



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**HCCC NO.252 OF 2017**

**CENTRE POINT SOLUTIONS LIMITED.....PLAINTIFF/APPLICANT**

*VERSUS*

**MURUNGA INVESTMENTS LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NAIVAS SUPERMARKET LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

The Plaintiff filed application dated 16<sup>th</sup> June 2017 brought under order r40 Rule 1,2 & 4 and order 50 rule 1 & 3 the Civil Procedure Rules 2010 and section 1A,1B,3A and 63 (e) of the Civil Procedure Act while the 2<sup>nd</sup> Respondent/Defendant filed preliminary objection dated 27<sup>th</sup> June 2017. Written submissions were filed and highlighted on both the application and the preliminary objection. The application seeks injunction to restrain the 1<sup>st</sup> Defendant from withdrawing contract dated 30<sup>th</sup> November 2015 leasing out block A which is part of development known as CIATA Mall being erected on LR no.5989/178 Nairobi to 3<sup>rd</sup> parties and the 2<sup>nd</sup> Defendant to be restrained from operating any restaurant business or catering establishment or running any business that compete with Plaintiff's business. Grounds on the face of the application are as follows

1. That the Plaintiff accepted and duly executed a letter of offer dated 30<sup>th</sup> November 2015 with the 1<sup>st</sup> Defendant for lease of premises located on the ground floor being part of the above development for kshs 1,062,500 per month and that the Plaintiff paid the 1<sup>st</sup> Defendant kshs 3,180,500 being security deposit, three months' rent, agency and legal fees
2. That the agreement further provided that the 1<sup>st</sup> Defendant would allow Plaintiff to exclusively carry out restaurant business and/or catering establishment within ground floor of the said premises
3. That the terms of the letter of offer was crystallized in a draft lease which was in the process of being finalized by the 1<sup>st</sup> Defendant
4. That upon executing the letter of offer the Plaintiff commenced purchase of furniture, lighting fittings/finishes and customized kitchen equipment.
5. That the 1<sup>st</sup> Defendant has purported to lease the premises to another party or interfere with the suit premises the consequence of which would interfere with the Plaintiffs use of the suit premises.

6. That there is risk that the 1<sup>st</sup> Defendant will proceed to withdraw the lease in breach of the said contract.

7. That the Plaintiff has not condoned the 1<sup>st</sup> Defendant's illegal conduct and has been vigilant and brought this application without delay.

The 2<sup>nd</sup> Defendant ground on the preliminary objection dated 27<sup>th</sup> June 2017 is that the Plaintiff has not established any cause of action against the 2<sup>nd</sup> Defendant as the portion of land leased to 2<sup>nd</sup> Defendant and lessor are completely different from those of the Plaintiff; that there is no nexus or link between 2<sup>nd</sup> Defendant and the rest of the parties herein. The 2<sup>nd</sup> Defendant attached copy of conveyance indenture transferring L.R.No. 5989/180 to Ciata Holdings Limited.

Both the application and preliminary objection were argued together.

The Plaintiff's application is supported by affidavit sworn by Diana Waceke Wainaina the director of the Plaintiff Company. She averred the grounds stated above. She attached the letter of offer, draft lease, RTGS advice slips for payment of KShs 3,180,500 and shipping invoices to the supporting affidavit. She averred that after making arrangements and payment for shipping of some of the goods purchased from overseas the Plaintiff learnt that the 1<sup>st</sup> Defendant had allowed the 2<sup>nd</sup> Defendant to set up restaurant/catering establishment with sitting capacity of 150 customers without any form of notice contrary to exclusivity of use granted to the Plaintiff in blatant breach and/or disregard of the express terms of the letter of offer. She averred that the 1<sup>st</sup> Defendant's action to withdraw the offer by letter dated 6<sup>th</sup> June 2017 is improper and actuated by malice with the purpose of occasioning irreparable damage to the Plaintiff. She added that the said letter was backdated with the intention of defeating the Plaintiff's demand letter. She averred that the Plaintiff has expended a substantial amount of money and made several commitments to 3<sup>rd</sup> parties. She averred that the balance of convenience way heavily in favour of conservatory orders sought herein to preserve Plaintiff's contractual rights.

