part of the Respondent, the Applicant terminated the agreement pursuant to its terms.
9. That for the foregoing reasons, the Applicant asks the court to issue preservative orders in the form of a temporary injunction restraining the Respondent from selling, disposing off, or in any way alienating the afore stated generator Set Model GSW80 and one stainless steel triple Unit Milk Dispenser with auto refill pump together with three tanks which are subject of the suit herein.
10. It is averred that if the injunctive orders are not issued, the Respondent will suffer irreparable loss and damage. Furthermore, that it is in the interest of justice to allow the application which is brought in good faith.
11. In opposing the application, the Defendant filed a Replying Affidavit sworn by Shadrack Njuguna, the Director of the Defendant Company on 23rd October, 2020.
12. The Respondent concedes to having leased the items/equipment including the generator Set Model Pramac Generator GSW80 and one stainless Steel Triple Unit Milk Dispenser through a master Rental Agreement dated 13th June, 2016. It is stated that the said agreement was terminated on 23rd October, 2018 after which the Applicant repossessed most of its equipment from the Respondent.
13. It is averred that upon the said repossession the Applicant neglected to carry away both the generator set and the unit milk dispenser which were both on site on the material date.
14. That when the leased items and equipment started being carried away, the Respondent's landlord encumbered most of them including the generator and the unit milk dispenser, a fact that is admitted by the Respondent's landlord in suit Nairobi case **CMCC No. 11368 of 2018 – Gerald Ndirangu Kariuki Vs Naks Limited.**
15. The Respondent avers that in the magistrate's suit, it filed a counter-claim in which it accused its landlord for failure to release the Applicant's generator and the unit Milk Dispenser. The prayers sought in the counter-claim were a declaration for the release of the stated equipment. A copy of the Amended Defence marked as SN2 is attached to the Replying Affidavit.
16. Consequently, it is the case for the Respondent that it is not in possession of any of the leased equipment including the generator and the Unit Milk Dispenser. Furthermore, it is not opposing the repossession of the said equipment from its former landlord because in any case, the Applicant is the legal owner of the equipment.

Analysis and Determination

17. The application was canvassed before me on 12th April, 2021. Learned counsel, Mr. Momanyi appeared for the Plaintiff/Applicant, whilst learned counsel, Ms. Wairimu held brief for Mr. Kiiru for the Defendant/Respondent. The parties relied on their respective application, the Supporting Affidavit and annexures thereto and the Replying Affidavit and its annexures as filed.

18. The application is mainly invoked under Order 40 Rule 10 of the Civil Procedure Rules which provides as under:

“(1) The court may, on the application of any party to a suit, and on such terms as it thinks fit-

(a) Make an order for the determination, preservation, or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;

(b) For all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; or

(c) For all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply mutatis mutandis to persons authorized to enter under this rule.

19. The above rule would be applicable to the second prayer in the application. The first prayer which is for a temporary injunction is governed by Rule 1 of Order 40 which provides that:

“Wherein any suit is proved by affidavit or otherwise:

a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit.

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

20. The power to grant an injunction is discretionary and such discretion must be exercised judiciously on the basis of law and evidence (See **Mrao v First American Bank of Kenya Limited & 2 others [2003] eKLR**).

21. The locus classicus case that sets out the conditions necessary for the grant of interlocutory injunctions is that of **Giella v Cassman Brown [supra]**, the court set out as follows:

“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 probability of success. Secondly an interlocutory injunction will not be normally 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.”

Whether the Applicant has a prima facie case with chances of success

22. The question of what constitutes a *prima facie* case was determined by the Court of Appeal in the case of **Mrao Limited V First American Bank of Kenya and 2 Others [supra]** as follows;

“A prima facie case in a Civil Case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

23. While adopting the same position, the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** added that:

“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..... 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.”

24. The determination of whether the Appellant has a *prima facie* case with chances of success in the present application calls for a consideration of the prospects of success of the pending suit since the ultimate objective is to safeguard the rights of the Applicant in the suit by maintaining the status quo, if need be.

