



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E108 OF 2020

BETWEEN

CROSSROADS LIMITED.....1ST PLAINTIFF

KAREN WATERFRONT PHASE TWO LIMITED.....2ND PLAINTIFF

AND

SHOPRITE CHECKERS KENYA LIMITED..... 1ST DEFENDANT

ANDREW MWEEMBA.....2ND DEFENDANT

KRUGER MORKEL DANIE.....3RD DEFENDANT

ANTON ANDREW WAGENAAR.....4TH DEFENDANT

ANTON BRUYN DE.....5TH DEFENDANT

IZAK JOHAM STEYN.....6TH DEFENDANT

GERHARD FRITZ.....7TH DEFENDANT

RULING

Introduction and background

1. It is not disputed that the plaintiffs are the proprietors of the Waterfront Karen Shopping Mall erected on Land Reference No. 30656 (Original No. 20587) (“the Mall”). On 26th November 2019, the plaintiffs and the 1st defendant (“Shoprite”) executed a Heads of Terms Agreement (“the Agreement”) whereby the plaintiffs were to lease to Shoprite, Unit 102 (Pl.0.47) situated on the ground floor of the Mall.

2. The gravamen of the plaintiffs’ claim set out in the plaint is that on 15th April 2020, Shoprite issued a, “*Notice of Termination of the Lease Agreement of Premises Situated at the Waterfront, Karen Shopping Mall*” (“the Notice”). In the Notice, Shoprite explained that its business at the Mall was not profitable and there were no reasonable prospects of improvement. It therefore gave the plaintiffs 3 months’ notice of termination with effect from 1st May 2020. The Notice stated in part that, “*The Company will vacate and hand back the keys of the premises to you on/or before the 31st July 2020. The premises will be reinstated during the notice period and the Company will continue to pay the monthly rent until 31st July 2020.*”

Plaintiff’s Case

3. In the plaint, the plaintiffs complained that the Agreement did not have a termination clause since it was the common intention of the

parties that it would only lapse after the expiration of 10 years, that is on 30th September 2029. The plaintiffs pleaded that as a result a constructive trust was established that Shoprite would occupy the Mall for a period of 10 years and that it had a legitimate expectation of receiving rent for that period. It further stated as an anchor tenant, Shoprite's conduct had caused panic among other tenants who were apprehensive that they would also suffer loss and damage and also cause it to suffer loss of rent for the remainder of the lease period and for costs incurred in sourcing for another anchor tenant.

4. The plaintiffs claimed that the Notice and Shoprite's subsequent conduct of advertising closure of its premises at the Mall and rendering its employees redundant constituted breach of the Agreement. As a result, the plaintiffs claimed that they are entitled to be indemnified from foreseeable loss and damage that would be suffered by them. The plaintiffs pray for general damages for breach of contract, general damages for loss of expectation of rental income for the remainder of the tenancy being USD 4,888,168.57, interest thereon and costs of the suit.

The Plaintiffs application

5. The plaintiff moved the court under certificate of urgency by a Notice of Motion dated 22nd April 2020 under **sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** and **Order 51 rule 1** of the **Civil Procedure Rules** and all other enabling provisions of the law seeking the following orders:

1. THAT the Application be certified as urgent and service thereof be dispensed with in the first instance.

2. THAT the Defendants be compelled to deposit in court a sum of USD 4,888,168,57 being the amount commensurate to the rent payable by the Defendants to the Plaintiffs in satisfaction of the remainder of the tenancy as a security for their appearance before this Honourable Court in view of fact that the 2nd to 7th Defendants are foreign nationals pending the hearing and determination of this Application.

3. THAT in the alternative, this Honourable Court be pleased to order the Defendants to deposit in court any other sufficient security to guarantee their appearance before this Honourable Court pending hearing and determination of this Application.

4. THAT Defendants be ordered to deposit in this Honourable Court a sum of USD 4,888,168.57 being the amount commensurate to the rent payable by the Defendants to the Plaintiffs in satisfaction of the remainder of the tenancy as a security for their appearance before this Court in view of the fact that the 2nd to 7th Defendants are foreign nationals pending the hearing and determination of the hearing and determination of the suit.

*5. THAT this Honourable Court be pleased to make an order freezing the Bank Accounts of the 1st Defendant held at Stanbic Bank Kenya Limited being Accounts Numbers 010*****334 and 010 ***** 631 until the Defendants make good to the Plaintiffs the rent payable of USD 4,888,168.57.*

6. THAT the 2nd to 7th Defendants be summoned to attend this Honourable Court for their examination on the 1st Defendant's Assets and to be compelled to produce all its books of accounts including but not limited to the 1st Defendant Annual Financial Statements.

