



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND DIVISION
CIVIL SUIT NO. 432 OF 2014

HUSSEIN IBRAHIM NUNI.....PLAINTIFF

VERSUS

AGUTHI ENTERPRISES.....DEFENDANT

RULING

The application for consideration is a Notice of Motion dated 7th April 2014 brought by the Plaintiff under Order 40 Rules 1, 2, 3, and 4, Order 51 Rule 1 of the Civil Procedure Rules and section 3 and 3A of the Civil Procedure Act. The Plaintiff inter alia seeks the following orders:

- a) That pending the hearing and determination of this suit, an injunction does issue restraining the Defendant by itself, its appointed directors, servants, agents, advocates or any person acting on its behalf or any of them or otherwise from terminating the lease agreement dated 9th December 2013 between the Plaintiff and the Defendant over property known as LR No. 36/II/28 plot number 28 of section 2, Eastleigh Nairobi.
- b) That pending the hearing and determination of this suit, an injunction does issue restraining the Defendant by itself, its appointed directors, servants, agents, advocates or any person acting on its behalf or any of them or otherwise from advertising or offering for sale or purporting to sell, Leasing or offering to lease, charging or offering for charging or in any other way alienating the property known as **LR No. 36/II/28** plot number 28 of section 2, Eastleigh Nairobi.
- c) That pending the hearing and determination of this suit, an injunction does issue restraining the Defendant by itself, its appointed directors, servants, agents, advocates or any person acting on its behalf or any of them or otherwise from collecting rent from any of the tenants on the property known as LR No. 36/II/28 plot number 28 of section 2, Eastleigh Nairobi.
- d) That pending the hearing and determination of this suit, a mandatory injunction be issued enjoining the Defendant by itself, its appointed directors, servants, agents, advocates or any person acting on its behalf or any of them to grant the Plaintiff possession of the property known as LR No. 36/II/28 plot number 28 of section 2, Eastleigh Nairobi.

The application is supported by grounds listed on the face of the application and the Plaintiff's affidavit sworn on 7th April 2014. The Plaintiff's case is that he and the Defendant are parties to a lease agreement dated 9th December 2013 over property known as LR No. 36/II/28 (hereinafter referred to as the suit property). The Plaintiff exhibited a copy of the lease dated 9th December 2013 and averred that the lease was for a period of 27 years and 3 months.

The Plaintiff states that on the expectation that the Defendant would honour its obligations, he paid the contractual amount of Kshs 1.8 million for the first 2 years of the lease as agreed by the parties. It is the Plaintiff's averment that the Defendant who was to hand over possession of the suit property to him on 1st April 2014 had unlawfully declined to hand over possession of the property to him despite having received rent as agreed. The Plaintiff annexed as evidence 2 cheques dated 10th January 2014 for Kshs 700,000/- each and an acknowledgement note dated 9th December 2013 for Kshs 400,000/- from the Defendant.

According to the Plaintiff, the Defendant has at all times been aware that the purpose of the lease was to allow him utilize the suit property by constructing a 7 storied building and collect all rent and income from the property until the date of termination of the lease by effluxion of time when the building would then be handed back to the Defendant. The Plaintiff alleges that the Defendant has commenced discreet negotiations with persons of Somali origin for purposes of either selling or leasing the property to them at a higher rental income.

The Plaintiff contends that he was advised by officials from the registry of documents that the Defendant had presented another lease agreement over the property to a different lessee for registration which was rejected since the lease dated 9th December 2013 had already been registered. It is the Plaintiff's contention that he is reasonably apprehensive that unless the Defendant is restrained by a court order, it will terminate the lease or lease the property to a third party thereby causing him to lose anticipated profits from the business. The Plaintiff states that the Defendant's actions will occasion him irreparable loss, prejudice and damage which cannot be compensated by way of damages.

The application is opposed by the Defendant who filed grounds of objection dated 24th June 2014 and a replying affidavit sworn on the same date by its director, **Mr. Samuel Kamau Githaiga**. The Defendant challenges the legality of the lease dated 9th December 2013 on grounds that it did not as a company pass a resolution at all either through its directors or at an annual general meeting to lease the suit property to the Plaintiff. The Defendant contends that the persons who signed the lease were not its legitimate directors since they were not appointed in accordance with the Defendant's Articles of Association.

