REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 90 OF 2017

PAMELA AOKO OGANYA.....APPELLANT

VERSUS

DESTINATION AFRICA LIMITED .....RESPONDENT

JUDGMENT

1. The Respondent in this Appeal is Destination Africa Ltd. ("Destination Africa"). It entered into a lease agreement with the Appellant (Pamela Aoko Oganga) of the premises known as Hibiscus House Number H-054, Court 2 of Phase 2 at Fourways Junction in Thindigua, off Kiambu Road ("Suit Premises") on 01/12/2016. The Appellant is the owner of the premises. The lease period was for five years and the agreed monthly rent was Kshs. 120,000/=.

2. On 27/02/2017, however, the Respondent received a Notice of Termination of the lease and a demand that it vacates the Suit Premises by 30/04/2017. The Respondent felt aggrieved by that decision and filed a suit on 12/04/2017. The suit sounded in breach of contract and misrepresentation. The gist of the suit was that the Appellant had, through her representations, made the Respondent believe that it would enjoy quiet possession of the Suit Premises for the entire lease period of five years as a result of which the Respondent says it improved and renovated the property to the tune of Kshs. 2,449,500/=.

3. In its Plaint, the Respondent had three specific prayers:

> *a. Compensation to the Plaintiff for costs incurred by the renovations done to the suit property amounting to Kshs. 2,449,500/= plus deposit paid.*
>
> *b. General damages for abrupt termination of the lease*
>
> *c. Costs of interests on the above*.

4. The suit was contested by the Appellant. The gist of it was two-fold. First, the Appellant argued that it was entitled to serve the Notice to vacate by the express terms of the Lease Agreement signed by the parties. Second, the Appellant argued that the Lease Agreement provided expressly that any renovations or alterations by the Respondent had to be approved in writing by the Appellant.

5. In any event, simultaneously with the Plaint, the Respondent filed a Notice of Motion Application asking for orders restraining the Appellants from interfering with its quiet and peaceful possession of the Suit Premises or otherwise evicting it until the suit was heard and determined.

6. The Application was heard *inter partes* and on 24/05/2017, the Learned Honourable J. Kituku granted the orders for injunction. The Appellant is aggrieved by that decision and instituted the current appeal.

Due to the urgency disclosed in her application, I agreed with the parties to expedite the hearing of the appeal.

7. The Appellant has listed seven grounds of appeal. However, they boil down to two. First, the Appellant complains that the Learned Trial Magistrate ignored well-established provisions of the law in arriving at his determination. Secondly, the Appellant complains that the Learned Trial Magistrate relied on extraneous factors in coming to his determination on the issues. There is a third issue of law – on whether the suit was properly instituted – which I will not reach for reasons I will briefly outline below.

8. I have read and fully considered the submissions of the parties and the authorities they submitted.

9. It is important to recall that the grant of an injunction is a discretionary power and that an appellate Court will not interfere with the exercise of such discretion by the Trial Court save where the Trial Court has misdirected itself on the law, or misapprehended the facts, or failed to take into account relevant considerations, or taken into account irrelevant considerations or otherwise the decision is plainly wrong. See ***MRAO LTD V. FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS*** ***[2003] KLR 125***.

10. In his ruling, the Learned Trial Magistrate, after summarizing the dispute between the parties states as follows:

> *The issue for determination in my opinion is the place of estopped (sic) where parties engagement in embodied in agreement and secondly whether the plaintiff has not met the threshold for grant of such injunctive orders.*
>
> *Estoppel is a rule whereby a party is precluded by some previous act to which he was a party or priory (sic) from asserting or denying a fact, (sic) it is a rule of exclusion or denying a fact. It is a rule of exclusion, making evidence of a relevant fact inadmissible.*
>
> *It is embodied in section 120 of the Evidence Act.*
>
> *Plaintiff's case is founded on equitable estopped (sic), and court have need (sic) that equitable estopped (sic) applied in Kenya.*
>
> ***[After citing a number of cases, the Court concludes:]***
>
> *In summary, therefore, equitable (sic) can prevent a party from exercising his right under a contract in appropriate circumstances.*

11. The Learned Trial Magistrate, then, proceeds to find the case before him as one such case where equitable estoppel would prevent the Appellant from exercising her contractual rights. He based his conclusion on his analysis that the Appellant had not contested the factual assertion that she was aware of the renovations the Respondent had done on the property.

12. With respect, the manner in which the Learned Trial Magistrate approached the question led him into error. In our jurisprudence, consideration whether a party is entitled to an interlocutory injunction now enshrined in a tripartite legal criterion set out in the celebrated case of ***Giella vs Cassman Brown*** in the words of Spry V.P.:

> *First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience*.

13. Hence, the Court's first task is to determine if the Plaintiff has established a *prima facie* case with a probability of success once the full case is ventilated. The Learned Trial Magistrate's first task would have been to satisfy himself that this first *Giella* factor had been met. This is what the Learned Trial

Magistrate seemed to be doing even though not explicitly in going into the principles of equitable estoppel.

14. What about the second *Giella* factor? The second *Giella* factor requires the Court to satisfy itself that the damage to be suffered if the injunction granted is irreparable or that it cannot be adequately compensated by damages. This is because the main purpose of an interlocutory injunction is to protect the plaintiff from irreparable injury and to preserve the power of the Court to ultimately render a meaningful decision on the merits. The Court must be careful, in considering applications for preliminary injunctions, not to determine any disputed right. The aim is to prevent a threatened wrong or the doing, by one of the parties to a litigation, an act which might threaten or endanger the rights of the plaintiff.

