REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE NO. 240 OF 2014

JAGUAAR PETROLEUM CO. LTD.....PLAINTIFF/APPLICANT

-VERSUS-

BRIGHTON FOOD LTD & ANO…….....DEFENDANTS/RESPONDENTS

RULING

1. The Plaintiff/Applicant moved this Court under section 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 1 (a), 3(3) and 4(1) of the Rules seeking orders ;

1. **Spent**

2. **Spent**

3. **That pending the hearing and determination of suit :**

(a) a temporary mandatory injunction do issue directed to the Defendants and removing the Defendants, themselves agents and/or employees from the plaintiffs leased properties known as Triton on Nyerere Avenue – Mombasa on L.R No. Mombasa/BLK/XIII/206 and Mombasa/BLK/XIII/210.

(b)A temporary order to issue restraining the Defendants whether by themselves, their agents and/or employees from trespassing, selling, transferring, charging, leasing, pledging or in any other manner alienating or disposing the plaintiff's leased properties and moveables therein known as Triton on Nyerere Avenue – Mombasa on L.R No. Mombasa/BLK/XIII/206 and Mombasa /BLK/XIII/210

(c) An order that in the event of any defiance of any Court Order on the part of the Defendant the Kenya police and in particular the OCPD Mombasa and OCS Mombasa do extend the necessary assistance for the enforcement of the Court Orders

2. The application is supported by the 13 grounds listed on the face of it and the affidavits of George Dicks Atwetwe sworn on 4.9.2014 and 22nd September 2014. The Applicant avers that the 1st Respondent is in arrears of rent amounting to Kshs 5,303,518 plus mesne profits of Kshs 1,245,000 while the 2nd Respondent arrears is Ksh 3,526,219 and mesne profits of Kshs 955000. Secondly that the leases expired on 28.2.2014 and inspite of notice to vacate, the Respondents have totally failed to vacate or pay the arrears. This inaction the Applicant pleads is causing her loss.

3. The Applicant deposes further that she issued further notice to the Respondents on 21.8.2014 demanding payment of the arrears and vacant possession as per the letter annexed as "*GDA – 4*". That the actions by the defendants contravene the provisions of article 40 of the Constitution and is causing the Applicant losses which cannot be compensated by an award of damages.

4. In the further affidavit, the Applicant deposes that any landlord/tenant relationship that may have existed between her and the Respondents ended on 28.2.2014 when the notice to vacate dated 31.1.2014 was issued. She also deposed that the alleged payments made by the Respondents are not supported by any documents such as deposit slips, petty cash or cheques.

5. The Applicant deposes further that given the Respondents are questioning the head lease; the consequence is that the leases between the Applicant and the Respondents is invalid. The Applicant deposes that she had authority to sublet the suit premises and the charges if any were made after the premises were leased to her by Triton Petroleum Co. Ltd. She urged the Court to grant the orders sought.

6. The application is opposed by the Respondents. They filed a replying affidavit sworn on 16th September 2014 and a further affidavit filed on 23rd September 2014. The Respondents depose that they got into possession based on a landlord/tenant relationship and not as trespassers. The Respondents aver that they settled rents through cash payments and settlement of various accounts on behalf of the Plaintiff/Applicant as per the annexed summary of the statements. That instead it is the Applicant who owes them money.

7. The Respondent deposes that the head lease did not confer any interest on ownership as there were existing encumbrances on the title and no consent to sublet was obtained as required by law. The Respondents deposed further about the meetings with the banks in relation to the purchase of the plot No Mombasa/Block XXIII/210 as regards paying off the charge to the bank. They also deposed to receiving correspondence from M/s Spars Fuel limited giving them permission to continue stay on plot No Mombasa/Block XXIII/206.

8. The Respondents have deposed that the Applicant has come to Court with unclean hands for failing to disclose the other directors as well as the existence of the civil case HCC No 517 of 2013. It is their case that the Applicant's remedy lies in bringing up a suit for vacant possession and distress for rent to be carried out at the determination of the lease. Lastly that the Respondents are not guilty of trespass and that they have not deprived the Applicant of her property as envisaged under article 40 of the Constitution. Instead the Respondents depose they are the ones who have suffered loss by the actions of the Applicant carried out on 16th September 2014 that forcefully closed their business premises.

9. The advocates on record thereafter filed written submissions. The Applicant submits that there is no answer to the plaintiff's claim as provided for under Order 2 rule 11. It is submitted further that there is no proof by way of hard evidence of the claimed payments made to the directors otherwise the notice to vacate would not have been issued. In submitting that they have established a prima facie case, they rely on the fact of admission of landlord/tenant relationship and that no rent has been paid since 2012 todate.