Further, the Defendant contends that one of the persons who executed the lease and held himself as a director/secretary was not qualified to hold the position of a secretary to the company. It is the Defendant's contention that since a lease cannot come into existence before its date of commencement, the lease dated 9th December 2013 which bears a commencement date of 1st April 2013 is null and void for lack of a valid commencement date.

The Defendant avers that the lease is ineffective, unconscionable and fraudulent for having unreasonable terms. According to the Defendant, a lease for 27 years with a flat rent of approximately 200,000/- without any increment for the entire period is unreasonable, unconscionable and amounts to an act of fraud against the shareholders. The Defendant contends that the lease is therefore null and void, vitiated by fraud and incapable of performance.

The Defendant also contends that the suit property is fully occupied by other tenants who have acquired a legal right to occupy the suit property, and can therefore not be forcibly evicted. According to the Defendant, a mandatory injunction seeking to put the Plaintiff in possession cannot issue and therefore, that since vacant possession of the suit property cannot be obtained, the lease is frustrated by operation of law/circumstances obtaining in the premises.

The Defendant denies being party to the lease and states that the execution of the lease, payment of

monies, cancellation of the lease and refund of the monies received was carried out by David Ndigirigi Gachura, Mr. Samuel Gitu Ngarua and Mr. Maina Ndirangu. It is the Defendant's contention that the entire transaction was a private transaction between the Plaintiff and the said individuals and therefore, that the Plaintiff should seek relief from David Ndigirigi Gachura, Mr. Samuel Gitu Ngarua and Mr. Maina Ndirangu.

Further, the Defendant states that the Plaintiff has not shown in what way or extent to which he stands to suffer irreparable damage if the orders sought are not granted. The Defendant avers that the Plaintiff has never been in possession and can easily be compensated with an award of damages. It is the Defendant's contention that the balance of convenience favours it and lastly, that it is easy, fair and more convenient to refund the Plaintiff money as has been done than to make orders based on an unconscionable and illegal lease.

The application was canvassed by way of written submissions and the Plaintiff in submissions dated 7th November 2014 stated that the law on injunction is well set out in the case of **Giella vs. Cassman Brown (1973) EA 358**. Counsel for the Plaintiff submitted that since the Defendant had not denied any of the facts in the supporting affidavit, the facts stated by the Plaintiff must be taken to be true as they are uncontroverted. Further, the Plaintiff submitted that the existence of the lease had not been denied by the Defendant who acknowledged the lease in its letter dated 21st March 2014.

It is the Plaintiff's submission that the Defendant did not raise the issue of unconscionable terms and further, that the Defendant could not approbate and reprobate at the same time by claiming that the lease agreement was not properly executed and at the same time claim it contains unconscionable terms. Counsel referred the court to the case of **Shell & BP (Malindi) Kenya Ltd vs. Kings Motors (2004) eKLR** where the court held that a valid lease cannot be trashed and issued a temporary mandatory injunction compelling the Defendant to vacate the suit property.

While submitting that the Defendant's assertion that the lease was negotiated by persons who were not directors was unfounded, the Plaintiff urged the court to uphold the principle that a person dealing with a limited liability company is not to be concerned with the internal management of the company as set out in the **Turquand's Rule**. The Plaintiff argued that the allegation was contradictory to the Defendant's letter dated 21st March 2014 where the Defendant made reference to its lease for the suit property dated 9th December 2013.

In further submission, the Plaintiff argued that he performed his obligations under clause 1 and 2(h) of the lease agreement as read with recital 4(a) through payment of rent amounting to Kshs 1.8 million. Counsel submitted that the Defendant confirmed receipt of the money in its letter dated 21st March 2014 as well as in its replying affidavit. It is the Plaintiff's submission that the Defendant has not performed its obligations under clause 2(f), 3(a),(b),(e) and 4 of the lease agreement by failing to hand over vacant possession of the suit property to the Plaintiff. Counsel for the Plaintiff submitted that equity will not assist law breakers and those who flout the law by infringing the rightful titles of others.

