



**Eureka Holdings Limited v Yan Liu t/a For You Chinese Restaurant; Ndungu (Interested Party)
(Environment & Land Case E128 of 2023) [2023] KEELC 18793 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18793 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E128 OF 2023
LN MBUGUA, J
JULY 13, 2023**

BETWEEN

EUREKA HOLDINGS LIMITED PLAINTIFF

AND

YAN LIU T/A FOR YOU CHINESE RESTAURANT DEFENDANT

AND

ISAAC CHEGE NDUNGU INTERESTED PARTY

RULING

1. Before me is the plaintiff's application dated March 22, 2023, seeking a temporary order restraining the Defendant, its servants or agents or any other person claiming through them from erecting any permanent or temporary structures, undertaking any construction activities or in any way altering the structural plan of the Plaintiff's premises within the property known as Land Reference No 330/241 (Original Number 330/120/1) situate within Nairobi County or in any other way or manner breaching the terms and conditions of the lease agreement dated June 23, 2020.
2. On May 22, 2023, the Interested Party was joined in this suit.
3. The application is based on grounds on its face and on the supporting affidavit as well a further Affidavit sworn on March 22, 2023 and on May 12, 2023 respectively by Leon Nyachae, the Plaintiff's company director.
4. He avers that the Plaintiff is the registered owner of the suit property, that on June 23, 2020, they entered into a lease agreement with the Defendant for a period of 5years and 3 months from March 1, 2020. He further avers that he recently inspected the suit property and established that the Defendant has breached and continues to breach specific terms of the lease agreement.



5. He points out that the Defendant has without their prior consent, unilaterally extended the contractual usage of the suit premises beyond the permitted purpose for a restaurant because the defendant now operates a retail butchery, farmers choice shop outlet, commercial car-wash and car detailing shop/ Centre, barber shop and spa center as well as a juice bar.
6. He avers that the Defendant has also installed within the suit premises some commercial car cleaning equipment and heavy duty vacuums and waterjets that cause excessive noise and emit obnoxious smell/ fumes. He adds that the Defendant has caused or permitted to be set up various open combustion fire points within the property and continues to undertake alterations and additions that alter the design of the premises.
7. The deponent further contends that the Respondent is actively undertaking further extensions and construction activities in the suit land. He points out that the Respondent has erected a make shift Swahili cuisine structure with a sign advertising 'Mama Nilishe' Swahili cuisine, as well as displaying another signage of the car wash business, has set up a pharmacy, set up entertainment joints , installed a rooftop bar and liquor store, patio umbrellas and chairs as well as gas cylinder distribution sale point.
8. These activities have now attracted the attention of the County Government of Nairobi who have issued an enforcement notice dated March 3, 2023.
9. He avers that if the orders sought are not granted, the Plaintiff will suffer irreparable loss since the premises were constructed in 1985 and the design aspect is part of the historical aspect that the Plaintiff intends to maintain for prosperity. He adds and that the activities of the Defendant including the defacing of the walls, floors and ceiling will continue to alter the design of the suit premises and will completely deform it to the extent that restoration of the premises to its original design will not be possible.
10. The application is opposed by the Defendant vide her Replying Affidavit sworn on May 18, 2023. She admits that she entered into a lease with the Plaintiff on June 23, 2022. She contends that despite clause 2 (q) of the said lease stating that the lessee shall not transfer, assign or sublet the subject premise, the Plaintiff vide a letter dated November 4, 2020 issued her with a consent allowing the subject premises to be sublet for the duration of the lease.
11. Subsequently, she entered into a lease agreement dated March 31, 2021 to sublet the subject premises to the Interested party for a period of 5 years and 3 months commencing November 1, 2020 and the same was approved by the head lessor, the Plaintiff herein vide the letter dated November 4, 2020 and further the sublease was executed by one Kenneth Bitange Nyachae on behalf of the Plaintiff.
12. The application is also opposed by the Interested Party vide his grounds of opposition and replying affidavit sworn on May 23, 2023. He avers that he entered into a lease agreement with the Defendant on March 31, 2021 to sublease the suit property with the Plaintiff's full consent.
13. He further avers that due to the economic problems encountered world wide as a result of the covid 19 pandemic, he agreed with the Defendant and the Plaintiff that he puts up the temporary structures to increase the business volume.
14. He avers that he proceeded to obtain the necessary authority from the Nairobi County Government to carry out the necessary construction of temporary structures with the understanding that he will remove them at the end of the sublease. He adds that he has not erected permanent structures on the suit land.
15. In response to the Defendant's and the interested parties replying affidavits, the Plaintiff filed a supplementary affidavit sworn on May 29, 2023 again by its director Leon Nyachae. He avers that the



limited use of the suit premises was also captured in the agreement dated May 31, 2021. He further avers that the lease agreement dated June 23, 2020 between the Plaintiff and the Defendant was registered on July 18, 2020.

