



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS,

CIVIL NO. 469 of 2013

PRIDENT TECHNOLOGIES LIMITED..... PLAINTIFF

VERSUS

GOODGRACE SUPA INVESTMENT LTD.....DEFENDANT

RULING

1. Before me are 2 applications a notice of motion dated the 11th of November 2013 filed by the plaintiff /applicant and another dated the 13th of November 2013 filed by the defendant/ respondent. The plaintiff/applicant seeks an injunction order as follows;

That the defendant either by itself, its agents, employees, assigns and or any person/s acting on their instructions whatsoever and howsoever be restrained forthwith by a temporary injunction from evicting, harassing, distressing, disconnecting power supply, leasing and or letting the premises to third parties and/or on in any other way whatsoever interfering with the plaintiff's quite possession of the premises situate on Land Reference Number 6845/182/19 Utawala Shopping Centre Nairobi pending the inter-partes hearing and determination of the case at the Business Rent Tribunal.

2. The applicant also seeks that the court makes orders that it may deem expedient and just for the maintenance of the plaintiff's peaceful occupation of the premises situate on L. R 6845/182/19 Utawala shopping centre Nairobi plus costs of the application.
3. The plaintiff moved to court by way of certificate of urgency on the 11/11/13 and after it was heard ex parte the court granted an ex parte temporary injunction as sought in prayer (b) of the Notice of Motion dated 11/11/13. On the 13/11/13 the respondent/defendant filed a notice of motion seeking to discharge and set aside the court order of 11/11/13 and all consequential orders.
4. The plaintiff/applicant filed a supporting affidavit sworn by Francis Maswili dated the 11th of November and on the 21/11/13 he filed a replying affidavit in response to the defendant's application dated 13/11/13. The defendant through its managing director Mr. Jacob Anunda filed a replying affidavit dated the 13/11/13 in response to the plaintiff application dated 11/11/13 and a supporting affidavit filed on the 13/11/13 in support of its application dated the 13/11/13.
5. I have read the said affidavits. The background to this application is as follows; the plaintiff and the defendant have a tenant landlord relationship. According to the plaintiff the lease agreement they have is dated 1/11/11 and is for a period of 5 years which falls under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301. The agreed rent was Kshs. 60000/- per month but the same was increased to Kshs.75, 000/- in January 2012 when

- the defendant added the plaintiff a store. According to the plaintiff it has been faithfully paying rent when it fell due, but on the 11/10/13 the defendant through its advocate purported to terminate the plaintiff tenancy by giving a notice of one month. That on the 8/11/13 the defendant sent Gallant Worldwide Investment Auctioneers to the premises to carry away the plaintiff's goods yet no proclamation had been done before attachment.
6. That apart from claiming non-existence rent the defendant also instructed the auctioneer to levy distress for purported unpaid electricity bill of Kshs.402, 470/- which the plaintiff states are illegal and that the bill is also disputed. The plaintiff claims that the defendant conduct is a clear indication that it wants to evict the plaintiff yet it is not in rent arrears. The plaintiff claims that it will suffer irreparable loss and damage if it is distressed and or evicted from the premises as it has invested heavily in the premises.
 7. The defendant admits that they have a lease agreement, but avers that the tenancy is not a controlled tenancy and is not subject to the provisions of the Landlord and Tenant (Shop, Hotels Catering Establishments) Act Cap 301 as the parties have a written tenancy/lease for 5 years and 5 days from the date it was executed on 1st November 2011. It admits that on the 1st of October 2012 the parties came up with a commercial lease agreement which was not executed but the terms were set out in the communication and write ups by the parties. The defendant denies that the rent was increased to Kshs. 75,000/- after the additional space was allocated in January 2012. It admits that the plaintiff initial rent was Kshs. 60,000/- but subsequently in September 2012 it was agreed that since the defendant was carrying out further construction work on them it would avail the plaintiff additional space on the understanding that rent would be increased to Kshs. 150,000/-. That later the parties realized that there was space which needed additional work and they adjusted the figure to Kshs. 123,750/- per month from February 2013 and the plaintiff topped up and adjusted its rent to kshs.300000/- and it made payments.
 8. That as the plaintiff continued to rent the premises it realized that the plaintiff had accumulated an electricity bill of Kshs 405,193/- and that the plaintiff had unilaterally without any authorization changed the supply to the premises from a single phase to a 3 phase. That it drew this to the plaintiff's attention but the plaintiff did nothing and this led to it issuing the formal notice to terminate the tenancy. It also instructed the auctioneers to levy distress for rent payments leading to the plaintiff to make payments but not clearing the rent arrears or settling the electricity bill. According to the defendant the plaintiff has been in arrears from February 2013 when the additional space was provided amounting to Kshs. 512,500/-.The defendant avers that the distress for rent arrears and electricity bill was proper.
 9. The plaintiff relied on that of *Patel & others Vs. General Equipment Corporation Ltd (1976-80) KLR page 1324*, where the court held that **“a controlled tenancy is one in which the tenancy has not been reduced into writing or where it has it is for a period of not exceeding five years or contains provisions for termination within five years from its commencement”**.
 10. In determining whether to grant the injunction as sought by the plaintiff, I have carefully considered the affidavits, the annexures and the law that controls controlled tenancies, Cap 301 of the Laws of Kenya. The defendant claims that the lease between the parties is for 5 years 5 days. Mr. Odawa submitted that the tenancy is not controlled as the agreement dated 1/11/11 has an expiry date of 6/11/16. The lease that is attached by the defendant as “J01” is a commercial lease agreement that is not signed by any of the parties. I find that it is the applicant who has filed the valid lease (see FM1) that binds the parties. The said lease is dated 1/11/2011. At clause 1 it states that the lease period is for 5 years.
 11. A controlled tenancy under Cap 301 means **“a tenancy of a shop, Hotel or Catering Establishment, which has not been reduced in writing or which has been reduced in for writing and which is for a period of not exceeding five years”**.
 12. The defendant agreed to lease the premises as a supermarket. The provisions of the business tenancy and equipment sale agreement signed by the parties dated 1/11/2011 clearly states that the tenancy is for 5 years. The tenancy therefore is a controlled tenancy as provided under Cap 301.
 13. Is the applicant entitled to the injunction as sought? There are issues of rent arrears, electricity bills and eviction notice. The principles of granting an injunction are clear and well laid out, (*see Geilla Vs. Cassman Brown Ltd E. A 1973 at page 358*). That the appellant must establish a prima facie case with a probability of success that the applicant has to show he will suffer irreparable

loss if the orders are not granted and if the court is in doubt it will decide the case on a balance of convenience. I have also stated that the applicant has shown that the tenancy it has with the defendant is a controlled tenancy. Is the applicant in rent arrears? The applicant states it is not and the defendant states it is. Rent was initially 60,000/-. It appears that the parties agreed on some additional space and as per the defendant the applicant is in arrears of rent to the tune of 512,500/- for this space. The tenant applicant states they agreed on a rent of Kshs. 75,000/- which it has been paying. From the proclamation that is attached by the defendant the sum claimed is Kshs. 970,439/-. It is not clear what is rent arrears out of the said sum. The defendant claims that it was right in levying distress for rent arrears and the unpaid electricity bill.

14. The plaintiff states that the electricity bill is in dispute. It is not clear whether this bill belongs to the applicant from what is attached. From the correspondence there appears to be dispute on the said bill. On the issue of rent, I find that the defendant has failed to persuade this court on the actual rent in arrears. It could be there is rent arrears but what amount and for what period? I agree with the submissions of the applicant counsel that when levying distress a party can only distress for rent arrears but not bills that are not paid. A party must move to sue for the unpaid bills and not lump the same with rent arrears.

15. I note that clause 6 of the tenancy agreement the parties have states that *“either party can terminate the agreement by giving 3 months calendar months written notice or 3 months’ rent equivalent in lieu of notice.* The defendant admits that giving one months’ notice, this is not as per the lease agreement.

16. Having considered all that is before me, I find that the plaintiff has shown that it has a prima facie case with a probability of success and bearing in mind that it is not clear what amount is due if any, the balance of convenience tilts in favor of the applicant .I therefore grant an injunction as follows;

- i. That the defendant by itself, its agent employee’s assigns and any other person acting on its instructions are restrained from evicting the applicant . The defendant shall comply with the terms of the lease and give a proper notice.
- ii. It is apparent there is a dispute on the rent owing. The parties shall sit and reconcile the rent and electricity payments within the next 21 days from the date of this ruling.
- iii. The plaintiff shall in the meantime have quiet possession of the premises L. R. No 6845/182/19 at Utawala Shopping Centre pending the hearing and determination of the case at the Business Rent Tribunal.
- iv. In the event that there is still no Chairman at the Business Rent Tribunal parties shall appear before this court on the 5/2/14 when they shall inform this court of the outcome of their reconciliation of rent and electricity bills.

With the above orders the exparte injunction order granted on the 11/11/13 is set aside.

Orders accordingly.

Dated signed and delivered this 17th day of January 2014

R. E OUGO

JUDGE

In the presence of:-

..... Plaintiff/Applicant

.....Defendant/ Respondent

.....Court Clerk