The Plaintiff relied on section 77(2) of the Land Act and submitted that the Defendant's action of failing to give vacant possession amounts to an unlawful eviction. It is the Plaintiff's submission that having performed his obligations, he has a strong prima facie case against the Defendant who has failed to perform its obligations. Counsel made reference to the cases of **Alghussein Establishment vs. Elton College (1991)1ALL ER 267** and **Cheall vs. Association of Professional Executive Clerical and Computer Staff (1983)1ALL ER** and submitted that a party in a contract cannot take advantage of his own wrong to seek a benefit against the other party.

Further, the Plaintiff submitted that the Defendant's argument that he paid the money to other persons other than the Defendant or that the Defendant had not benefited from the money received was a fallacy. It is the Plaintiff's submission that the allegation that the cheques for refund of the monies to him were made by the persons who negotiated the lease agreement with the Plaintiff was not supported by any facts. Counsel averred that the Plaintiff has never received any money from the Defendant as a refund.

According to the Plaintiff, the action by the Defendant to terminate the lease agreement was unlawful and made in bad faith. Counsel argued that the Defendant has not alleged that the Plaintiff has failed to perform his covenants under the lease agreement and averred that the extraneous factors alleged do not entitle the Defendant to terminate the lease. The Plaintiff submitted that the Defendant's failure to provide a notice of termination was unlawful and reliance was placed on section 75 of the Land Act. The court was referred to the case of **Parvi Holdings Ltd vs. Nairobi City Council (2006) eKLR** where a temporary injunction restraining a landlord from leasing part of the suit property was issued.

In respect to the Defendant's assertion that the lease contained unconscionable terms and was fraudulent, the Plaintiff submitted that the allegation was unfounded and an afterthought intended to obscure the facts. Counsel averred that the lease was valid and created legal obligations between the parties. Further, it was submitted that the Defendant had not pleaded inequality in bargaining power, duress or coercion at the time of negotiating and executing the lease and therefore, that the claim for unconscionable terms is unfounded.

Counsel argued that it is not the business of the courts to rewrite contracts on behalf of parties and further, that the allegations that the lease period is long or that the rent is too low is irrelevant, immaterial and inadmissible. It is the Plaintiff's submission that the Defendant had not pleaded the particulars of fraud either in the defence or in the replying affidavit.

While stating that the Defendant's attempt to discredit the lease agreement based on the wrangles and internal arrangement of the Defendant were baseless, the Plaintiff argued that he transacted with a limited liability company which is a body corporate and which is separate from its members and directors as laid down in the case of **Salomon vs. Salomon**. Counsel averred that the Defendant did not offer any proof of who its elected directors were or in which way the said persons were not validly elected. It is the Plaintiff's submission that internal wrangles of a company have their own dispute settlement mechanism under the Companies Act and actions by shareholders against the company and shareholders as per the rules established in **Foss vs. Harbottle**.

The Plaintiff argued that the Defendant's allegation that the lease was unlawful for commencing on a future date was baseless for reasons that the date was by mistake owing to a typographical error. Counsel argued that the parties could only have meant 1st April 2014 and not 1st April 2013 since throughout the lease agreement, the date indicated was 1st April 2014.

Counsel for the Plaintiff submitted that damages were an inadequate remedy in this case. The Plaintiff contended that the suit property was a valuable piece of land situated in a very marketable place in Easileigh and that there being no such other land available to him, damages would be inadequate. While submitting that the Plaintiff intended to demolish the building currently on the suit property and put up a commercial building, Counsel argued that it was impossible at this stage to determine the amount of compensation payable to the Plaintiff.

Reference was made to the case of **Olympic Sports House ltd vs. School Equipment Centre Ltd (2012) eKLR** where the court stated that it was difficult to quantify the damage the Plaintiff would suffer and further, that even if the Defendant could compensate the Plaintiff with damages, an injunction should still issue to restrain the continued breach of the law.

In respect to the balance of convenience, it was submitted that the same was in favour of the Plaintiff since the lease had not been terminated and had not been denied by the Defendant. Counsel argued that the balance of convenience tilts towards preserving the suit property pending the hearing and determination of the suit. The Plaintiff submitted that the Defendant would not suffer any prejudice if the orders sought were granted as it would receive rent for the suit property as per the lease agreement. The Plaintiff contended that in the event the suit property was sold, charged, leased to a third party or otherwise, the suit would have been rendered nugatory.