16. He avers that the purported approval dated January 12, 2023 could not form the basis of the alteration or additions to the suit premises for the reason that the approval is in reference to the Defendant and not the Interested Party.

Analysis

17. I have considered all the arguments raised herein including the rival submissions. The Plaintiff seeks a temporary order restraining the Defendant/her servants or agents or any other person claiming through her from altering the structural plan of its premises Land Reference No 330/241 (Original Number 330/120/1). To grant or not to grant the said prayers is the issue for determination.
18. The principles for grant of injunctions were settled in the case of *Giella vs. Cassman Brown case Giella v Cassman Brown* [1973] E A 358. A party seeking a temporary injunction is required to establish a *prima facie* case and prove that if the order is not granted, the party will suffer irreparable loss not capable of being compensated by an award of damages and if the court is in doubt, the matter is decided on a balance of convenience.
19. The Plaintiff has established ownership of the suit property. It has also established that it leased the suit property to the Defendant vide a lease dated June 23, 2023. Clause 2(k) of the lease provides that the suit premises will be used for the purpose of a restaurant only and not any other purpose without the written consent of the lessor. Further, Clause 2(x) provides that the lessee shall not make any alterations/ additions without the consent of the lessor.
20. The Plaintiff argues that in breach of the 2 aforementioned clauses among others in the lease, the Defendant has set up a plethora of businesses in the suit premises and altered its structure by erecting permanent and temporary structures.
21. I find that while the lease dated June 23, 2020 between the Plaintiff and the Defendant prohibited subletting and alterations, the letter dated November 4, 2020 varied the terms of the said clauses, allowing the Defendant to sub-let the suit premises.
22. Pursuant to the said variation, the suit property was sublet to the Interested Party by the Defendant vide a lease dated March 31, 2021. The same is signed by one Kenneth Bitange Nyachae whom the Defendant claims is a representative of the Plaintiff while the Plaintiff disputes that fact.
23. At paragraph 5 of their Supplementary Affidavit, the plaintiff does not deny that the initial lease was subsequently varied. Their issue is that they were not aware of the details of the subtenant. I disagree. The plain wording of the heading in the letter of November 4, 2020 authored by Leon Nyachae is "Variation of Lease -LR. 330/241/Gitanga Road Nairobi". The logical consequence of that letter was that subletting would follow. Thus at this stage of the trial, the plaintiff cannot advance a claim that they were not informed as to when the subletting took effect.
24. I find that the Interested Party is on the suit land legally, pursuant to the Plaintiff's consent to allow the Defendant to sublease the premises. The Interested Party is also paying rent, and the Plaintiff is profiting from the activities being carried out on the suit land.
25. In light of the above analysis, this court desist from delving into the conflicted issues, particularly the interpretation of the letter of November 4, 2020. It would be in the interest of justice that the rights



and interests of the parties be determined in the main trial. In the circumstances, the appropriate order befitting the circumstances herein is the order of maintenance of Status Quo.

26. In the case of *Daniel Kinyanjui Gitau & 227 others v Mary Ruguru Njoroge* [2020] eKLR , the court had this to say on the issue of *status quo*;

“The Court of Appeal defined what ‘status quo’ means in the case of Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR as follows:

“Status quo” in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events. We fail to see what can be ambiguous about that order. All it meant was that everything was to remain as it was as at the time that order was given. If there was any transaction of whatever nature that was going on in respect of the land in question, it had to freeze and await the discharging of the Court order. The agreement of sale may have been signed prior to that date, but once the court ordered maintenance of status quo, everything else had to wait.”

The order for the maintenance of status quo therefore meant that things were to remain as they were as at the date of the delivery of the Ruling. If the Defendant or the Plaintiffs had already put up structures on the suit property, the said structures were to remain intact pending the hearing and determination of the suit”.

27. The final order given herein is the maintenance of *status quo* as at the time of delivery of this ruling. The same entails that the businesses which are already running should continue to run and rent should be paid as per the various agreements between the parties. However, no further alterations should be carried out in the suit premises.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Muisyo holding brief for Mr. Stonik for the Applicant

Bakaya holding brief for Muchemi for the Defendant

Okeyo for the Interested Party

Court Assistant: Eddel

