



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 10 OF 2015**

**PORTLINK LIMITED ..... PLAINTIFF**

**V E R S U S**

**KENYA RAILWAYS CORPORATION ..... DEFENDANT**

**RULING**

1. The Plaintiff has presented Notice of Motion dated 27<sup>th</sup> January 2015 brought under the provisions of Section 7 of the Arbitration Act, Cap 49. In that Notice of Motion Plaintiff seeks the following two prayers-

- **An injunction be granted, to restrain the Defendant, its servants, agents, and or any other person/body claiming under it, from Evicting the Plaintiff from property leased to it (the Plaintiff) at the Mombasa Railway Station pursuant to a Lease Agreement dated 1<sup>st</sup> July 2013, and or interrupting, interfering with, or disrupting the Plaintiff's Business carried thereat or in any other manner whatsoever, depriving the Plaintiff of its quiet right to enjoyment of the said property, pending hearing and conclusion of Arbitration Proceedings between the Plaintiff and the Defendant arising out of the Lease Agreement dated 1<sup>st</sup> July 2013.**
- **The Termination Notice issued by the Defendant to the Plaintiff dated 7<sup>th</sup> November 2014, with an effective date of 28<sup>th</sup> February 2015, be stayed, pending the conclusion of the Arbitration Proceedings between the Plaintiff and the Defendant.**

2. The Plaintiff is the lessee of Defendant's land measuring 0.692 acres at Mombasa Railway Station. The lease which commenced on 1<sup>st</sup> August 2013 is for 15 years.

3. The Defendant has invoked Clause 20.2 of that lease which provides-

**“The Lessor may terminate the tenancy at any time or if the subject land herein is needed for railway development or any other reasonable reason by giving the Lessee at least Three (3) months written notice to that effect.”**

The Defendant by its letter dated 7<sup>th</sup> November 2014 gave Plaintiff three months notice as per that Clause. The notice terminates on 28<sup>th</sup> February 2015. The reason for termination of the lease was given in Defendant's letter of 7<sup>th</sup> November 2014 to be:-

**“As is well within your knowledge, the Corporation’s key mandate is the development and provision of freight and passenger services within Kenya. The Corporation has finalized the feasibility studies and preliminary studies for the commuter rail development of Mombasa and the County generally. The Mombasa Railway Station is the core focal point for this development and is required to be free from all encumbrances as we finalize the detailed designs and engagement with the potential Public Procurement Partnership investors.”**

4. The Plaintiff responded to Defendant’s letter of Notice by its letter dated 25<sup>th</sup> November 2014. By that response Plaintiff queried Defendant’s notice which was given within one year of signing a 15 year lease. Plaintiff also raised its concern of the development it had undertaken of one Storey Office building on the leased land. Plaintiff raised a concern that Defendant’s letter had not addressed compensation of such development. By that letter Plaintiff concluded thus-

**“In view of the above, we request, and therefore require that you retract your notice given to us dated 14<sup>th</sup> November 2014, and allow us to continue with our smooth operations of the business that we are conducting in the stated premises.**

**Take Notice therefore that unless you confirm that you will do as stated by us in Paragraph (e) above within the next 10(ten) days from the date hereof, we will proceed to invoke and utilize the provisions of Clause 23.3 of the Lease.”**

5. Clause 23.3 of the lease referred to by Plaintiff above provides-

**“The Lessor and the Lessee irrevocably agree to submit any dispute over any claim or matter arising under or in connection with this Lease or the legal relationship established by it that cannot be resolved amicably for final resolution by arbitration under a single arbitrator in accordance with the provisions of the Arbitration Act (1995) or such arbitrator to be appointed in default of agreement by the Chairman for the time being of the Law Society of Kenya.”**

6. The Defendant did not respond to Plaintiff’s letter of 25<sup>th</sup> November 2014. Accordingly Plaintiff invoked the provisions of Clause 23.3 of the lease by its letter dated 16<sup>th</sup> December 2014. By that letter Plaintiff wrote-

**“RE: TERMINATION OF LEASE, MOMBASA RAILWAY STATION  
INVOLVING: PORTLINK LOGISTICS LIMITED**

**We wrote to you on the 25<sup>th</sup> of November 2014, concerning the above matter, in which we gave you 10 days within which to respond and retract the termination notice given to us dated 7<sup>th</sup> November 2014.**

**That period has since lapsed, and you have not responded to our said letter.**

**Accordingly, and in compliance with Clause 23.3 of the Lease, we now require you to liaise with the undersigned in the choice of a common Single Arbitrator for determination of the current dispute, which we, for ease of reference, summarize, albeit not limited to the following matters:**

