



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 489 OF 2014

GULF INTERTRADING CO. LTD.....PLAINTIFF/APPLICANT

VERSUS

TOTAL KENYA LIMITED.....1ST DEFENDANT/RESPONDENT

GEORGE GITONGA MUCHIRI T/A

FANTASY AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 17th April 2014 in which the Plaintiff/Applicant is seeking for orders of temporary injunction restraining the Defendants from attaching, levying distress or dispossessing the Plaintiff of any of its assets and specifically buses registration numbers KAX 228L, KBG 189K and KBJ 815E as proclaimed by the 2nd Defendant and from interfering with the Plaintiff's quiet enjoyment and use of the parcel of land known as L.R. No. 209/5909/4 (hereinafter referred to as the "suit premises") pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for costs of this Application to be borne by the Defendants.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Hassan Mohamed Hajir, a director of the Plaintiff, sworn on 17th April 2014 in which he averred that the Plaintiff is and has been a lawful tenant of the 1st Defendant in part of the suit premises comprising of South C Total Petrol Station. He further averred that the Plaintiff is a controlled tenant as there is no written lease between it and the 1st Defendant, the previous lease agreement having been for a period of 2 years which has since lapsed. He further stated that the 1st Defendant has over the course of time illegally increased the rent payable by the Plaintiff contrary to section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. He pointed out that the initial agreed and lawful rent was Kshs. 50,000/- per month but that the 1st Defendant had subsequently increased the rent payable as follows:

a) From 1st January 2007 to 31st December 2007 – Kshs. 65,000/- per month exclusive of VAT

- b) From 1st January 2008 to 31st December 2008 – Kshs. 80,000/- per month exclusive of VAT
- c) From 1st January 2009 to 31st December 2009 – Kshs. 88,800/- per month exclusive of VAT
- d) From 1st January 2010 to 31st December 2010 – Kshs. 96,800/- per month translating to a total of Kshs. 112,288/- per month VAT inclusive.

He further averred that the 1st Defendant has demanded illegal rent as a result of the unlawful increases and has caused the Plaintiff rent account to be inflated with arrears. He further intimated that the Plaintiff has over the course of time been coerced by the 1st Defendant to make payments over and above the lawful rent and that all such payments are illegally being held by the 1st Defendant. He stated that the Plaintiff is entitled to an account of all those monies and a refund or credit of all over payments. He further averred that in furtherance of the 1st Defendant's illegal and unlawful action, the 1st Defendant purported to terminate the tenancy in December 2010 by demanding the handover of the site which the Plaintiff successfully challenged at the Business Premises Rent Tribunal in BPRT Case No. 217 of 2011. He further averred that the 1st Defendant through its lawyer's letter dated 8th February 2013 demanded an amount of Kshs. 561,440/- as purported rent arrears but later instructed the 2nd Defendant to levy distress on the Plaintiff for alleged arrears of Kshs. 2,919,488/- by letter dated 7th April 2014. He further stated that the 2nd Defendant proceeded to illegally proclaim the Plaintiff's buses registration numbers KAX 228L, KBG 189K and KBJ 815E. He stated that the distress is unlawful and illegal for the reason that the amount of rent arrears proclaimed in the demand letter and in the instruction letter are inaccurate, inflated and uncertain.

The Application is contested. The 1st Defendant filed the Replying Affidavit of Boniface Abala, its Legal Manager, sworn on 21st May 2014 in which he confirmed that it was indeed true that the 1st Defendant did lease to the Plaintiff the suit premises in the year 2006 at a monthly rent of Kshs. 50,000/-. He further stated that on 11th December 2006, the 1st Defendant wrote to the Plaintiff informing them of the revised terms of extending their agreement for a further 2 years at a monthly rent of Kshs. 65,000/- from 1st January 2007 to 31st January 2007 and at Kshs. 80,000/- from 1st January 2008 to 31st December 2008. He further stated that when the term came to an end the Plaintiff expressed interest to remain on the premises upon which the 1st Defendant further reviewed the Licence Agreement by letting the suit premises to the Plaintiff for a further 2 years at a monthly rent of Kshs. 88,000/- from 1st January 2009 to 31st December 2009 and Kshs. 96,800/- from 1st January 2010 to 31st December 2010. He further stated that the Plaintiff was being less than candid and guilty of misrepresentation by failing to disclose that the 1st Defendant issued to him notices of rent increases which the Plaintiff expressly acceded to. He further added that the Plaintiff has been paying rent voluntarily as per the licence agreement and subsequently renews thereof albeit intermittently until it fell into arrears leading them to demand payment. He also added that the Plaintiff has expressly signed renewal letters in the past wherein the rent was reviewed by mutual agreement. He averred that the Plaintiff has not honored its obligation to pay rent and has as a result fallen into arrears amounting to Kshs. 3,031,776/-. He further stated that the Plaintiff has been duly notified of these rent arrears but has not only failed, neglected and or refused to settle the same, but has despite invitation to settle accounts declined to oblige. He further stated that the 1st Defendant is therefore within its right under the Distress for Rent Act, Cap 293, in instructing the 2nd Defendant to levy distress against the Plaintiff and to recover the outstanding rent arrears. He further added that the attachment/proclamation of the Plaintiff's goods was done within the law as the chattels that have been proclaimed belong to the Plaintiff and fall in the category of attachable assets within the demised premises. He further stated that the Plaintiff is not entitled to the injunctive orders it seeks as it has not come to court with clean hands.

The Plaintiff/Applicant filed a Further Affidavit sworn by Hassan Mohamed Hajir on 26th June 2014 in which he averred that the 1st Defendant had admitted that the rent payable was Kshs. 50,000/- per month and has never been lawfully altered. He further added that the letter offered does not amount to a contract

and was indeed clearly marked “subject to contract” with no subsequent contract being entered into by the parties. He further added that the agreements attached by the 1st Defendant are null and void as they are in contravention of section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. He further denied paying the increased rent as the same was illegally increased and added that the money paid to the Plaintiff was under duress and on account of threat of eviction or distress. He further stated that the attachment of the Plaintiff’s buses is illegal.

Both the Plaintiff and the 1st Defendant filed written submissions which have been read and taken into account in this ruling.

The issue which I must determine is whether the Plaintiff is entitled to the temporary injunction that they pray for. In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Does the Plaintiff/Applicant have a genuine and arguable case? The Plaintiff/Applicant’s case is that it is a controlled tenant within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and therefore the increases of rent by the 1st Defendant up from the initial rent of Kshs. 50,000/- is illegal and that the resultant distress for rent and proclamation of its 3 buses is unlawful and should be stopped by way of a temporary injunction. Is the Plaintiff/Applicant a controlled tenant and if so what are the implications vis a vis the 1st Defendant’s actions complained of by the Plaintiff? In section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, a controlled tenancy is defined as follows:

“means a tenancy of a shop, hotel or catering establishment-

(a) Which has not been reduced into writing; or

(b) Which has been reduced into writing and which –

i. Is for a period not exceeding five years; or

ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

iii. relates to premises of a class specified under subsection (2) of this section

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as a landlord or as a tenant shall be a controlled tenancy.”

The same section defines the word “shop” as follows:

“means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money’s worth.”

Going by this definition of the term “shop”, it is quite clear to me that the Plaintiff, which runs the business of a Bus Ticketing Office at the suit premises, does qualify to be termed as a shop within the meaning of that statute. Is the Plaintiff a controlled tenant? The 1st Defendant has contended that the tenancy with the Plaintiff was reduced in writing and in proof of that attached the following documents:

1. A Licence Agreement dated 2nd May 2007 for a term of 2 years from 1st January 2007 to 31st December 2008 purportedly signed by the Plaintiff’s signatories and an accompanying letter dated 22nd February 2007;
2. A letter dated 19th March 2009 alluding to a further extension of the tenancy by a further 2 years from 1st January 2009 to 31st December 2010. No formal agreement was entered into.

Though the Plaintiff has insisted that it did not execute any of the agreements produced by the Plaintiff, it appears to me that the net effect is the same as even though the Plaintiff admits having entered into those agreements, the term stipulated is less than 5 years and therefore either way, the Plaintiff falls within the category of a controlled tenant. This is a preliminary finding on this issue based solely on the evidence presented so far in affidavits sworn by the parties and does not in any way preempt the full trial and conclusive finding by this court. Being a controlled tenant, was the Plaintiff bound by the increases of rent by the 1st Defendant and therefore liable to pay the rent arrears claimed by the 1st Defendant? Section 4(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act provides that no term enjoyed by the tenant under such a tenancy shall be altered to the detriment of the tenant except in accordance with the Act. Section 4(2) states that a landlord who wishes to alter any term enjoyed by the tenant must give notice in that behalf to the tenant in the prescribed form. Such a tenancy notice must take effect not less than two months from service. Was the Plaintiff served the required tenancy notice of rent increase by the 1st Defendant? The notices issued to the Plaintiff by the 1st Defendant are comprised in the letters dated 22nd February 2007 and 19th March 2009. None of the two notices complied with the legal requirement to take effect after not less than 2 months from receipt thereof by the Plaintiff. To that extent therefore, I find that the stated tenancy notices are amenable to challenge on that basis and the resultant rent increases and arrears may be declared to be illegal and unlawful. To that extent therefore, I find that the Plaintiff has established that it has a genuine and arguable case and has therefore demonstrated a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff’s rights.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 23RD DAY OF JANUARY 2015.

MARY M. GITUMBI

JUDGE