



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND CASE NO.174 OF 2013

PETROL OIL KENYA LIMITEDPLAINTIFF

VERSUS

GLADYS NDIRA KIRAITHE.....DEFENDANT

R U L I N G

1. This is a ruling on a Notice of Motion filed here on 4/7/2013 and dated 26/6/2013. The application was filed contemporaneously with a suit of even date in which the plaintiff – **PETRO OIL KENYA LIMITED** – accuses the defendant – **GLADYS NDIRA KIRAITHE** – of frustrating implementation and execution of a new lease concerning Land Parcel **KISUMU/MUNICIPALITY/BLOCK 9/194**.

2. In the application, the plaintiff is the applicant (and is so referred to hereafter) while the defendant is the respondent (also so referred to hereafter). The application is brought under Section 13(7) of the Environment and Lands Court Act and order 40 Rules 2(1) of Civil Procedure Rules, 2010. Five prayers are sought of which prayers 1,2 and 3 are spent and not for consideration at this stage.

3. The prayers for consideration are therefore 4 and 5, which are as follows:

Prayer 4: That an order of injunction be granted restraining the defendant whether by herself or her servants, agents or otherwise howsoever from interfering with the plaintiff's possession of the suit property – **KISUMU/MUNICIPALITY/BLOCK 9/194** – pending hearing and determination of the suit herein.

Prayer 5: Costs of the application be provided for.

4. The application is premised on the grounds that the applicant is the lessee of the suit property vide lease dated 5/5/2003 which provided for renewal upon expiry; that the Applicant exercised its option for such renewal; that a difference arose as to rent during continuance of the new lease; that the applicant invoked and followed the procedure provided for in the lease in case of a disagreement concerning rent and the rent payable was duly fixed; and, finally, that the respondent, even after signifying acceptance of the new lease, has refused to co-operate.

5. It seems clear that the application is informed by the need to forestall any interference from the respondent before the suit is determined.

6. The application has a supporting affidavit containing some history and background of the matter and highlighting the circumstances necessitating the filing of the suit and this application. The contents of the supporting affidavit are generally a restatement and amplification of what the grounds forming the basis of the application contain. But the affidavit, unlike the grounds, provides back-up material for the

averments made. For instance, there is availed a certificate of lease “BK2”, the first lease agreement “BK3”, copy of the plaintiff’s Notice of intention to renew the lease and plaintiff’s response vide letter dated 18/10/2012 “BK4”, various correspondences concerning the issue of rent “BK5” and so on.

7. The Respondent opposed the application vide a replying affidavit filed on 4/9/2013. According to the Respondent, the Applicant breached the original lease by allowing a third party to enter the leased land and construct new structures. According to the respondent too, the applicant wants a new lease but she wanted negotiations on rent payable and on other pertinent issues like encroachment of the land. Instead, the applicant seemed to have other ideas to take advantages of the situation. The respondent alleged that the Applicant has been rude and its representative has had occasion to threaten and ridicule her.

8. The Respondent said that her relationship with the Applicant is so hostile that she is unwilling to grant it the lease. The Applicant, she further said, is avoiding engaging with her to reach an amicable settlement on the issue of the rent payable and the encroachment; and she is being forced to collect rent before any agreement is reached. In simple terms, the Respondents reads mischief and dishonestly in the applicants conduct, which she buttresses further with the allegation that the applicant once cheated that the original certificate of lease was lost and even went ahead to obtain another one while in this case, a copy of the alleged lost certificate is availed, meaning that the new one was obtained through misrepresentation or fraud.

9. This application didn't go for hearing; submissions were filed instead. The Applicant submitted, inter alia, that it has established a prima facie case. Such case, it was submitted, is manifest from the contents of the then running lease between the parties which contained a provision for renewal. The applicant invoked the renewal option and proposed a lease which the Respondent accepted but is now apparently backtracking. The contention is, or should be, about rent but the respondent seems likely to opt for eviction of the Applicant. She no longer wants the lease.

10. The Respondents conduct constitute an infringement of the Applicants rights and the Applicant apprehends that the Respondent might interfere with its possession of the suit property.

11. The fact of the possession of the suit property by the Applicant; the fact of the option of renewal of the lease by Applicant; and the Respondents intimated acceptance of such renewal, when viewed against the intention by the Respondent to renege should, according to Applicant, convince the court that there is a prima facie case established.

12. And for the meaning of such prima facie case as is established herein, the court should look at Black's Law Dictionary Ed.8 at page 1228, **C.M.C MOTORS GROUP LTD AND ANOTHER VS EVANS KAGECHE BORO (2001) LLR 61 09** and, finally, **MRAO VS FIRST AMERICAN BANK OF KENYA LTD: (2003) KLR 125**.

13. The likelihood of the Applicant suffering irreparable harm was also alleged. The Applicant was said to have constructed structures and installed equipment on the suit property. It has carried on business and acquired reputation and goodwill. The Respondent may be intending to evict the applicant, it was alleged, yet she has not demonstrated capacity to compensate the plaintiff should the case succeed. And even in the event that she could compensate, such compensation would still not suffice as it would not cover reputation and goodwill.

14. The balance of convenience is also said to lie in the Applicant's favour. The Applicant would suffer the greater risk of injustice if a restraining order is not granted. The circumstances highlighted would require the granting of injunction. The Applicant is in possession, has already tendered a sum to be paid as rent, and is willing to make good any deficit that may need to be paid. All this makes it deserving of an injunctive relief. The decided case of **SULEIMAN VS AMBOSELI RESORT LTD (2004) KLR 589** was cited to illustrate the principle of opting for the lower rather than the higher risk of injustice.

