



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.317 OF 2014

BETWEEN

AL YUSRA RESTAURANT LIMITED.....PETITIONER

AND

KENYA CONFERENCE OF CATHOLIC BISHOPS.....1ST RESPONDENT

KNIGHT FRANK KENYA LIMITED.....2ND RESPONDENT

RULING

1. Introduction

Before me are two Applications; the first is dated 9th July 2014 by the Petitioner and seeks the following orders;

“(i) That an interim conservatory order be granted restraining the Respondents, whether by themselves, their agents and or servants from interfering, trespassing, evicting, alienating, leasing, charging, transferring, selling or in any way interfering with the Petitioner’s right to possession of the restaurant on Ground Floor of Waumini House, LR No.1870/IX/4 Westlands, Nairobi.

“(ii) That a mandatory injunction be granted compelling the 1st and 2nd Respondents to allow the Petitioner access to its restaurant on the Ground Floor of Waumini House on LR. No.1870/IX/4 Westlands, Nairobi pending the hearing and determination of the Petition.

“(iii) That the costs of this application be provided for.”

2. The second is dated 1st August 2014 by the 1st Respondent and seeks the following orders;

“(i) That an interim conservatory order be issued to restrain the Petitioner, by themselves or through their agents or representatives, or otherwise howsoever, from interfering with the 1st Respondent’s quiet possession or use of its premises on the Ground floor of Waumini House LR. No.1870/IX/42, Westlands, Nairobi pending the hearing and determination of this application inter-parties and the Petition.

“(ii) That an interim conservatory order be issued to compel the Petitioner under the supervision

of the 1st Respondent to remove its fixtures and fittings from the 1st Respondent's premises on the ground Floor of the Waumini House LR.1870/IX/42, Westlands, Nairobi pending the hearing and determination of this application inter-parties and the Petition herein.

(iii) That in the alternative to prayer (ii) above, the 1st Respondent be and is hereby authorized to remove the Petitioner's fixtures and fittings from its premises on the Ground Floor of Waumini House LR. No.1870/IX/42, Westlands, Nairobi."

3. On 21st November 2014, it was agreed that the two Applications would be heard and determined together.

Background

4. It is not contested that sometime in November 2013, the 2nd Respondent, acting as an agent of the 1st Respondent, offered the Petitioner rental space at Waumini House, Westlands (LR. No.1870/IX/42) with effect from 1st December 2013 for a term of six (6) years. On 3rd December 2013, the Petitioner accepted the offer and paid Kshs.2,055,457.20 in accordance with the Head of Terms. The Petitioner then entered the premises and commenced renovations, refurbishments etc in order to commence its restaurant business.

5. On 18th February 2014, the Trustees of the 1st Respondent terminated the lease/rental arrangement and proceeded to lock up the premises hence the present proceedings.

Case for the Petitioner

6. According to the Petitioner, the only reason why the lease/rental contract was terminated was because the 1st Respondent's Trustees were uncomfortable with Somali Muslims operating a restaurant business specializing in Somali cuisine on the premises (the 1st Respondent is the Conference of Catholic Bishops in Kenya) together with the presumed and anticipated clientele of the restaurant business (Somali Muslims).

7. In the Petition, the Petitioner has therefore sought declarations that the Respondents are in breach of the Agreement for Lease and that their refusal to allow the Petitioner to carry on its restaurant business is unlawful and discriminatory. Further, orders are also sought in the nature of a permanent injunction restraining the Respondents from interfering with, trespassing into, alienating or in any other way dealing with the premises as well as a mandatory injunction compelling the Respondents to grant the Petitioner access to the said premises.

8. Pending the determination of the above issues, the Petitioner, by the Application dated 9th July 2014 the Petitioner seeks the orders elsewhere above set out and in submissions, Counsel for the Petitioner argued that firstly, by its Petition, Supporting Affidavits and annexures thereto, it has demonstrated that *prima facie*, its constitutional rights to non-discrimination under **Article 27(4)** of the **Constitution** were violated by the Respondents. It specifically relies on an email sent by the Finance Director of the 1st Respondent to the 2nd Respondent seeking to allegedly profile all tenants at Waumini House and specifically whether any of them were Muslims.

9. Counsel also submitted that because the 2nd Respondent presented itself as an agent of the 1st Respondent; negotiated the lease agreement in issue; received Kshs.2,055,457.00 on behalf of the 1st Respondent and proceeded to hand over the premises to the Petitioner, it had established, on a balance of convenience, that it was entitled to occupation of the premises without interruption for the duration of the Lease Agreement.

10. As regards the 1st Respondent's Application dated 1st August 2015, the Petitioner's answer is that the claim for vacant possession made therein is spurious and the claim that the 2nd Respondent had no

authority to negotiate the Lease Agreement is a belated attempt at validating an unlawful decision to deny the Petitioner the right to operate a lawful business.

