



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 406 OF 2011

MIDDLE EAST AFRICA SPARES LTD.....PLAINTIFF/ APPLICANT

VERSUS

FRANCIS NJOROGE BORO MUNGAI.....DEFENDANT/RESPONDENT

RULING

1. Pursuant to the provisions of Sections 1A, 1B and 3A of the

Civil Procedure Act, Order 40 Rules 1,3 and 4(1) of the Civil Procedure Rules, Rule 3 (1) and (2) of the High Court Practice Rules and pursuant further to section 10 of the Judicature Act, **Francis Njoroqe Boro Mungai**, the applicant herein took out the motion dated 4th September 2014 in which he sought the following orders interalia:

- a. *That the Honourable court be pleased to certify this application as urgent and dispense with service thereof at the first instance;*
- b. *That this honourable court be pleased to her this application during the current court vacation;*
- c. *That this court be pleased to issue a temporary injunction against the defendant, by himself, his agents, servants, employees or any person cting under the defendant howsoever from evicting, levying distress for rent or in any other way interfering with the plaintiff's premises known as LR.No. 209/8675 pending the hearing and determination of the entire suit herein.*
- d. *That costs of the application be provided for.*

2. The motion sets out the grounds it is based together with supporting affidavits of **David Njonjo Waiharo and Humphrey**

Gitau Njoroqe and supplementary affidavit of **David Njonjo Waiharo**. When served, the respondent, the defendant herein, filed a replying affidavit he swore to oppose the application.

3. Learned counsels from both sides filed their respective submissions and cited authorities to support their positions. I have considered the material placed before me plus the rival submissions.

4. It is the submission of **Mr. Sifuma**, learned advocate for the applicant that this court should grant the order sought since the applicant has met the principles set out in the case of **Giella vs Cassman Brown & Company Limited (1973)EA 358**. **Mr. Sifuma** in proving that a prima facie case has been established argued that a temporary order of injunction was issued against the respondent by **Odunga J.** issued on 19th December 2012. He asserted that the suit premises, LR NO. 209/8675 which were the subject matter of the said order is the same subject matter herein which premises were let to the applicant vide the lease dated 2nd May 2006 and was executed by

Margaret Wanjiru and the applicant herein. He averred that the lease was later extended by a further lease dated 29th December, 2008 between the applicant and **Margaret Wanjiru** now deceased. He averred that following the demise of the deceased, one of the two administrators of her estate sent the applicant a bundle of demand letters directed at third parties who are purportedly referred to as trespassers but whom the applicant avers that they are utilising part of the premises in his name as authorised by **clause 2 (ix)** of the lease agreement dated 2nd May 2006. The applicant's counsel further submitted that the applicant has been paying the requisite rent and maintained that the court's order dated 19th December, 2012 is still valid in accordance with order 40 Rule 6 of the Civil Procedure Rules. He concluded that the balance of convenience tilts in the favour of the applicant since its rights would be infringed on if the order sought is not granted. .

5. **Mr. Oyugi**, learned advocate for the respondent submitted that the applicant's application is an abuse of the court process. He argued that the applicant was granted conditional interim orders on 19th December 2012 which order is in force to date and has enjoyed the order but has not facilitated to have the suit heard. He stated that the applicant seeks to protect third parties by filing this application yet the third parties are not parties to the suit. He added that the applicant is in breach of clause 28 of the lease dated 2nd May 2006 by sub letting the suit premises to third parties. He averred further that the applicant has filed a reference in the Business Premises Rent Tribunal case number 552 of 2014 where it obtained an interim injunction, which case it failed to inform this court hence concealing crucial information. He concluded by stating that the applicant cannot purport to use two leases one of 2nd May 2006 and another of 29th December 2008 since the deceased died on 31st October 2008 and could not have executed the lease.
6. There is no dispute that there exists an order dated 19th December, 2012 which restrained the respondent from interfering with LR. No. 209/8675 pending the hearing of the suit so long as the applicant continues paying the respondent the rent pursuant to the existing lease agreement. This court has been beseeched to issue temporary orders of injunction to restrain the respondent from evicting, levying distress for rent or in any other way interfering with the applicant's premises known as LR. No. 209/8675 pending the hearing and determination of the entire suit herein. The Principles to be considered in such application are well settled. First, one must show a prima facie case with a probability of success. Secondly an applicant must show that unless the order is given he would suffer irreparable loss. Thirdly where there is doubt the court will apply the balance of convenience.
7. I have looked at the evidence on record, and it is apparent that there are third parties who are in occupation of the suit premises. The said third parties have allegedly according to the applicant received demand letters to vacate the suit premises. There is affidavit evidence showing that **Odunga J.** issue temporary orders of injunction restraining the respondent from interfering with the applicant's quiet occupation of LR. number 209/8675 for so long as the applicant pays the rent.
8. The respondent is now claiming that there are rent arrears and that the Lease dated 2nd May 2006 does not allow the applicant to sub-let the property. I have looked at the lease dated 2nd May 2006 which lease is supposed to be valid for 8 years. The clause 2 (xviii) referred to by the respondent reads that: "***During the term herein granted, the lessee shall not transfer or assign the demised premises or any other part without written consent of the Lessor and further not to charge mortgage or in any manner whatsoever part with the possession of the demised premises altogether.***" In response to this assertion, the applicant has referred to clause 2 (ix) which provides that: "***The lessee shall employ such servants and/or agents of apparent good character and moral conduct who shall adhere to the rules and regulations of the Lessor in respect to points and routes to and from the buildings and the restricted areas.***"
9. The applicant is adamant that it has not sublet the premises and instead the people therein are utilising and occupying the premises by the power and or authority of the applicant. Looking at the evidence adduced by the respondent, there is no evidence tendered to show that the premises has

been sub-let to third parties contrary to clause 2(ix) and/or that the third parties are not agents of the applicant but sub- lessees. I therefore find that the third parties could very well be agents of the applicant.

10. On the claims by the respondent that the applicant has been indolent in the matter since obtaining the Order issue by **Odunga J.** The record shows that the applicant has been active in this matter. Finally on the claims that this matter is before the Business Tribunal, no proof has been tendered to show what nature of suit is before the tribunal and I am not in position to verify the averments of the respondent as far as that issue is concerned. On these grounds I find that the applicant has shown that it has a prima facie case with high probability of success.

11. I am convinced further that If orders sought are not granted, the applicant will suffer irreparable loss of eviction of the third parties who are allegedly his agents who may be carrying out his business. The other important doctrine which is relevant to this matter is the question of convenience. By virtue of the order dated 19th December 2012 which issued a temporary injunction against the respondent, I find that the balance of convenience tilts in favour of the applicant since the respondent was previously barred from trespassing on the premises.

12. In the end I find merit in the motion dated 4th September 2014. The same is allowed, with costs to the applicant.

Dated and delivered in open court this 20th day of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent