REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 20 OF 2015

HIGH PREFERENCE PROPERTIES LTD.....1ST PLAINTIFF

FLEXITANK SYSTEMS KENYA LTD.....2ND PLAINTIFF

VERSUS

STEPHEN MAINA MUTURI.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 13th January 2015 in which the Plaintiffs/Applicants seek for orders of temporary injunction restraining the Defendant/Respondent from terminating the Plaintiffs' Lease Agreements or evicting the Plaintiffs from the ground floor shops specified in the Lease Agreements dated 5th November 2009 on L.R. No. 209/1820 Mepalux Plaza located at River Road, Nairobi (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and suit.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Ann Kajuju, a Director of the 1st Plaintiff, sworn on 13th January 2015 in which she averred that the Plaintiffs occupy two separate ground floor shops in the suit property as tenants of the Defendant pursuant to Lease Agreements dated 5th November 2009 (hereinafter referred to as the "Lease Agreements") entered into between them and the Defendant's father and predecessor in title known as Gerald Muturi Maina (Deceased) for a term of 5 years and 3 months. She disclosed that prior to entering into the Lease Agreements, the Plaintiffs had been tenants of APA Insurance Company Limited and had converted the suit property into ready-made "exhibition halls" which were used for exhibition and sale of wares by informal traders. She confirmed that upon entry into the Lease Agreements, they continued using the suit property for the same business of exhibition halls. She denied that the exhibition of wares within the suit property amounts to sub-tenancy on the grounds that the exhibitionists do not retain any control of any portion of the suit property, they have no long term agreements, they are not permanent as they come and go on a daily basis and further that they do not pay any electricity, water or security bills. She emphasized that in the circumstances, the exhibitionists do not fit in the legal description of sub-tenants. She highlighted Clause 3(n) of the Lease Agreements which provides as follows:

> **" Not to transfer sublet or part any further with the possession of any part of the premises without the written consent of the landlord…and it is expressly agreed and declared that upon any breach by the tenant of this covenant the landlord may re-enter upon the premises**

without notice and thereupon the term shall determine absolutely…"

She contended that the "part any further" in the above clause meant that the spaces that had been designated by the Plaintiffs and occupied as exhibition spaces prior to 5th November 2009 were to remain as such but that the Plaintiffs were not allowed to increase the said spaces without first obtaining the landlord's written consent. She similarly highlighted Clause 3(o) of the Lease Agreements which provides as follows:

> **"Not to permit any part of the premises to be used by other third parties without the prior written consent of the landlord."**

Her interpretation of that provision was that the clause places a restriction to parting with possession of additional third parties but reserved the Plaintiffs' right to retain into the demised premises any third parties who were in occupation as at 5th November 2009. She further highlighted Clause 7 of the Lease Agreements which provides as follows:

> **"That at the expiration of the lease herein the tenant shall have an option to renew the lease and the rent reserved herein shall be reviewed or increased by such amount which shall not be below the prevailing market rates and/or by not less than the rent contained herein whichever is higher provided that the tenant express its intention to renew the lease three months preceding the termination period."**

She stated that by their letters dated 29th May 2014 and 17th June 2014, the Plaintiffs exercised their option to renew the Lease Agreements for a further term of 5 years 3 months, a period of over 5 months to the expiry of the Lease Agreements. She added that her understanding of that clause is that upon exercise of the option to renew, the right to a new lease crystallized and the only outstanding issue would be an upward review of the rent or retention of the rent that was payable at the expiry of the Lease Agreements. She further added that Clause 7 of the Lease Agreements did not entitle the Defendant discretion to accept or refuse to extend the Lease Agreements. She further stated that by a letter dated 19th August 2014, Messrs Harit Sheth, Advocates wrote to them alleging that they were in breach of Clause 3(n) of the Lease Agreements and that therefore the Lease Agreements had automatically determined and the Defendant was at liberty to re-enter the suit property at any time and further informed them that the Defendant would not renew the Lease Agreements on account of the said breach. She further disclosed that a flurry negotiations in respect to this impasse failed, leading them to file this suit. She contended that the Defendant's allegation of sub-letting is ill intend, is unfounded and unsupported by law or facts and is merely created by the Defendant as an excuse not to recognize the Plaintiffs' legitimate exercise of their option to renew the Lease Agreements. She added that the Defendant's attempt to prevent them from exercising their right to renew the Lease Agreements was unbusinesslike and exposes them to grave loss and expense having invested millions of shillings in the suit property by way of refurbishment and good will which cannot be compensated by an award of damages. She also stated that the Defendant's communication denying them the right to exercise the option to renew is illegitimate, has no basis in law, is superfluous and amounts to an attempt by the Defendant to exercise a right or discretion that is not conferred to him by the Lease Agreements. She concluded by praying for this court to issue appropriate orders to preserve their interest in the suit property.