7. THAT the 2nd to 7th Defendants present in Kenya be compelled to deposit their passports and travel documents in this Honourable Court pending the hearing and determination of this Application and suit.

8. THAT this Honourable Court be pleased to order the 3rd Defendant, KRUGER MORTEL DANIE who resided in Karen to deposit his passport and travel documents pending the hearing and determination of this Application and suit,

9. THAT this Honourable Court be pleased to issue any other such orders as it may deem fit and just in the circumstances.

10. THAT costs of this application be borne by the Defendant.

6. The application is supported by the affidavit of Daniel Muthanji Muguku, a director of the plaintiff, sworn on 22nd April 2020. He reiterated the common facts and plaintiffs' case as I have outlined above. He further deponed that the defendants had affixed notices to the outer walls and door of the premises informing the public of their intention to vacate the premises. That they have started removing their merchandise from the mall and rendered their employees redundant. He also deponed that the defendants do not have any known assets in Kenya other than their outlets situated at Westgate Mall and Garden City Mall in Nairobi and City Mall in Mombasa. He also deponed that all the directors of Shoprite are foreign nationals with no known assets in Kenya and that in view of the foregoing, the plaintiffs would likely suffer total loss amounting to USD 4,888,168.57 plus costs should its claim succeed at the trial.

The Defendants' Application

7. In response to the application, the respondents also filed a Notice of Motion dated 11th May 2020 under **Order 1 rule 10(2)** of the **Civil Procedure Rules** seeking an order that the court, "strike out the 2nd -7th Defendants as parties to the suit." The application is supported by the affidavit of Andrew Mweemba, Shoprite's General Manager, sworn on 11th May 2020. The defendants also filed a replying affidavit to the plaintiff's motion sworn on 11th November 2020.

8. The position taken by the defendants in opposition to the plaintiffs' case was that although the Agreement signed by the parties, it was, "subject to contract and lease" as it was expected that the parties would enter into a formal lease of the premises. They contended that to date no lease has been prepared and forwarded for execution by Shoprite. They add that the obligation to prepare the lease was on the

plaintiffs' advocates, *Miller and Company Advocates*, who never prepared or presented the lease. According to the defendants and their advocates, since no lease was signed, the relationship was that of a periodic tenancy and since there was no provision for termination and Notice issued was appropriate and given in terms of **section 57(4)** of the **Land Act, 2012**.

9. Mr Mweeba deponed that the plaintiffs misrepresented to Shoprite that the Mall's would have a mix of tenants including banks, telecos, branded clothes outlets and ATMS to accord with industry standards taking into account similar establishments. Shoprite also denied that it was anchor tenant as there was another tenant; Game Stores holding superior space, a fact the plaintiffs advertised in a press statement. Shoprite contended that it acted reasonably and informed the plaintiffs of its actions of its intention to resolve the matter amicably.

10. Mr Mweeba further deponed that Shoprite is an international supermarket chain of global repute, operating over 2,543 stores in 15 countries and that its holding company is listed in the Johannesburg Stock Exchange. He maintained that Shoprite has known assets and remains able and willing to make good any damages.

11. In addition, and also in support of its application to strike out the 2nd to 7th defendants, the defendants contended that Agreement was signed between the Plaintiffs and Shoprite, a company incorporated in Kenya under the **Companies Act, 2015** as a company limited by shares and as such can sue and be sued in its own name. They contended that the plaintiffs have not provided any basis for joining them to the suit as they are only directors and not shareholders of Shoprite.

12. The defendants also contested the orders sought against the 2nd to 7th defendants by stating that they are Shoprite employees overseeing its business which requires travelling from time to time. They maintained that the orders sought against them would unnecessarily curtail their rights and freedom of movement guaranteed under **Article 39** of the Constitution. The defendants urged that the plaintiffs have not established any basis for the grant of the orders sought against them.

Issues for determination

13. Both parties filed written submissions in support of their respective positions. Those submissions mirrored what the parties had stated in their respective depositions. As I stated earlier, the Agreement and Notice are not disputed and from the applications and depositions, the following issues fall for consideration.

(a) The first, which arises from the defendants' Notice of Motion dated 11th May 2020 to strike out the 2nd to 7th defendants from the suit, is whether the 2nd to 7th defendants are necessary parties to the suit.

(b) Second, whether the defendants should be ordered to provide security in the manner prayed for in the plaintiffs' Notice of Motion dated 22nd April 2020.