11. The Petitioner for the above reasons, seeks dismissal of the 1st Respondent's Application and grant of the orders sought in its Application in the terms set out above.

1st Respondent's Case

12. In response to the Petitioner's Application aforesaid, the 1st Respondent has urged the point that there is no *prima facie* evidence that the Petitioner has suffered any violation of its constitutional rights and specifically the right to non-discrimination as alleged.

13. The 1st Respondent further contended that at no time did any of its officials act in any manner that was discriminatory of the Petitioner and that its actions were never actuated by religious or ethnic motives. That its primary concern was to secure its premises, having received intelligence that it was a target for terrorist attacks. In addition, that the character of Waumini House required that the 1st Respondent had to approve all prospective tenants but in the case of the Petitioner, and for suspicious reasons, it never got the opportunity to do so.

14. To buttress the point that it had no religious motives in barring the Petitioner from taking possession of the disputed premises, it averred that it has existing Muslim tenants but never undertook religious profiling by demanding that they should disclose their religious persuasions.

15. The 1st Respondent further contended that there was no lease or tenancy agreement between the Parties capable of enforcement as the 2nd Respondent had no authority to enter into any such agreement.

16. In the circumstances, the 1st Respondent submitted that since interlocutory orders are discretionary, no fundamental rights have been violated and since no rights accrued to the Petitioner, any injunction against the 1st Respondent would cause an injustice by excluding it from exercising control over its premises. That the Petitioner had therefore failed to establish a *prima facie* case and on damages, they are adequate, have been quantified and are payable, if the Petition succeeds. On the question of balance of convenience, it is the 1st Respondent's case that its security concerns far outweigh the Petitioner's commercial interests.

17. Regarding its own Application dated 1st August 2014, it is the 1st Respondent's case firstly, that certain discussions and/or correspondences between the Parties have been exhibited as evidence but the said discussions and/or correspondences were all made on a "**without prejudice basis**" and should not, as a consequence, be admitted as such evidence.

18. Secondly, that the 2nd Respondent should be struck off the proceedings as an agent of a disclosed principal i.e. the 1st Respondent. The reason for this proposition is that no evidence has allegedly been laid to show that the 2nd Respondent in any way discriminated against the Petitioner and so no purpose would be served by sustaining it in the proceedings. Further, the relationship between the 1st and 2nd Respondents is governed by an agency agreement and any disputes arising therefrom can only be determined in arbitral proceedings and not by proceedings under the Constitution.

19. Thirdly, that the substratum of the present Petition is not allegations of violations of constitutional rights but a simple commercial/tenancy dispute dressed as a constitutional matter. That being the case, the forum and mechanism for resolving such a dispute is not this Court and that being the case, the Petition ought to be struck off.

20. Fourthly, even if there were constitutional issues arising for determination, the Petitioner cannot profess a religion, it being a company, neither can it ascribe to itself an ethnic identity.

21. Lastly, that its Application should be granted and the Petitioner's Application dismissed with costs.

2nd Respondent's Case

22. The 2nd Respondent's answer to the two Applications before me is contained in the Replying Affidavit of Ms. Margaret Motiri, its Property Manager as well as submissions by Mr. McCourt, its learned Counsel. Its case is simply that none of the orders sought by the Petitioner or the 1st Respondent should be granted against it because;

- i. As an agent of a disclosed principal, the Petitioner, by law, has no case against it.
- ii. By a Ruling delivered by this Court on 21st November 2014, an application to strike it out as a party was declined.
- iii. Any orders directed towards it are incapable of being executed as it has no possession of the disputed premises.

23. That therefore the two Applications should be dismissed with costs to it.

Determination

24. I must begin by stating that in the two Applications before me, two issues necessarily arise for determination;

- i. Whether interim conservatory orders should be issued either to restrain the Respondent from interfering, trespassing, evicting, alienating, leasing, charging, transferring, selling or in any other way interfering with the Petitioner's right to possession of the restaurant on the Ground Floor of Waumini House or, and in the alternative, whether conservatory orders should be issued to restrain the Petitioner from interfering with the 1st Respondent's quiet possession or use of its premises aforesaid.
- ii. Mandatory orders of injunction compelling the Respondents to grant the Petitioner access to the premises aforesaid or, and in the alternative, whether orders should be issued to compel the Petitioner to remove its fittings and fixtures on the premises aforesaid and if not, whether the 1st Respondent should be authorized to do so.

25. Before I determine the above issues, my Ruling of 21st November 2014 disposed of two issues;

- a. Whether evidence of the alleged "**without prejudice**" discussions and correspondence should remain on record; I determined that they would.
- b. Whether the 2nd Respondent should be struck off the proceedings; I determined that I would not do so.

26. In the event, any submissions on the above two issues are misguided and the 1st Respondent spent precious time on them for no reason at all.

