REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 440 OF 2014

HARTEBEEST CAMP AND GUEST HOUSE LTD…..……. PLAINTIFF

VERSUS

BEMUDA HOLDINGS LIMITED……..…….……..……1ST DEFENDANT

WISKAM AUCTIONEERS…….……....…..……2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 9th April 2014 in which the Plaintiff/Applicant seeks for the following orders:

1. Spent.
2. That this honorable court be pleased to issue a temporary injunction against the 2nd Defendant/Respondent restraining it from disposing off by public auction the goods from the Plaintiff/Applicant pending the hearing and determination of this Application.
3. That this honorable court be pleased to order the 2nd defendant/Respondent to forthwith return the illegally and unlawfully distrained goods to the Plaintiff/Applicant.
4. That this honorable court be pleased to grant an order compelling the 1st Defendant/Respondent to open and reinstate the Plaintiff/Applicant into the business premises on L.R. No. 209/394/4 (hereinafter referred to as the "suit premises") pending the hearing and determination of this Application.
5. That the costs of this Application be provided.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Rufus Njogu Mungai, the Managing Director of the Plaintiff, sworn on 9th April 2014 in which he averred that in March 2012, the Plaintiff/Applicant entered into a sub-lease agreement with the 1st Defendant/Respondent for a period of 5 years 3 months. He annexed a copy of the sub-lease agreement. He averred that the Plaintiff/Applicant operates a hotel and guesthouse business on the suit premises where it has put up massive structures in the form of cottages costing hundreds of thousands of shillings. He further averred that pursuant to the sublease, the Plaintiff has diligently paid the monthly rent due to the 1st Defendant as shown in the statement of account he annexed. He further averred that according to the statement of account, the only amount owed by the Plaintiff to the 1st Defendant was a deposit which the Plaintiff agreed to pay within 14 days after paying the April 2014 rent which was due

on 5th April 2014. He averred further that on 4th April 2014, the 2nd Defendant/Respondent on instructions of the 1st Defendant/Respondent proceeded to the suit premises and carted away goods, chattels and tools of trade belonging to the Plaintiff/Applicant without following the laid down procedure of conducting a proclamation before taking away goods that have been proclaimed. He further added that clause 4 of the sub-lease agreement provides that any notice relating to the sub-lease shall be in writing and further that clause 3(a) provides that re-entry into the premises by the landlord shall be carried out if the monthly rent due and demanded has fallen in arrears by thirty (30) days which was not the case here. He pointed out that the Plaintiff/Applicant is ready and willing to pay for the April rent and the outstanding deposit provided that the status quo before the illegal distress and lockdown is reinstated.

The Application is contested. The 1st Defendant filed the Replying Affidavit of Martha Vincent, its Managing Director, filed on 22nd April 2014 in which she admitted that there existed a lease agreement between the parties herein for the lease of the suit premises by the Plaintiff from the 1st Defendant. She averred that upon signing the lease, the Plaintiff started defaulting on payment of rent agreed upon. She further averred that in their letter dated 9th July 2013, the Plaintiff admitted to having an uncleared debt of Kshs. 2,895,531/- and attributed this to financial difficulties that they were experiencing. She disclosed that the Plaintiff moved to the lower court vide **Miscellaneous Application No. 976 of 2013** seeking an injunction against them restraining the 1st Defendant from evicting them but that in its ruling delivered on 24th January 2014, the same was dismissed with costs meaning that the Plaintiff were no longer enjoying any temporary relief. She further stated that in exercise of their rights provided in the lease, they instructed the 2nd Defendant/Respondent to move in and distress for rent for the amounts outstanding. She added that the 2nd Defendant/Respondent followed the due procedure by serving the Plaintiff with the proclamation notice and due to the non-cooperation of the Plaintiff proceeded to obtain a break in order from the court to enable them to execute the instructions. She concluded by stating that the Plaintiff/Applicant is not entitled to the relief sought at they have admitted to having defaulted in paying rent and as such do not come to court with clean hands.