15. In the case before the Learned Trial Magistrate, what was the threat which potentially endangered the rights of the Respondent not protectable by damages? The Respondent did not sue for continued possession of the Suit Property. It did not even sue for an injunction against eviction from the Suit Property. It merely sued for compensation, general damages, interests and costs. What interest, potentially endangered by failure to grant award an interlocutory relief did the Respondent seek to protect?

16. Our decisional law is quite clear that if a party can be compensated by damages, however strong a prima facie case they have, they are disentitled from interlocutory injunction.

For example, in ***Wairimu Mureithi Vs City Council of Nairobi Civil Appeal no. 5 of 1979***, the Court held that:

> *However strong the Plaintiff's case appear to be at the stage of Interlocutory application for Injuction, no injuction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them.*

17. In my view, the Learned Trial Magistrate fell into this error because he did not set out the appropriate legal standard to be applied at the outset. Had he done this, it would have occurred to him that the Respondent had not even attempted to demonstrate what irreparable harm he would suffer if the injunction was not granted.

18. It may be that eventually the Respondent will succeed in persuading the Trial Court that the Appellant was estopped from denying that she had permitted the Respondent to make the renovations despite the clear terms of the Lease Agreement and that it is therefore entitled to those sums. However, the Respondent did not make any claim in its Plaint that this equitable estoppel (which was not pleaded) entitled it to remain in possession of the Suit Premises. All that the Respondent claimed was that the representations made by the Appellant entitled it to the sums it had spent on the renovations as well as general damages for the "abrupt termination of the lease."

19. In these circumstances, it was not open to the Respondent or the Court to grant interlocutory injunction. This is because interlocutory injunction serves the purpose of protecting interests which cannot be compensated by an award of damages unless the injunction is granted. If, as here, the Respondent in its own suit papers is clear that it can be compensated by damages, then one of the pre-requisites for injunctive relief is not satisfied.

20. Our decisional law is also quite clear that where a party has not made a prayer for injunction in the Plaint, it is not open to them, without amending the Plaint, to bring an application for interlocutory injunction under Order 40 Rules 1 and 2. See, for example, ***Kihara*** *v.* ***Barclays Bank (2001) 2 E.A 240.***

21. In this case, even a cursory glance at the Plaint confirms that there is no prayer for injunction. The Application for interlocutory injunction, therefore, appears, unhinged suspended in the air, floating like a colossus, without any support in the supporting pleadings of the case.

22. Finally, in the circumstances of this case, it would appear that the balance of convenience would have

been in favour of the Appellant. The Appellant had clearly indicated that she needed her house back so that her children can move back in after she had been transferred to an international work station which is not a family station due to volatility. Hence, she needed her family to move back to the house which she had purchased as a family home. She had leased it to the Respondent on the understanding that she would be away with her family at a work station where families are allowed. She had taken the trouble to include a two-months termination period in the lease in the event she needed her family residence back. On the other hand, the Respondent only claimed damages for renovations done and for "abrupt termination" contrary to its expectations. It appears clear that the balance of equities would have tilted in favour of the Appellant respecting the request for interlocutory relief.

23. I have not reached one of the issues raised on appeal – namely whether the suit was instituted without proper authorization by the Respondent Company. This is because I have noted that the issue was raised and canvassed at length by the Appellant at the Trial Court. The Trial Court disposes of the issue in its ruling thus: "*I have seen the authority file (sic) in Court on 12/04/17, it has the seal of the company and duly signed*."

24. On appeal, Counsel for the Appellant insisted that there was no such authority at the time the parties argued the case before the Trial Court and expressed dismay that the Trial Court was able to find such authority. When I called for the Trial File, I could not find the document in the Court file. Instead, counsel for the Respondent, during oral hearing handed to me a document entitled "Authority to Sue and Represent Destination Africa Ltd." It is dated 11/04/2017 and bears a Court stamp of 12/04/2017. However, I noted two curious things. First, I noted that all the documents filed on 12/04/2017 by the Plaintiff's lawyers were all spiral-bound together. The case number "189" was intituled on the first page of the bound volume. However, the purported Authority to Sue and Represent which bears the Court stamp on the same day is loose bound. The Appellant's counsel is resolute and categorical that he was never served with that document and he never saw it before the date of oral arguments before me.

25. The second curious aspect of this document is that there was no receipt evidencing its filing. All the documents filed on 12/04/2017 were assessed, the assessment indicated on top of the first document in the bound volume, and paid for with a single receipt which is in the Trial Court file. However, no assessment can be found; no receipt could be found; and no evidence could be found of payment for this impugned document in the Court file. It could be a simple issue of co-incidence and misfiling. It could also be potentially a serious issue that may implicate the integrity of some Court staff. I therefore instructed the Head of the Civil Registry to do an investigation and file a report in the Court file. By a copy of this ruling, I am hereby requesting the Chief Magistrate, Kiambu Law Courts to take charge of those investigations, file a detailed report in this Court file and take appropriate action if any wrong-doing is discovered.

26. In any event, I have not factored in this last issue in my decision.

27. The upshot is that this Appeal succeeds. The ruling and order given by the Trial Court on 24/05/2017 is hereby set aside. In its place, the Court enters an order dismissing the Respondent's Application dated 11/04/2017.

28. The Respondent shall bear the costs of this Appeal.

29. Orders accordingly.

Dated and delivered at Kiambu this 29th day of January, 2018.

……..

JOEL NGUGI

JUDGE