- i. Whether it is lawful for you to terminate the lease in the manner you now purport to.**
- ii. Whether indeed there have arisen any circumstances that are compelling enough to entitle you to terminate the lease, and**
- iii. The lessee has neither surrendered the lease, nor has the same expired. What quantum of**

**compensation is it entitled to in the event of your unilateral termination of the same?**

**In order to expedite the process, we give you're the first option to nominate the Single Arbitrator in the dispute, and forward to us the name of him for our consideration either for acceptance, or our counter-proposal of a nominee.**

**Again, for purposes of alacrity in the matter, we suggest that you comply with the foregoing within the next 10 days of your receipt of this letter."**

7. It is in the above back ground that the Plaintiff seeks the orders set out in its Notice of Motion. Plaintiff through its Director, Fahmy Hamid, seeks interim relief from this Court pending arbitration. In so seeking Plaintiff deponed, through its Director, that the Defendant was instrumental in approving the drawings of its development on the leased land. That that approval was given by Defendant on 4<sup>th</sup> September 2013. That the Defendant should therefore compensate the Plaintiff for such development.

8. Defendant opposed Plaintiff's application through the Replying Affidavit sworn by its Legal Officer.

9. By that Replying Affidavit Defendant maintained that it was entitled under the lease to terminate the same and that the Plaintiff was then obligated to surrender the remainder of the lease term unconditionally. That the only remaining issue then is Plaintiff's compensation for development. That before the expiry of the notice period the Plaintiff will have had adequate period to carry out valuation of the development.

10. Defendant is of the view that since termination is provided for in the lease Plaintiffs are not entitled to the prayers they seek under Section 7 of Cap 49. Defendant submitted that if the Court do entertain Plaintiff's prayer it will be tantamount to the Court re-writing the parties contract. Further by relying on the case **SEVEN TWENTY INVESTMENT LTD -Vs- SANDHOE INVESTMENTS KENYA LTD [2013]eKLR** Defendant submitted that the Court cannot preserve the lease. In that case the Court stated in that regard-

**"If the Court were to grant the orders as sought, it would mean that the Court would be preventing one of the parties to the contract from terminating the contract."**

11. Defendant was also of the view that Plaintiff should not be granted orders sought because it had failed to show that it would suffer irreparable loss if orders were not granted. That Plaintiff is only entitled to damages which if found due can be issued notwithstanding the termination.

### **ANALYSIS**

12. I have considered parties affidavit evidence, their legal authorities and their submissions.

13. Section 7 of Cap 49 under which Plaintiff have moved by its Notice of Motion is in the following terms-

**"7(1) It is not incompatible with an arbitration agreement for a party, to request from the High Court, before or during arbitral proceedings, an interim measure of protection for the High Court to grant that measure.**

**(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to this application, the High Court shall treat the Ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."**

In issuing an interim measure of protection as provided in Section 7 the Court's determination of the parties dispute is restricted. The Court's role was eloquently outlined in the decision of J. G. Nyamu J.A. in the case **SAFARI LIMITED -Vs- OCEAN VIEW BEACH HOTEL LIMITED & 2 OTHERS**

**(2010)eKLR** where it was stated the Court faced with such application should take into account the following-

1. **The existence of an arbitration agreement.**
2. **Whether the subject matter of arbitration is under threat.**
3. **In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?**
4. **For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?**

14. Bearing the above in mind, there is indeed an arbitration Clause in parties lease.

15. Is the subject matter under threat? In my view the subject matter is under threat. In this regard reference is made to expense Plaintiff has incurred which includes Kshs. 8,970,000/- paid to Defendant, in respect of the lease; and it includes the expenses incurred in construction of the building. If Plaintiff is evicted as sought by Defendant by 28<sup>th</sup> February 2015, the Plaintiff will loose the value of the property. It is instructive to note that todate Defendant has not conceded that the Plaintiff is entitled to be compensated for that development. Having not made that concession there is therefore a dispute.

16. In the above circumstances the appropriate measure of protection is for Plaintiff to be granted an injunction. I so state because the Plaintiff by its letter dated 16<sup>th</sup> December 2014 identified the issues to be determined by the arbitrators as whether Defendant was entitled to terminate the lease; whether circumstances have arisen to entitle Defendant to terminate; and what is the quantum of compensation that Plaintiff is entitled to?

17. It is important to note that the lease provided that Defendant could terminate the lease at any time or when it needed the land for development or other reasonable reason. In my view the arbitrator may need to inquire whether indeed Defendant is entitled to terminate. But I qualify that by saying that it is not the place of the Court to determine the issues for determination by the Arbitrator. If the Arbitrator's determination would be that Defendant was not entitled to terminate and the Plaintiff has been evicted and its development demolished the finding of the arbitrator may be academic and of no use to the Plaintiff.