15. The Respondent submitted that it was the owner of the suit land. As owner, she has her rights protected both by the constitution and the applicable statutory law. According to the Respondent, the

option to renew the lease was available but the applicant was not entitled to exercise it, having breached the first lease by allowing a trespasser into the suit property and generally being dishonest and deviating from the terms of the lease.

16. It was also pointed out that the Applicant was asking for 20 years extension as opposed to the 10 years that the provision for renewal in the first lease envisaged. When all this is considered, the Applicant is said not to have established a prima facie case.

17. And damages would be adequate remedy, the Respondent submitted. The assertion that damages would not cover goodwill was said not to qualify as ground for consideration. The rent was said to be quantifiable and hence payable as damages.

18. The balance of convenience was said to lie in the Respondent's favour. The defendant is the owner of the suit land. It was submitted that it would be grave injustice to grant injunctive relief as that would infringe on the defendant's rights to property as enshrined in article 40 of the Constitution and protected by Section 24 of the Land Registration Act, 2012.

19. The defendant's submissions were replied to. The allegation that the Applicant allowed a trespasser into the suit land was denied. The Applicant, it was submitted, was even ready to take the trespasser to court but the defendant proposed to handle the issue. The Applicant also asserted that it has adhered to the terms of the lease and the allegation of violation by the Respondent was therefore without basis. And the renewal option was exercised within the period envisaged, it was further submitted.

20. It is clear that there is now an expired lease between the parties herein. The lease contained an option for renewal on the part of the Applicant. The applicant decided to exercise that option and the respondent accepted that but seems to have later changed her mind.

21. The Applicant has permanent structures and has installed business equipment on the suit land. The renewal of the lease was obviously necessary for the Applicant to continue with the lease.

22. The Applicant proposed a further lease of 20 years instead of the 10 years envisaged by the expired lease. And knowing such, the respondent gave her acceptance in writing, the only unresolved issue being the rent amount.

23. But it seems the Respondent later decided against the new lease. But the turn-about by the Respondent seems surprising given that the issues she raises were still there when she intimated acceptance of the new lease. My understanding of the lease contents is that once the Applicant exercised the right to renew the lease, and with the subsequent intimation of acceptance of the new arrangement by the Respondent, the only issue remaining was the rent amount. But the Respondent turned around and placed difficulties in Applicant's way when she decided to change her mind.

24. It is noteworthy that the Respondent had even made rent proposals. And when the respondent has evidently changed her mind, she is completely mum as to the damages that her behaviour might occasion to the Applicant. In a matter like this, one would expect that the Respondent would give an undertaking as to damages should the Applicant later turn out to be successful in the suit. As it were, no such undertaking is given. It is not also demonstrated that the Respondent has the ability to pay such damages should it become necessary.

25. The Respondent asserts that as the owner of the suit land, the granting of injunction to the Applicant would interfere with her constitutional and statutory rights of ownership. This is not true. The Applicant is a lessee. It makes no claim to Respondent's ownership rights. The applicant's sole desire is to continue being a lessee and to continue doing business on the suit premises as it has been doing previously. There is no manifest intention to take over ownership from the Respondent.

26. The Respondent has also raised issues of encroachment and violation of the lease agreement that was in force. The Applicant has denied all this. It seems to me that the issues raised by the applicant require

evidence and are therefore for determination at the trial. At this stage, they remain unproven. It would be improper for me to place reliance on such allegation at this stage.

27. Given what I have said so far, it is clear the Applicant has some justification to complain. The Respondent has placed hurdles in its way of realizing a new lease. The first lease has expired. As a business entity, the Applicant requires a sure legal footing regarding its operations and stay on the suit property. This is what the Respondent is throwing into uncertainty. An injunction at this stage would provide a temporary relief. I take the position that the Applicant has established a prima facie case. It is in possession of the suit property and should the Respondent make a move to remove it, it stands to make heavy losses in view of the investments it has on the site.

28. I also think that the issue of damages favour the Applicant. It is true that there is a lot that is quantifiable by way of damages but the sticking issue here is whether the Respondent is in a position to pay such damages. I note that no undertaking is granted by the Respondent to pay such damages. I think a restraining order would therefore maintain the status Quo until the outcome of the suit.

29. There is the issue of the balance of convenience. I have considered what each side has said on this issue. My take is that the Applicant would be more inconvenienced. It has considerable investments on the property. It is doing business there. Disruption of its activities before the suit is determined might send the wrong signals to its customers and creditors. If that happens, losses could ensue. It would be wrong for that to happen before the legal tussle herein is determined.

30. All considered therefore, it is necessary to grant injunctive relief. I therefore allow the application herein in terms of prayer 4 but costs (which is prayer 5) will be in the cause.

A.K. KANIARU – JUDGE

29/1/2015

29/1/2015

Before A.K. Kaniaru – Judge

Diang'a G. - Court clerk

No party present

Interpretation: English/Kiswahili

Ogada for plaintiff Onyango P.D for Mwamu for defendant

COURT: Ruling on application dated 26/6/2013 read and delivered in open **COURT.**

Right of Appeal – 30 days

A.K. KANIARU – JUDGE

29/1/2015