



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 193 OF 2013

VILLA CARE LTD. ::: PLAINTIFF

-VERSUS-

REGISTERED TRUSTEES OF

THE NATIONAL FUND FOR

THE DISABLED OF KENYA ::: DEFENDANT

R U L I N G

1. This Ruling relates to the Notice of Motion dated **14th February 2014** and filed in Court on **19th February 2014**. The Application is taken out under Order 40 Rule 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.
2. The Application seeks for the following orders:-
 1. *Spent*
 2. *Spent*
 3. *This Honourable Court be pleased to issue a temporary injunction Order restraining the Defendants by themselves, their servants, agents and or auctioneers from levying distress for the terrace rent arrears, charging rent to the terrace space, evicting the Plaintiff and or in any other manner whatsoever interfering with the Plaintiff's quiet enjoyment, possession and occupation of its office premises and adjacent terrace on the 6th floor of New Rehema House Westlands, erected on L.R No. 1870/VI/260 Nairobi pending hearing and determination of this suit. (herein the suit property)*
 4. *This Honourable Court be pleased to fix a date for pre-trials to facilitate expeditious hearing and determination of this suit on merit.*
 5. *Costs of this application be in the cause.*
3. The Application is premised on the several grounds (23 grounds to be specific) stated therein and supported by the affidavit of **DANIEL OJIJO** sworn on **18th February 2014** as well as his supplementary affidavit filed in Court on **17th April 2014**.

4. Briefly, the Defendant has given the Plaintiff a five-month Notice dated 17th January 2014 to determine the tenancy relationship between them effective 30th June 2014.
5. The Plaintiff had instituted this current suit challenging the Defendant's intention to charge rent on the terraces. The Plaintiff simultaneously filed the application dated 15th May 2013 seeking orders that the Defendant be restrained from distressing rent, threatening to evict or in any way interfering with their quiet enjoyment of the suit property.
6. The Court in its ruling delivered on 4th November 2013, dismissed the Plaintiff's application. The Court held that there was no substantial evidence to show that the Defendant was in any way interfering with the Plaintiff's quiet occupation and enjoyment of its tenancy in the suit property. At that time the Defendant had also not levied any distress on the Plaintiff.
7. However, it seems the circumstances have since changed from when the ruling was delivered. It is the Plaintiff's position that in a letter dated **13th November 2013** the Defendant wrote to the Plaintiff demanding **Kshs. 3,151,469/=** as rent arrears for the terraces. The Plaintiff responded by its letter of **26th November 2013** requesting for a joint evaluation to determine the actual market rate of the terraces.
8. In a letter dated 17th January 2014, the Defendant set out alleged breaches of the tenancy by the Plaintiff and issued the five months notice terminating the Plaintiff's tenancy. The Defendant has accused the Plaintiff of a number of breaches. Among them is the failure by the Plaintiff to return the duly executed copy of the formal lease for the amalgamated office space forwarded to them in April 2009.
9. It is the Plaintiff's contention that the Notice dated 17th January 2014 is null and void *ab initio*. Besides the notice being inadequate, it is the Plaintiff's case that the lease agreement does not give room for termination of a lease midstream prior to expiry. According to the Plaintiff they are entitled to occupation of the leased premises until expiry of the amalgamated lease on 2nd April 2015. It is also the Plaintiff's case that the Defendant is being frivolous and unreasonable in its notice to determine the tenancy whereas no material breach has been committed.
10. The Application is opposed vide the Replying Affidavit of **ANNIE MUGAMBI** described as the Chief Executive Officer of the Defendant and sworn on **26th March 2014**. In the said affidavit, the deponent avers that the Plaintiff had earlier in this suit filed a Notice of Motion dated 15th May 2013 seeking similar injunction orders. The said motion was dismissed vide the ruling delivered in this suit on 4th November 2013. The deponent therefore urges this Court to dismiss the current application on the basis that it seeks the same orders as those declined by the Court in the earlier application.
11. With regard to the Notice of termination, the Defendant's Chief Executive Officer avers that there is no formal lease between the parties. She avers that, despite several reminders by the Defendant, the Plaintiff has never returned the executed lease that was forwarded to them in April 2009. The Defendant therefore refutes the Plaintiff's allegation that it has a six year lease with the Defendant for the suit property.
12. The deponent clarifies that what the parties have is simply a signed Letter of Offer dated 6th February 2009. The same was to serve as the parties' agreement while awaiting the preparation of the formal Lease. The deponent makes reference to clause 16 (b) which states as follows:-

"Acceptance.

This offer shall only be accepted on the following terms:-

- a. ...
- b. **Until such a time as the standard Lease has been executed and registered, all covenants and conditions in the lease and rent agreed by you shall be deemed to have been incorporated in this letter**
- c. ...
- d. ...”

13. It is the deponent's assertion that it is from the context of the said Letter of Offer that the Defendant's Notice of termination of tenancy ought to be understood.

14. With regard to the basis of termination, the deponent refers to clause 11 of the Letter of Offer which allows for termination of tenancy in the event of breach and provides as follows:

“if the rent agreed or any part thereof shall at any time remain unpaid for seven (7) days...or if any time thereafter you are in breach of any of the covenants or conditions referred to in the standard Lease, it will be lawful to re-enter the premises or any part thereof in the name of the whole and thereupon the Lease shall be terminated absolutely.”