25. In the instant case, there is no contestation that the Applicant and the Respondent entered into Master Rental Agreement in which several equipment was leased to the Respondent as per the Master Rental Agreement dated 13th September, 2016. Amongst the equipment leased were the Model Pramac Generator GSW80 and one Stainless Steel Triple Unit Milk Dispenser with auto refill pump together with three tanks. No doubt the said equipment belonged to the lessor, the Applicant herein.

26. What is also undisputed is that the Respondent ran into financial problems as a result of which he was unable to meet the monthly rentals for the equipment. Pursuant to the latter, it is also clear that, due to the financial difficulties, he was unable to pay rent in the premises he was running the supermarkets. This led to the termination of the Master Rental Agreement.

27. Amongst the terms placed in the agreement upon termination or expiration of the agreement was as per clause 11.3 to 11.6. Clause 11.3 provides that:

‘If we terminate the renting of the equipment under clause 11.1 or 11.2, you must immediately:

(a) return the equipment to us at a place specified by us;

(b) pay to us a total of 100 percent of the remaining lease rentals from the date of termination;

(c) pay to us any break cost incurred by us or a secured or financing party or the owner of the equipment in prepaying any fund arrangements in connection with the purchase and renting of the equipment to you.”

28. Clause 13.1 on the other hand stated that:

“At the expiration or earlier termination of the renting of the equipment, you will at your expense deliver the equipment in good working order. Should any of this be in doubt or where you will not have a satisfied technician to check the machinery, then the local dealer will provide the confirmation necessary. During the term, the equipment should be maintained as close as possible to the return condition. Annual inspection may be carried out to identify discrepancies to return condition above, which should be rectified immediately to avoid breach of terms.

29. Clauses 13.2 and 13.3 read as follows:

“13.2 The equipment will not be regarded returned unless (where applicable) it is decommissioned in accordance with the original manufacturers specifications by an authorized person and appropriate certificates have been supplied and it is returned in accordance with the requirements set out in this agreement.

13.3 If it is not possible for you to return the equipment to us in accordance with the provisions of this agreement, then you must immediately at the expiration or earlier termination of the renting of the Equipment in terms of this agreement and at your cost deliver to us replacement equipment approved by us and of a similar nature to the equipment.”

29. From the afore going, the agreement having been terminated the Respondent was obligated to return by delivering the leased equipment to the Applicant in a specified location/store.

30. The twist in this matter is that by its own admission in the Replying Affidavit, the Respondent was unable to fulfil this term of the agreement because the equipment was proclaimed by its landlord, one Gerald Ndirangu Kariuki. By a copy of a plaint annexed to the Replying Affidavit, the said landlord has sued the Respondent herein vide **Nairobi CMCC No. 11369 of 2018- Gerald Ndirangu Kariuki v Naks Superstores Limited** for rent arrears of Kshs. 3,872,589/=, electricity bills of Kss 1,393,377/= and painting the premises of Kshs. 50,000/= all totaling to Kshs. 5,265,966/=.

31. At paragraph 9 of the plaint, it is clear that the Respondent after running into financial problems with its landlord, left behind the Applicant’s generator Pramac GSW80 worth about Kshs. 1 million in the rented premises. By that concession, there is no doubt that the Plaintiff in that suit is aware that the generator does not belong to him.

32. In the defence, the Respondent filed a Counter-Claim and Set Off wherein it is stated that amongst the equipment it left behind in the rented premises were the afore stated generator as well as a milk ATM machine worth Kshs. 1 million. Amongst the reliefs sought in the Counter-Claim is a release of both the generator and milk ATM machine.

33. What is not clear is whether after the goods and equipment were proclaimed by the Respondent’s landlord the same were sold or not. Nevertheless, the court being alive to the fact that the generator and the milk machine belonged to the Applicant and not the landlord and there being a Counter-Claim on the basis that the equipment was proclaimed and ought to be released to the Respondent is a testament that it is in possession of the Respondent’s landlord.