The 2nd Plaintiff filed the Supporting Affidavit of Susan Mukami Ndungu sworn on 13th January 2015 which contained similar averments as those of the 1st Plaintiff.

The Application is contested. The Defendant filed his Groulnds of Opposition dated 21st January 2015 in which he stated as follows:

> 1. That the Lease Agreements expire by effluxion of time on 31st January 2015 and the Defendant has notified the Plaintiffs that he will not renew the same as a result of which the Plaintiffs have no proprietary or contractual interest to protect in the suit property.

2. That the practical effect of the orders sought is to force and arm twist the Defendant into entering into new lease agreements with the Plaintiffs yet contracts are voluntarily negotiated and entered into.

3. That there cannot be an order of specific performance in the absence of a valid contract.

4. That Clause 7 of the Lease Agreements is clear that the parties will negotiate new rent but does not provide a mechanism for ascertaining the same in the event of failure to agree. Further that negotiations between the Plaintiffs and the Defendant on the terms of the new lease had failed therefore there has been no effective renewal of the Lease Agreements. Further that it is trite law that if a material term of the contract is left to future agreement, in this case the rent payable, the contract is unenforceable until or unless that term has been agreed to.

5. That the Defendant is under no legal obligation to give reasons for not extending the Lease Agreements.

6. That the Plaintiffs had blatantly breached their covenants under clause 3(n) of the Lease Agreements by sub-letting the suit property to several persons unknown to the Defendant and without the Defendant's consent which persons had no contractual obligations whatsoever with the Defendant thereby compromising the security of the suit property and the other lawful tenants.

The issue that I am called upon to determine is whether or not to grant the Plaintiffs/Applicants the orders of temporary injunction which they seek. In deciding whether to grant the temporary injunction sought after by the Plaintiffs/Applicants, 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."**

Have the Plaintiffs/Applicants 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."**

Have the Plaintiffs shown that they have a genuine and arguable case and therefore a prima facie case with high chances of success at the main trial? In essence, the Plaintiffs/Applicants are seeking the court's order compelling the Defendant to specifically perform clause 7 of the Lease Agreements by renewing the Lease Agreements for a further term of 5 years 3 months. The Plaintiffs have ably contended that they have exercised their option to renew the Lease Agreement under clause 7 thereof which I will reproduce hereunder:

> **"That at the expiration of the lease herein the tenant shall have an option to renew the lease and the rent reserved herein shall be reviewed or increased by such amount which shall not be below the prevailing market rates and/or be not less than the rent contained herein whichever is higher provided that the tenant express its intention to renew the lease three months preceding the termination period."**

It is common ground that the Lease Agreements were to expire on 31st January 2015. It is also common ground that the Plaintiffs were entitled to exercise the option to renew the Lease Agreements for a further term under clause 7 of the Lease Agreements cited above. It is agreed by all the parties that the Plaintiffs did in fact exercise the option to renew the Lease Agreements in their letters to the Defendant dated 29th May 2014 and 17th June 2014. The Defendant confirms having received those letters but contends that they were of no legal effect on the ground that the new rent to be paid by the Plaintiffs could not be agreed upon following failed negotiations on the same.

Where does that leave us? In answering that question, I will rely on the case of **Sands v. Mutual Benefits Ltd (1971) EA 15**6 where it was held that in the absence of agreement or a method of securing agreement to the new rent there was no effective renewal of the lease. Further that a lease agreement, if its terms are sufficiently certain, may be specifically enforced like any other contract but if the parties fail to express what they mean with reasonable certainty, the agreement is unenforceable and will be held void. Clause 7 of the Lease Agreements does not specify how the parties would determine the new rent payable if the option to renew was exercised. The court merely enforces what is agreed by the parties but cannot impose any obligation or right that is not captured in the Lease Agreement. My finding at this interlocutory stage is that the option to renew the lease contained in clause 7 of the Lease Agreements is void for uncertainty. Accordingly, it seems to me that this so-called option was entirely illusory being void for uncertainty. I therefore conclude that the Plaintiffs do not have a genuine and arguable case and have therefore not shown that they have a prima facie case with high chances of success at the main trial.

Since the Plaintiffs have failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

> **"The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is … sequential so that the second condition can only be addressed if the first one is satisfied…"**

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 13TH DAY OF MARCH 2015.

MARY M. GITUMBI

JUDGE