10. In support of their prayer for mandatory injunction, the Applicant cited the Court of Appeal decision in **Kenya Breweries Ltd vs Washington Okeyo C.A.C.A 332 of 2000 (Nairobi)** (unreported) at page 3. The Applicant avers her case is clear and therefore warrants the issuance of mandatory injunction. She submits that the principles governing grant of mandatory injunctions was re-stated in the case of **Menengai Bottlers Ltd vs Nakuru Teachers Housing Sacco (2008) eKLR**. She urged the Court to grant the application to prevent any further breach of the contract and unnecessary escalation of costs.

11. The Respondents submitted that the sub-lease between the parties herein contained a clause requiring either party to serve 3 months' notice of their desire to terminate or renew the lease. That the sub lease was not registered as provided for under the Registration of Titles Act (repealed) therefore it ceased being a lease but became a mere agreement.

12. The Respondents submit further that given the circumstances of this case, the applicable law is Cap

301 which requires that 2 months' notice be served. He referred the Court to several case law inter alia; ***Rogan Kamper vs Lord Grosvenor (1976-1980) 1KLR 558, E.A Power & Lighting co Ltd vs the A.G (1978) KLR 217 and Gusii Mwalimu Investments Co Ltd & Ano vs Mwalimu Hotelkisii Ltd (1995-98)2EA100***. On the principles of granting mandatory injunction, he relied on the test set out in the case of **Hasan vs Adan (2007) 2 EA 179** and that the instant case does not meet that test. They have no objection to prayer 3(b) being granted with amendment as they do not intend to dispose of the suit property.

13. The Respondents further submit that the Applicant has not proved a prima facie case inter alia that the Applicant has not shown of what effect the non – registration of the sub-lease has on their landlord – tenant relationship. That on irreparable loss, the agreed rent is ascertainable and the balance of convenience tilts in favour of the Respondents who are in possession.

14. The Applicant filed a response to the Respondents submissions stating that if there is any defence on record then the same has not been processed according to the Rules of procedure. He also distinguished the authorities cited by the Respondents to the present case before Court. The Applicant also quoted the provisions of section 52(2) of the Registered Land Act (*repealed*) in respect to receipt of rent after determination of the lease. The Applicant submitted that this suit is properly before this Court in view of the provisions of Article 162 of the Constitution.

15. The issue of whether there is a defence filed and if it is properly on record or not was raised in the submissions. It is trite law that parties are bound by their pleadings. Submissions are not a pleading and therefore I will leave the issue of the legality or otherwise of the defence on record and its impact as it is not part of the matters raised in the current application for my determination.

16. The first question for this Court to determine is whether the orders of mandatory injunction sought in prayer 3(a) can be granted. Both parties have cited case law which sets out the principles to be considered in granting mandatory injunction. In the case of **Menengai Bottlers Ltd supra** where the Court re-stated the principles laid down in para ***948 of 24 Halsbury's Laws of England, 4th Edn and the English case of Lacabail International Ltd vs Agro Export & Others (1986) All ER 90*** that an interlocutory mandatory injunction is granted **sparingly and only in exceptional circumstance i.e where the plaintiff's case is very strong and straight forward and where the defendant is attempting to steal a match from the plaintiff; or where a simple and summary act which can easily be remedied**.

17. The Applicant has submitted on the principle that this is a clear case. In explaining this, she submitted that the Respondents have admitted that they have a landlord/tenant relationship. The Applicant avers that although the Respondents claim they were up to date with rents payments as at 4th September 2014 yet there was document shown to prove that such payments were made. That if the rents were up to date then they would have not issued notice to vacate. In any event if such rent was paid then the same was not made to the plaintiff. The issue of payment or non-payment of rent is thus a dispute.

18. The Respondents on their part submit this claim does not merit the grant of an injunction in the nature sought. One of the reasons is that the letter of offer provided for service of 3 months' notice yet the notice that was served was for a period of one month or in the alternative that the notice should have been served as provided for under Cap 301 being two months' notice. The Respondents aver they are not trying to steal any match from the Applicant. Lastly that the Respondents have invested millions of shillings and long term stocks that the issuance of mandatory injunction would economically paralize them. They urged for the dismissal of the application

19. It is not in dispute that the sub-lease between the Applicant and the Respondents has expired. The Applicant submits that she first served notice dated 31.1.2014 and a second one dated 21.8.2014 then subsequently filed this suit. By serving notice, she acknowledged that the Respondents entered occupation through her consent. She is further demanding arrears of rent and mesne profits. In this scenario, the Respondents cannot then be said they are trespassing on the suit property when their entry was lawful and rent is being demanded.

20. The Applicants has extensively referred to the letter of offer dated 25.2.2011 and the expiry of the term contained therein as the reason why the orders sought ought to be granted. Secondly that the Respondents are in arrears of rent. The respondents aver that the applicant breached the lease because it did not give notice of 3 months as was provided in their agreement and that this became a controlled tenancy under the Landlord & Tenant Act Cap 301. The Respondents contend that they have paid all rents due as instructed by the Applicant and that the Applicant owes them money.