Determination

Whether the 2nd to 7th defendants are necessary parties

14. In its written submissions, counsel for the defendants cited **Werrot & Co., and 3 Others v Andrew Douglas Gregory and Others NRB HCCC No. 2363 of 1998 (UR)** where Ringera J., laid down the principles for the determining who is a necessary party as follows:

For determining the question who is necessary party there are two tests;

(i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and

(ii) It should not be possible to pass an effective decree in the absence of the party...

15. In this case the relationship between the parties was governed by the Agreement signed between the plaintiffs and Shoprite. Shoprite is a body corporate and it is not in dispute that the 2nd to 7th defendants are its directors. The principle of corporate personality established so long ago in **Salomon v Salomon [1897] AC 22** is well established in this jurisdiction (see **Victor Mabachi and Another v Nurturn Based Limited NRB CA Civil Appeal No. 247 of 2005 [2013] eKLR**). There are, of course, instances where the court may lift the corporate veil to impose liability on directors and shareholders where the corporate body is being used as a vehicle for fraud (see **Mugenyi & Company Advocates v The Attorney General [1999] 2 EA 199**).

16. Counsel for the plaintiffs submitted that Shoprite was in the control and direction of the 2nd to 7th defendants who negotiated the Agreement and issued the Notice and were thus privy to the Agreement. The plaintiffs also argued that although Shoprite had assets in Kenya, its financial position was not known hence it was necessary to sue the 2nd – 7th defendants and make them liable for any liabilities of the Company.

17. Whether the 2nd to 7th defendants are necessary parties to this suit implicates the question whether the court can sidestep the principle of corporate personality as contended by the plaintiffs. A company by its nature is controlled and managed by its directors but its directors do not thereby assume liability for its acts. As Mabeya J., stated in **Multichoice Kenya Limited v Mainkam Limited and Another NRB HCCC No. 492 of 2012 [2013] eKLR**:

I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make the contract, then only the company is liable on it. To mind, there is no doubt that ever since the famous case of

Salomon v Salomon (1897) AC, 22. Court have applied the principle of corporate personality strictly.

18. I have read the Agreement. It is between the plaintiffs and Shoprite. There is nothing in it that imposes any liability on Shoprite's directors. It is Shoprite that exercised its right to terminate the Agreement which is a matter in dispute. There is no allegation in the plaint that each or any of the directors committed fraud of the kind that would make them liable for acts which are ordinarily within the purview of authority of the company. Since Shoprite is the party to the Agreement and it is the party liable under it for any breach, the 2nd to 7th defendants are not necessary parties to this suit and are accordingly struck out as the principle of corporate personality cannot be swept aside by a side wind.

Whether the Defendants should provide security

19. The finding on the first issue disposes of prayers 6, 7 and 8 of the plaintiffs' Notice of Motion dated 22nd April 2020 in relation to the 2nd to 7th defendants leaving prayers 2, 3, 4 and 5 in relation to Shoprite. The basis of the plaintiffs' case is that Shoprite has terminated the Agreement, started removing merchandise from the Mall and rendered its employees redundant. Mr Muguku depones that Shoprite and its directors have no known assets in Kenya other than their outlets situate at Westgate Mall, Garden City Mall and City Mall, Nyali while the directors are foreign nationals.

20. The plaintiffs admit that Shoprite is still carrying on business in Kenya as it has other establishments. There is no evidence that it is disposing of its properties with a view to evading any liability that may result from a judgment against it. Shoprite has stated that it will settle all the rent until the end of the notice. As to whether the plaintiffs are entitled to the full rent for the remainder of the lease period as contended by the plaintiffs is a matter for trial. At this stage I would only state that where there is breach of an agreement, the plaintiffs also have a duty to mitigate their loss.

21. Without dwelling on the issue any further, I do not find any reason to order Shoprite to provide security. The plaintiffs have not proved that it is disposing of its property, they acknowledge that it is still carrying on business in Kenya and the averment by Mr Mweeba's that Shoprite is part of an international chain of supermarkets listed in the Johannesburg Stock Exchange is not controverted.

Disposition

22. For the reasons I have set out above, I now order as follows:

- (a) The plaintiffs' Notice of Motion dated 22nd April 2020 is dismissed.
- (b) The defendants' Notice of Motion dated 11th May 2020 is allowed and the 2nd to 7th defendants are struck out from the suit.
- (c) The interim orders issued by this court on 24th April 2020 be and are hereby discharged.
- (d) The plaintiffs shall bear the costs of both applications and of the suit as against the 2nd to 7th defendants.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE 2020.

D. S. MAJANJA

JUDGE

Mr Chege instructed by Miller and Company Advocates for the plaintiffs.

Mr Omondi instructed by Humphrey and Company LLP for the defendants.