In response the 1<sup>st</sup> Defendant filed replying affidavit and further affidavit sworn by Gregory Mbugua Kibue on 23<sup>rd</sup> June 2017 and 7<sup>th</sup> July respectively. He averred that the premises where the Applicant/Plaintiff alleges to have been offered space is on L.R.NO.5989/178 whose registered owner and landlord is Muruga investments Ltd. He attached copy of indenture of conveyance for the plot. He added that the 2<sup>nd</sup> Defendant is a lessee in L.R no.5989/180. He attached copy of offer in respect of the plot from Ciata Holdings Ltd. He stated that Ciata holdings Ltd who are the 2<sup>nd</sup> Defendants Landlords are not a party to this suit. He averred that muruga investment and Ciata Holdings are companies which are distinct and separate and none of the two companies hold shares in the other. He averred that at no one time the Plaintiff has ever obtained a lease in L.R.no5989/180 and has not claimed any interest in the land and therefore has no cause of action against the 2<sup>nd</sup> Defendant; and similarly the 2<sup>nd</sup> Defendant has no interest in L.R NO.5989/178. He stated that the Plaintiff has no existent lease for ground floor of block A which is built on L.R.no. 5989/178. Since the letter of offer issued by the 1<sup>st</sup> Defendants agent Ben the agent consultant Ltd was merely an offer which was accepted by the Plaintiff on 16<sup>th</sup> December 2015 on the following conditions;

1. That payment of KShs 9,153,000 was made within 14 days after 16<sup>th</sup> December 2015.
2. Execution of formal lease agreement upon payment of full consideration
3. Agreement on commencement date of lease agreement, date of payment of rent, fit out period and taking over possession

He averred that the Plaintiff failed to pay full consideration within the stipulated time and therefore failed to comply with the terms of offer thus frustrated the finalization of negotiations and execution of the formal lease. He stated that by stipulation deadline the Plaintiff had paid 2,650,000. He added that the

Plaintiff kept changing the name of the intended lessee creating confusion to the 1<sup>st</sup> Defendant. He averred that after withdrawing the offer to the Plaintiff the 1<sup>st</sup> Defendant offered the premises to another entity namely Elton ventures Ltd and that the Plaintiffs claim has been overtaken by events as there is a lawful tenant in the premises. He concluded that the only recourse available for the Plaintiff is refund of all monies that may be proved to have been deposited. He prayed for dismissal of the application herein with costs to the Defendants.

In response to averments in the replying affidavit, the Plaintiff filed supplementary affidavit sworn by Diana Waceke Wainaina a director for the Plaintiff. She averred that the development known as CIATA City Mall comprises of 3 blocks block A, block B and Naivas block all erected in two parcels of land L.R.numbers 5989/178 and 5989/180 which parcels of land share same entry, parking space, exit and common services such as water and security services and all the times viewed as one as there is no boundary separating the aforesaid blocks. He added that the letter of offer show that Plaintiff was allotted space in block A of Ciata mall erected in L.R.no.5989/178 rendering averment that its claiming interest in L.R.no.5989/180 irrelevant. He averred that the Plaintiffs prayers is for exclusive use of the premises as guaranteed by the 1<sup>st</sup> Defendant and or its agents a fact confirmed by 1<sup>st</sup> Defendants deponent via email of 17<sup>th</sup> June 2016 and 1<sup>st</sup> Defendant's Advocates letter dated 17<sup>th</sup> June 2016.He averred that by letter dated 31<sup>st</sup> may 2017 the 1<sup>st</sup> Defendant claimed no tenant had exclusive user rights renegeing on their promise in the letter dated 16<sup>th</sup> June 2016.He averred that a total of kshs 9,210,000 has been paid being 3 months' rent and security deposit and denied knowledge of demand of a sum of kshs 5,175,508 purportedly sent on 6<sup>th</sup> April 2017.He averred that the only sum left is V.A.T which was not paid owing to the fact that 1<sup>st</sup> Defendant was yet to acquire E.T.R machine. He denied causing delay in finalization of draft lease and that trading names were communicated to the 1<sup>st</sup> Defendant way back on 24<sup>th</sup> feb.2014.He blamed the 1<sup>st</sup> Defendant for delay in carrying out works in the kitchen and lounge. He averred that the Plaintiff has assumed possession as it has carried out extensive electrical and plumbing works. He averred that after withdrawing the offer the 1<sup>st</sup> Defendant quickly allocated the space to Elton ventures who issued 5 bakers cheques dated 12<sup>th</sup> June 2017 for a total of kshs 10,454,929; showing that the 1<sup>st</sup> Defendant had no intention of honoring the agreement. He averred that the Plaintiff had legitimate expectation that it would be granted exclusive use of the space in CIATA Mall and incurred huge costs in purchasing items in anticipation of running a restaurant and café business exclusively.