Whether conservatory orders should be issued in favour of the Petitioner or the 1st Respondent

27. In our realm, the law on conservatory orders has been well expressed by the Supreme Court in the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** as correctly submitted by Counsel for the 1st Respondent. In that case, the Court stated thus;

“The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

28. I am duly guided and applying the above principles to the present case, there is no doubt that contrary to the submission by the 1st Respondent, whereas the tenancy/lease agreement is in dispute; whether it was executed or not; whether the 2nd Respondent had lawful authority from the 1st Respondent to negotiate it or not, there is the bigger question to be determined; whether in fact the dispute was triggered by the alleged acts of non-discrimination on religious and ethnic lines, on the part of the 1st Respondent. All the issues above are therefore inter-twined and I am not ready at this stage to separate the commercial/tenancy dispute from the underlying constitutional issues raised.

29. The above being the case, I am satisfied that both the Petitioner and 1st Respondent have raised precise issues which require this Court’s intervention under the Constitution. To say more would prejudice their respective cases at the hearing of the Petition.

30. Having so said however, there is the reality of the interim conservatory orders sought by each one of them; they want possession and control of the said property by seeking orders denying the other such control. In my view, neither of the conservatory orders sought are practical.

31. I say so because to grant the conservatory orders sought by the Petitioner would mean authenticating a disputed lease agreement at the interlocutory stage.

32. That finding would then lead me to the mandatory orders sought; to either allow the Petitioner to enter and commence its business on the basis of a contested leasehold or deny it such an order but retain all its fixtures and fittings until the Petition is heard and determined. Such orders would similarly raise practical questions of fairness to both the Petitioner and the 1st Respondent. The reason for my saying so is because this Petition has been pending before this Court for a year through no fault of the Parties or the Court. Rent is being lost by the 1st Respondent and the Petitioner has already lost immense business.

33. When should a Court grant a mandatory injunction then? Under **Article 23(3)(b)** of the **Constitution**, this Court has the discretion to grant an injunction (the nature of such an injunction is not given but I opine that it must include a mandatory injunction). In addition and in any event, **Article 23(3)** generally grants this Court the mandate to grant an **“appropriate relief”** in the circumstances of each case.

34. In civil law and in the above context, mandatory injunctions are issued very sparingly and I agree with the submission by Mr. McCourt that the case of **Kenya Breweries Ltd & Anor vs Washington Okeyo, C.A 332 of 2000 [2002] I EA 109** best expresses the position to be taken by a civil Court. The Court expressed itself 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 normally not 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 a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the Plaintiff, a mandatory injunction will be granted on an interlocutory application. ... Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

35. I dare add that in constitutional cases, such as this one, the Court also ought to consider the proportionate magnitude of its orders, the constitutional issues that are before it, the appropriateness of the orders to be given to the circumstances before it and the need to ensure that the principles of fairness and equity are not compromised.

36. I have in the above context explained the immense losses that both the Petitioner and the 1st Respondent are undergoing on a daily basis yet their relationship, like a still-born marriage, has deeply broken down.

37. What is better than an order that releases them from each other but retains their right to pursue recompense for those losses in the future?

38. It is my view that the only order that would save the parties from the on-going mutual inconvenience, is one where the premises are restored to the 1st Respondent, and the Petitioner mitigates its losses by moving out and reserving its rights to seek damages for any losses that it has/or may incur. Such a remedy is available to it under **Article 23(3)(e)** of the **Constitution** and **Article 165(3)(a)** and **(d)** of the said **Constitution**.

Disposition and Final orders

39. Before I make my final orders, it is obvious that the Applications should not have been directed at the 2nd Respondent. Like the proverbial grass, it is suffering as the elephants fight. It no longer has a decent relationship with either party yet it is a necessary party for a just determination of the Petition. Its protestations are therefore valid as regards the final orders to be made.

40. Having so said and for the above reasons, the only orders that can be granted are the following;

(i) That a mandatory injunction order is hereby issued to compel the Petitioner under the supervision of the 1st Respondent to remove its fixtures and fittings from the 1st Respondent's premises on the Ground Floor of Waumini House L.R. No.1870/IX/42, Westlands, Nairobi, within thirty (30) days of this order pending the hearing and determination of the Petition herein.

(ii) That in the alternative to order (i) above, the 1st Respondent is hereby authorized to remove the Petitioner's fixtures and fittings from its premises on the Ground Floor of Waumini House, L.R No. 1870/IX/42, Westlands, Nairobi at the expiry of thirty (30) days should the Petitioner not have complied with order (i) above.

41. The two Applications before me are determined in the above terms and as to costs, let the same abide the hearing and determination of the Petition.

42. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kazungu – Court clerk

Miss Kurui holding brief for Mr. Issa for Petitioner

Mr. Orare for 2nd Respondent

Mr. Kanjama for 1st Respondent

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Order

Mention on 14/9/2015.

ISAAC LENAOLA

JUDGE

11/9/2015