In further submission, the Plaintiff stated that the test for the grant of a mandatory injunction at an interlocutory stage requires the applicant to satisfy the court that there are special circumstances as laid

down in the case of **Shell & BP (Malindi) Kenya Ltd vs. Kings Motors (2004) eKLR**. Counsel submitted that there were exceptional circumstances in this case to warrant the grant of a mandatory injunction. The Plaintiff reiterated that he had performed his obligations under the agreement and further, that there was no controversy that the lease was duly executed.

The Plaintiff submitted that the Defendant had declined to give vacant possession and had not refunded the rent paid to it. It was submitted that the Defendant had not denied commencing negotiations for the sale or lease of the suit property with a third party and further, that such actions would render this suit nugatory. Counsel submitted that the Defendant who had obtained money from the Plaintiff was acting in a high handed manner to avoid its obligations under the lease. Lastly, it was submitted that the internal wrangles exhibited by the Defendant may result in prejudice to the Plaintiff.

The Defendant in submissions dated 3rd February 2015 reiterated the facts as pleaded and argued that persons who purportedly executed the lease document did not have authority of the Defendant company to do so. The Defendant submitted that the names of the persons who signed the lease on its behalf do not appear on the lease and therefore, that their identity was unknown. Counsel submitted that it was incumbent upon the Plaintiff to demonstrate that the lease was validly and properly executed.

According to the Defendant, the term of the lease expressed to be for a period of 27 years and 3 months with effect from 1st April 2013 with a review of rent scheduled for the beginning of the year 2028 is unconscionable, unlawful, unreasonable and dishonest. Counsel argued that there was no resolution by a general meeting of the company or by the company's board of directors approving the lease.

It is the Defendant's submission that the overall effect of the lease would be to dis-empower the shareholders of the company and render them destitute. The Defendant submitted that the court is obliged to cancel unconscionable bargains that are contrary to good conscience and offend public good. According to the Defendant, the lease offends the provisions of the Perpetuities and Accumulations Act and that the same ought not be given effect as it is full of uncertainties and imponderables.

While submitting that the lease expressed to commence on 1st April 2013 and yet it was executed on 9th December 2013 suffers from a grave want of form, the Defendant submitted that the error on the date of commencement when combined with the error of execution renders the purported lease null and void. The Defendant argued that the suit premises was occupied by tenants who had accumulated legal rights under the Landlord and Tenant(Shops, Hotels and Catering Establishments) Act and the Rent Restriction Act and therefore, that the purported lease was frustrated.

It is the Defendant's submission that evicting the tenants would amount to a violation of their rights and that the court cannot give effect to an agreement whose effect would be to break the law. Counsel submitted that since the tenants shall be adversely affected by the orders sought, it was incumbent upon the Plaintiff to join all the third parties in this suit.

While submitting that the purported lease presupposes the handing over of possession and demolition of the present buildings to pave way for the reconstruction of a multi storey building by the Plaintiff, the Defendant submitted that there was no provision for compensation and that the Plaintiff had not provided any guarantee or security to the court in the event of demolition and subsequent failure to build the proposed multi storey building.

In further submission, the Defendant contended that a mandatory injunction can only be issued in the clearest of cases and that in the instant suit, the Plaintiff had not demonstrated that his case was clear and that he was likely to succeed a trial. Counsel submitted that the Plaintiff's case was based on an impugned lease document and further, that the Plaintiff who was not in possession of the suit property had not invested any money in the suit premises.

It is the Defendant's submission that the Plaintiff who has not commenced the process of building a multi storey building will suffer no loss and can easily be compensated by damages if he is successful at trial. Lastly, it was submitted that the balance of convenience tilts in favour of the Defendant who was in

occupation, was collecting rent and had not kept any of the Plaintiff's money.

The issue for determination is whether the Plaintiff is entitled to the prayers sought. The principles that govern the granting of a mandatory injunction at the interlocutory stage were set out by the Court of Appeal in the case of Kenya Breweries Ltd and another vs. Washington Okeyo (2002) 1 E.A. 109 as follows:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing. But in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the Plaintiff, a mandatory injunction will be granted on an interlocutory application.”