21. Clause g of the offer letter read thus ***"three months' notice shall be served to either party that desire to terminate or renew the sub-lease at any period of the tenancy".*** This clause was not complied with by both the applicant and the respondents who remained in possession as they were also required to give such notice. The notice was required to be served any time during the period of the tenancy. In this instance, the notice served was less than one month since the letter dated 31.1.2014 was sent to the Respondents by registered post of the same date (as per receipt to annexed to *GDA-3*) and the letter of 21st August 2014 was a notice for 7 days. No notice was thus issued as provided in the lease document between the parties.

22. The failure to serve notice as provided for then raises the second question as to whether the Applicant is entitlted to the orders of vacant possession in the manner sought. This question has been taken up by the Respondents in their submission that the notice ought to have been served for three months or as provided for in section 2 of Cap 301. The third issue raised in the replying affidavit is whether this court has jurisdiction to hear this matter as the sub- lease herein was for a period of three(3) years therefore it became a controlled tenancy as defined under sec 2 of the Landlord and Tenant (shops, hotels & catering establishments) Act. If the tenancy is controlled then the proper forum for the applicant to apply for vacant possession would be the Business Premises Tribunal court. Article 162 of the Constitution has not ousted the jurisdiction of the Business Premises Tribunal Court as article 162 (4) and 169 provided for other Court or local tribunal as may be established by an Act of parliament

23. Taking into account that the lease between the applicant and the respondents expired on 28.2.2014, did the respondents herein become trespassers to entitle the Applicant to be granted the orders sought or was there a continuing landlord /tenant relationship? S**ection 60 (1) of the Land Act** ***provides that a lessee who remains in possession of land without the consent of the lessor after the term of the lease has expired, all the obligations of the lessee under the lease continue until such time when he ceases to be in possession.*** In my opinion, this section provides for the remainder of the Respondents in possesion and it required them to be bound by the terms of the expired lease. The respondents are thus not trespassers as pleaded by the Applicant as their obligations continued until they ceased to be in possession.

24. The question whether the parties are bound by the provisions of Cap 301 and if notice was to be served as provided under their initial agreement or as per section 2 of Cap 301 requests for a determination. Section 2 of Cap 301 describes which tenancies are governed by it which includes inter alia; a tenancy reduced into writing and which is for a period of less than five (5) years. The same section defines what a shop to mean is; **"Premises occupied mainly or wholly for the purpose of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth."** From the period given in the letter of offer, it is my finding that the tenancy fell within the meaning of a controlled tenancy under Cap 301. The notice to vacate the suit premises ought to have been given in accordance with the terms of the offer letter or in accordance with section 4(2) of the Act (Cap 301).

25. The other issue raised in the pleadings is the capacity of the plaintiff to demand vacant possession of the suit premises. In regard to this both parties have refered to the dispute raised in **Mombasa HCC no 517 of 2013.** The respondents annexed as *MS-8* a copy of the order issued in that case and *MS-9* and *10* postal searches for the two plots showing an order of inhibition registered on the suit title. On his part, the Applicant explained that the civil case no 517 of 2013 does not concern the parties herein. Further that in that suit, the plaintiffs Triton Gas Station Ltd & Triton Service Station Ltd sued KCB LTD & PTA BANK to **restrain them from advertising for sale or selling or in any manner disposing off the the two plots. These plaintiffs also sought an order of inhibition to inhibit all the titles of their properties illegally sold and transferred to third parties** (*underline mine for emphasis*)**.** As to whether

the Applicant lacks capacity or not in view of the issues in dispute or contemplated to be in dispute in HCCC 517 of 2013 is a very important matter which can only be determined during a full hearing.

26. In view of these issues, I am not satisfied that the applicant has convinced the court that this case falls under any of the principles for granting mandatory injunction as set out above. There are too many issues as shown in the body of this ruling that require to be resolved by giving each party an opportunity to present their case before court. Consequently, it is my finding that the circumstance of this case does not merit the grant of prayer 3(a) of the motion. Prayer 3(b) was not opposed subject to the word "trespassers" being deleted. The said prayer is granted in the following terms;

> **"An order of temporary injunction be and is hereby issued restraining the defendants whether by themselves, their agents and/or employees from selling, transferring, charging, leasing, pledging or disposing the plaintiffs leased properties and moveables herein known as Triton on Nyerere avenue- Mombasa on L.R no MSA/Block XIII) 206 and 210."**

27. Each party to bear their respective costs of this application.

Ruling dated and delivered at Mombasa this 29th day of April, 2016

A. OMOLLO

JUDGE