The Application is further contested by the 2nd Defendant/Respondent who filed the Replying Affidavit of Wilson M. Kariuki, the Chief Executive Officer of the 2nd Defendant, sworn on 22nd April 2014 in which he averred that he was instructed by the 1st Defendant to levy distress upon the Plaintiff after the matter in **Miscellaneous Application No. 976 of 2013** was determined. He further averred that after obtaining warrants of attachment, he visited the suit premises on 18th February 2014 and served a Proclamation Notice upon one Rufus Njogu. He averred further that after the expiry of fourteen (14) days as per the notice, they visited the suit premises but found the Plaintiff uncooperative by disputing the rent arrears and resisting entry into the suit premises. He confirmed that vide application dated 19th March 2014, they moved to court to obtain break in orders and assistance of police. He further stated that the court ordered them to serve the Plaintiff the Application which they did but that the Plaintiff did not take any steps and the application proceeded in their absence on 26th March 2014. He averred further that the court granted the break in order as prayed on 26th March 2014. He confirmed that it is pursuant to the break in order that they were able to access the suit premises and levy distress.

Both the Plaintiff/Applicant and the 1st Defendant/Respondent filed their written submissions.

The first issue arising for my determination is whether to grant the Plaintiff/Applicant an order of temporary injunction restraining the 2nd Defendant/Respondent from selling off by public auction the goods that they collected while distraining for rent. 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 and therefore a prima facie case with high chances of success at the main trial? The Plaintiff/Applicant's main line of argument is that the due process for distraining its goods was not followed. In particular, the Plaintiff/Applicant asserts that this was an illegal distress for rent because no proclamation was done by the 2nd Defendant and further that even the process server did not effect service of the pleadings upon the Plaintiff. The Plaintiff/Applicant disputes that there were any rent arrears as at the date of distress because the distress for rent was carried out on 4th April 2014 yet the rent was due for payment the following day on 5th April 2014. Judging by the averments made by the 2nd Defendant, the distress process leading up to the date when they collected the Plaintiff's goods started much earlier than 4th April 2014. From the 2nd Defendant's letter dated 28th February 2014 annexed to the 1st Defendant's Replying Affidavit, it would appear that the 1st Defendant gave the 2nd Defendant the instructions to distrain for rent on 17th February 2014. In his Replying Affidavit, the 2nd Defendant disclosed that he proceeded to the suit property the following day being 18th February 2014 when he averred he proclaimed the Plaintiff's distrainable goods and gave them a 14 day notice. In that letter, the 2nd Defendant made the following statement "kindly note that the notice expires on 4th March 2014". In that same letter, the 2nd Defendant notified the 1st Defendant of the difficulties it was facing with the Plaintiff disputing the rent arrears outstanding and denying him access to the suit premises and requested for authority to proceed to court to obtain a break in order. It would appear that the authority to go to court for a break in order was granted because the 2nd Defendant annexed a copy of the order in Miscellaneous Application No. 279 of 2014 dated 26th March 2014. In that order, the court noted the rent arrears as amounting to Kshs. 3,711,612.66. It is on the strength of this order that the 2nd Defendant proceeded to distrain for rent against the Plaintiff. From this information, I can already establish, albeit on a prima facie basis, that the Plaintiff's assertions that no proclamation was made prior to the carting away of their goods are false. It is also not true that there were no rent arrears as alleged by the Plaintiff because the Court in **Miscellaneous Application No. 279 of 2014** dated 26th March 2014 found that the rent arrears amounted to Kshs. 3,711,612.66. I wish to rely on the case of **David Mungai & 2 others –vs- Registered Trustees of Teleposta Pension Scheme [2012]e KLR** where the court held that, *"….to come to court with arrears seeking injunctive orders would be deemed as coming to court with unclean hands*". The Plaintiff has failed to show that it has a genuine and arguable case and therefore a prima facie case.

Since the Plaintiff has 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…"**

The court therefore declines to grant the Plaintiff/Applicant the order of temporary injunction sought for.

The Plaintiff/Applicant also sought for an order that the 2nd defendant/Respondent do forthwith return

the illegally and unlawfully distrained goods to the Plaintiff/Applicant and a further order compelling the 1st Defendant/Respondent to open and reinstate the Plaintiff/Applicant into the suit premises. These orders shall also not be granted to the Plaintiff/Applicant for the reasons enumerated earlier.

Arising from the foregoing, I hereby dismiss the Application with costs to the Defendants.

DELIVERED AND SIGNED IN NAIROBI THIS 22ND DAY OF MAY, 2015.

MARY M. GITUMBI

JUDGE