1<sup>st</sup> Defendant filed further affidavit in response to Plaintiff's supplementary affidavit. The deponent reiterated that Naivas supermarket is not in L.R.NO.5989/178 where the space offered to the Plaintiff is located; that the offer to Plaintiff was subject to contract/execution of formal lease and that the contract was to indicate commencement date; that the offer which was to crystalize to contract was terminated; that acceptance of the offer was to be made within 14 days on condition that kshs 9,153,000 was paid; that the Plaintiff paid kshs 2,650,000 while returning the offer thus frustrating the contract process; that payment was to be done by 30th December 2015 but next payment was on 26<sup>th</sup> June 2016 way off the offer period;1<sup>st</sup> Defendant was therefore constraint to withdraw the contract. That Plaintiff insisted on depositing money after withdrawal of the offer and has since deposited 8,550,000 as per deposit slips shown in annexure DWW3 which is in short of money needed for rent and security. He averred that the Plaintiff has no exclusive contractual rights for exclusive operation of restaurant business in CIATA Mall which if existed is against public policy frowned upon by competition Authority of Kenya. He averred that there is no existent contract between Plaintiff and 1<sup>st</sup> Defendant capable of specific performance.

I wish to consider the letter of offer has any binding effect on the 1<sup>st</sup> Respondent. I have perused documents annexed to the affidavits filed. The letter of offer dated 30<sup>th</sup> November 2015 relate to L.R.no.5989/178 whose lessor is muruga investment and lessee the Applicant/Plaintiff herein. clause 33 gives terms of acceptance of the offer to the effect that acceptance is open for 14 days from the date of letter of offer and shall be in writing to be returned within 14 days together with required payments.

The 1<sup>st</sup> Respondent has indicated that the Plaintiff failed to comply with the condition of the offer prompting them to lease the space to another tenant.1<sup>st</sup> Defendant cited failure to pay rent deposit and

security fee as indicated in the letter of offer. I note that the letter of offer is signed on 12<sup>th</sup> December 2015. As stated above kshs 2,650,000 was paid on 30<sup>th</sup> December 2015 and the next payment 26<sup>th</sup> June 2016 a period of 6 months after withdrawal of offer letter is dated 6<sup>th</sup> June 2016 meaning the payment was made after withdrawal of the offer. This clearly shows that the Plaintiff failed to comply with conditions in the letter of offer and there was nothing to bar the 1<sup>st</sup> Defendant from leasing the space to another party. The letter of offer did not crystalize into a formal contract. There no fault demonstrated on part of the 1<sup>st</sup> Defendant as it relate to finalization of lease. From record deposit for rent and security were done way out of the time stipulated in the letter of offer as was indicated in the submission deposits made so far do not add up to the amount expected to have been deposited. In so as the 2<sup>nd</sup> Defendant is concerned no document has been availed to show that there exist contract to the effect that the Plaintiff was to have exclusive rights to operate the business it intended to operate; it is also evident from the documents attached that the Plaintiffs intended lessor and 2<sup>nd</sup> Defendant's lessor are two separate entities and contracts between each landlord and its tenant in respect of their separate parcels of land cannot bind the others tenant.

From the foregoing I find that the Plaintiff has failed to demonstrate breach on part of the 1<sup>st</sup> Defendant in respect of letter of offer nor presence of any agreement/contract to bar any party from operating business similar to Plaintiff or nexus between Plaintiff and 2<sup>nd</sup> Defendant.

I decline to grant orders sought and do strike out the 2<sup>nd</sup> Defendant from this suit. Costs to the Defendants.

**Dated and Delivered at Nairobi this 29<sup>th</sup> day of September 2017**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

.....COURT ASSISTANT

.....COUNSEL FOR PLAINTIFF/APPLICANT

.....COUNSEL 1<sup>ST</sup> DEFENDANT/RESPONDENT

.....COUNSEL FOR 2<sup>ND</sup> DEFENDANT/RESPONDENT