Therefore, a mandatory injunction can issue at the interlocutory stage where the case is a clear one and the Court is of the view that it ought to be decided at once. The existence of the lease entered into between the parties has not been denied. The Defendant however challenges the legality of the lease on grounds that it did not pass a resolution either through its directors or at an annual general meeting to lease the suit property to the Plaintiff and further, that the persons who signed the lease were not its legitimate directors having not been appointed in accordance with the its Articles of Association.

In my view, the issues that the Defendant has raised in regard to the absence of a resolution are issues of internal management of the Defendant which cannot be raised to defeat rights which have accrued to a third party. The Court in the case of Morjaria vs. Kenya Batteries (1981) Ltd & 2 others (2002) 1KLR 406 stated as follows in respect to similar issues:

“As regards the defence that the agreement was not executed properly by the company and that the borrowing was unauthorized, I am persuaded by the plaintiffs’ advocate that whether a company has or has not complied with its internal procedures as to borrowing or execution of contracts is an internal management issue and cannot afford a defence to a third party dealing with the company. The third party is entitled to assume that the company has complied with its internal rules and regulations unless he has had actual knowledge of them or there are suspicious circumstances putting him on inquiry. That is what is called the rule in Turquand’s Case and was propounded in Royal British Bank v Turquand (1856) 119 E.R. 886. The case of Shah Manek Ltd v Ukay Estate Ltd & 2 others [HCCC No.833 of 1998] cited by the plaintiff also supports the above view of the matter.”

The Rule in Turquand’s Case was affirmed by the Court of Appeal in the case of East African Safari Air Limited vs. Anthony Ambaka Kegode & another CA No. 42 of 2007 where the the Court stated as follows:

“While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called “the indoor management” and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained.”

The Defendant can therefore not walk away from the lease on grounds that its internal management processes were not complied with.

The Defendant urged the Court not to give effect to the lease for reasons that it was unconscionable for having unreasonable terms. The Defendant contended that the 27 years lease had a flat rent of approximately 200,000/- without any increment for the entire period is unreasonable, unconscionable and amounts to an act of fraud against the shareholders. What the Defendant appears not to take account of is that the plaintiff was under the lease required to construct/build a new business for commercial building of up to 6 or 7 floors as per the preamble of the lease and clause 3(e) of the lease. This may have informed the provision of the long term of the lease and the otherwise conservative monthly rental. At the expiration of the lease the building was to be turned over to the landlord at no cost. The long term of the lease no doubt would have enabled the lessee to recoup his investment on the property. Thus in my view the Defendant's assertion that the lease terms were unreasonable and unconscionable lacks any substantiation. The Court in the premises is of the view that in the absence of coercion, fraud or undue influence which have been pleaded and proved, the Defendant is bound by the terms of the lease dated 9th December 2013. The Court is guided by the finding of the Court of Appeal in the case of **National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd & another (2002) EA 503** where it stated that :-

" This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause. "

The Defendant's contention that the lease is frustrated by tenants in occupation of the suit property who have accumulated legal rights under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and the Rent Restriction Act is without basis. Under clause 3(b) of the lease dated 9th December 2013, the Defendant made a covenant that it would ensure that all the tenants on the premises at the time of execution of the lease had vacated the premises by 1st April 2014. The Defendant can therefore not be heard to say that the lease is unenforceable due to the presence of tenants in occupation when he has failed to perform his part of the bargain. Under the provisions of the Landlord and Tenant (shops, Hotels and Catering Establishments) Act Cap 301 there are lawful ways and means of terminating tenancies and the Defendant must have been aware of that at the time of entering the lease with the plaintiff. The Defendant has not pleaded he took the measures provided under the Landlord and Tenant Act to have the tenants vacate the premises and failed. The court gets the feeling that the Defendant is perhaps "fishing" for a way to walk out of the contract it entered into. I do not think the Defendant ought to be allowed to do so.

In the result I am satisfied this is a clear and plain case where a mandatory injunction ought to issue and I accordingly grant orders in terms of prayers 3, 5 and 8 of the Notice of Motion dated 7th April 2014.

I direct that the costs of the Notice of Motion shall be in the cause.

Ruling dated, signed and delivered this.....25thday of.....**March**....2015.

J.M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiff

.....For the Defendant