18. The Defendant invited this Court to find that the Plaintiff would not suffer irreparable loss that cannot be compensated by damages which is one of the principles of granting an injunction as per **GEILLA – Vs- CASSMAN BROWN [1973]**. The Court of Appeal in the **SAFARICOM LTD** case (supra) faulted the High Court for having applied the principles of **GEILLA –Vs- CASSMAN BROWN** (supra) and stated thus-

**“With great respect to the Superior Court, although the right of intervention was specified in Section 7 and the limit of intervention defined in the Section, what happened is that the Court misapprehended its role, declined to grant the interim measure by applying line, hook and sinker the Civil Procedure preconditions for the grant of interlocutory injunctions as laid down in the celebrated case of Giella vs Cassman Brown [1973]EA 358 and also delved into the rights of parties whereas under the provisions of Section 7, there was not suit pending before it for determination because the interim measure of protection was being sought before the commencement of an intended arbitration.**

**By determining the matters on the basis of the GEILLA principles the Superior Court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets,**

**or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. In the case of Kenya, the Arbitration Act is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as “interim measures of protection” under Section 7 of the Arbitration Act.”**

19. The above makes it clear that the Court in considering an application under Section 7, the principles set out in **GEILLA’s** case ought not to be considered.

20. Defendant opposed Plaintiff’s application on the ground that the Verifying Affidavit in support of the Plaintiff was sworn by Plaintiff’s Director but the Plaintiff’s Company failed to give that Director authority under seal as required under Order 9 Rule 2(c) of the Civil Procedure Rules. That Rule requires that an appearance or act on behalf of Corporation can be undertaken by an officer of that Corporation “**duly authorized under the Corporate seal**” of such Corporation.

21. I have looked at the Verifying Affidavit and the Defendant is correct in its submissions.

22. The Court is however of the view that because of the overriding objective of Section 1A and 1B of the Civil Procedure Act and Article 159(2) (d) of the Constitution it should lean towards sustaining this case rather than striking it out on the ground that Plaintiff’s Company did not authorize its Director under seal to swear the Verifying Affidavit. This finding is encouraged by the holding of the Court of Appeal in the case **NICHOLAS KIPTOO ARAP KORIR SALAT –Vs- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013]**, viz:-

**“In Abdirahman Abdi ALSO KNOWN AS Abdirahman Muhumed Abdi –Vs- Safi Petroleum Products Ltd & 6 Others, Civil Application No. Nai. 173 of 2010 where a Notice of Appeal was served on the Respondent out of time and without leave of the Court, upon being asked to strike it out, the Court (Omolo, Bosire and Nyamu JJA) observed that:-**

**“The overriding objective in Civil litigation is a policy issue which the Court invokes to obviate hardship, expense, delay and to focus on substantive justice ...**

**In the days long gone the Court never hesitated to strike out a Notice of Appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159(2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in Civil litigation in which the Court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the Court strike out the offending document. In short, the Court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159(2) (d) of the Constitution makes it abundantly clear that the Court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The Court has to weigh the prejudice that is likely to be suffered by the offending party if the Court strikes out its document. The Court in that regard exercises judicial discretion.”**

Balancing the scale of justice I am of the opinion that the lack of authority of the Corporation to its Director to swear the Verifying Affidavit need not lead to striking out this suit.

23. In that regard the Plaintiff’s Company will be required to file an authority under seal to authorize the deponent of the Verifying Affidavit to swear the same.

## **CONCLUSION**

24. The Court therefore grants orders that:-

- a. **An injunction is hereby granted restraining the Defendant, its servants, agents, and or any other person/body claiming under it, from Evicting the Plaintiff from property leased to it (the Plaintiff) at the Mombasa Railway Station pursuant to a Lease Agreement dated 1<sup>st</sup> July 2013, and or interrupting, interfering with, or disrupting the Plaintiff's Business carried thereat or in any other manner whatsoever, depriving the Plaintiff of its quiet right to enjoyment of the said property.**
- b. **The injunction granted in (a) above is for only forty five (45) days from this date hereof to enable parties to institute the necessary arbitral process.**
- c. **The injunction in (a) above is also granted on condition that Plaintiff's Company does file in this case an authority under seal authorizing or ratifying FAHMY HAMID swearing the Verifying Affidavit dated 27<sup>th</sup> January 2015.**
- d. **The costs of Notice of Motion dated 27<sup>th</sup> January 2015 shall abide with the outcome of the arbitral process.**

**DATED and DELIVERED at MOMBASA this 26<sup>th</sup> day of February, 2015.**

**MARY KASANGO**

**JUDGE**