34. One of the prayers sought in the suit herein is for access into the Respondent’s leased premises for purposes of recovery of the afore stated generator as well as the release of the milk dispenser machine amongst many other items. Thus, it is clear that the Applicant herein has an arguable case with chances of success in that the Respondent was obligated under the Rental Agreement to return to the Applicant all the leased equipment and items if the agreement was either terminated or came to an end by effluxion of time. It follows then that if the court does not grant conservatory orders, the substratum of the suit may be defeated. The first test for the grant of a temporary injunction passes.

Whether the Applicant will suffer irreparable injury

35. Having rendered myself as above, and being alive to the fact that the Applicant is unable to access its legally owned equipment and further having regard to the fact that the equipment has been proclaimed in another suit, albeit the party probably being ignorant of the ownership, there lies the danger of either the equipment being sold or wasted.

36. Applying the threshold for grant of an injunction in the **Giella v Cassman Brown** case (supra), this is one case where the court could easily conclude that the damages are compensable by damages. I say so having regard that the value of the equipment is quantifiable. But again, it is clear that the Applicant, under the contract, was in the business of renting business equipment. If the court does not order the preservation of such equipment, there lies the danger of it being wasted both in physical deterioration and the lessee purporting to own it consequent which unsuspecting third parties would be duped to take lien over. This therefore, is a case I find that, the Applicant having established a *prima facie* case the court would issue injunctive orders so as to preserve the Applicant’s legal right to the equipment. In so holding I have reliance on the case of **Waithaka v Industrial Development Corporation (2001) e KLR** where the court delivered itself thus;

“As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy. By using the word “normally” the Court was

recognizing that there instances where an injunction can issue even if damages would be an adequate remedy for the injury the Applicant may suffer if the adversary were not enjoined. I think that some of the considerations to be borne in mind is the strength or otherwise of the Applicant's case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high-handed or oppressive in its dealings with the Applicant this may move a court of equity to say: "money is not everything at all times and in all circumstances and don't you think that you can violate another citizen's rights only at the pain of damages."

37. In the present case, I have already found that there exists a *prima facie* case with a probability of success. I would not, *per se*, think that the Respondent's case is one that can be regarded as high-handed. But again, the scenario herein is unique in that the Respondent went on an escapade of renting equipment and failed to pay rental instalments as per the parties' agreement. In addition, after the contract was terminated he did not honour his obligation to deliver back the equipment but waited until its landlord proclaimed it for rent.

38. It can only be in the interest of the preservation in good condition pending the determination of the suit herein, that the equipment is kept in a safe place and preserved in a manner that it can operate after the suit is heard and determined. That way, the Applicant's legal rights to its equipment will be preserved. This will further avert the equipment being sold to unsuspecting buyers which will drag the Applicant into fresh suit(s) in an attempt to reclaim its ownership. In this case, the Applicant is at liberty to move the equipment to the storage facility as, in any event, it can recover the costs from the Respondent. It is my view then that an interim injunctive order is deserved notwithstanding that it falls outside the spelt out normal rule of granting interlocutory injunction.

39. It therefore follows from the foregoing that the balance of convenience tilts in favour of the Applicant, to grant the orders sought.

Conclusion

40. In sum, I find that the application is merited and I grant the following orders.

a) A temporary injunction is hereby issued restraining the Respondent either by itself, its servants, agents, or employees from selling, alienating, disposing off, or dealing in any manner with the generator set model Pramac GSW80 and one Stainless Steel Triple Unit Milk Dispenser with auto refill pump together with three tanks pending the hearing and determination of the suit herein.

b) That the generator model Pramac Generator GSW80 and one Stainless Steel Triple Unit Milk Dispenser with auto refill pump together with three tanks be stored at Leakey's Storage Warehouse for safe custody pending and determination of this suit.

c) That the Applicant is at liberty to deliver the equipment to the storage warehouse at the cost of the Respondent.

d) That the cost of the application be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 22nd April, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr.Momanyi for the Appellant/ Applicant.*

2. *No appearance Thuita Kiiru for the Respondent.*