15. The deponent avers that the reason for termination was because of the blatant breaches, misdeeds and acts committed by the Plaintiff. She further avers that despite numerous requests and notices, the Plaintiff has refused, failed and/or ignored to correct or act upon the same. (*Annexed as exhibit “AM 6” is the correspondence exchanged between the parties*)

16. It is the deponent's assertion that among the matters which the Defendant demanded that the Plaintiff complies with was returning of the duly executed lease and payment of the legal fees arising from preparation of the said lease. The Defendant also demanded the reimbursement of the cost of exorbitant electricity charges that had been consumed by the Plaintiff.

17. As regards the occupation of the terraces and demand for payment of rent, the deponent avers that the Court already made findings on the same. The Court established that at no time did the Defendant accept the Plaintiff's proposal to occupy the terraces for free. It is therefore the Defendant's case that there is no justifiable reason for stopping them from levying distress for rent of occupation of the terraces.

18. I have considered the pleadings herein as well as submissions filed by both parties. The main issue for determination is whether the Plaintiff is entitled to the interim injunction orders it seeks. To make the said determination, the following are some of the issues to be addressed;-

- a. ***Is the current application res judicata?***
- b. ***Is the Defendant in breach of the terms of the tenancy to warrant a termination of the same?***

19. I will begin with the preliminary issue. It is the Defendant's case that the Plaintiff's application is *res judicata*. In rebuttal, it is the Plaintiff's case that the new factual development in the letter dated 17th January 2014 changes the factual position to distinguish the current facts from the facts the Court considered in its ruling on 4th November 2013. It is submitted for the Plaintiff that the new facts entitles it to seek a fresh injunction order.

20. I agree with the Plaintiff's position. Indeed, in the earlier application, the Court in its ruling established that there was no substantial evidence to show that the Defendant was in any way interfering with the Plaintiff's quiet occupation and enjoyment of its tenancy in the suit property. At the moment, it is clear that circumstances have changed and the Plaintiff has now been served with a Notice to vacate the suit property. Therefore, simply put, the current application cannot fit within the confines of *res judicata*.

21. The second issue is whether or not the Defendant is in breach of the terms of the tenancy. On or

- about 24th April 2009, the Defendant prepared the amalgamated lease of the premises being occupied by the Plaintiff/tenant and forwarded it to the Plaintiff for execution. The Plaintiff states that they proposed some alterations to the tenancy agreement but the same have not been mutually agreed upon. At this point the question that arises is whether or not there is a valid lease with regard to the occupation of the terraces. The undisputed fact is that the said amalgamated lease was never executed by the Plaintiff. However, the Defendant charged rent on the terraces which is the cause of dispute in this suit.
22. It is the Plaintiff's case that they had been occupying the terraces at no cost since 2006 yet the Defendant threatened to levy distress for the alleged outstanding rent for the terraces in early 2010 for the first time. Thereafter, the Defendant did not make any immediate demand for the terrace and office rent until 2012.
23. I addressed the issue of the occupation of terraces in my ruling dated 4th November 2013. I therefore reiterate that at no time did the Defendant accept the Plaintiff's proposal to occupy the terraces for free. In the circumstances, there is no basis to restrain the Defendant from levying distress for any rent arrears. In fact the Plaintiff is not disputing that there is outstanding rent with regard to the terraces.
24. The dispute is as to how much money should be charged by the Defendant for the Plaintiff's occupation of the terraces. The Plaintiff is of the opinion that the rental amount to be levied by the Defendant ought to be slightly lower than the rent for the main office block. It is the Plaintiff's position that a joint commercial evaluation should be done to determine the actual market value of the terrace space per square metre. It is not clear what purpose this evaluation will serve if there was an agreement with regard to the service charge in the Letter of Offer dated 6th February 2009. The same provided for a review of the service charge. Therefore this Court cannot make any orders that will rewrite the contract between the parties.
25. The five month notice by the Defendant to the Plaintiff terminating the tenancy is based on the breach of the tenancy agreement as alleged by the Defendant. The said breaches are as enumerated at paragraph 23 of the supporting affidavit filed by the Plaintiff. (*See a copy of the Notice dated 17th January 2014 marked as exhibit DO 12*).
26. It is not in dispute that the amalgamated lease was not executed by the Plaintiff. Therefore, it is apparent that the guiding document when it comes to terminating the tenancy was the Letter of Offer dated 6th February 2009 as is clearly provided for at Clause 11 already restated at page 6 of this ruling.
27. The Plaintiff is of the opinion that no breach has been committed. The Plaintiff did not substantiate this position. I have read the said breaches as alleged by the Defendant. It is not in dispute that the Plaintiff neither executed the Amalgamated Lease nor did they pay the Legal fees arising from preparation of the Lease. What needs to be ascertained is breach number (c) and (d) as stated in the Notice of termination. (*See exhibit "AM 6" attached to the Defendant's Replied affidavit*).
28. The Defendant accuses the Plaintiff of failing to pay Kshs. 724,092.70 for the extra consumption of electricity. The Defendant also contends that the Plaintiff has blatantly continued to display, without permission, housing models on the common areas which should not be used by any tenant. The Plaintiff has not rebutted these allegations. Instead the Plaintiff has gone on a tangent contending that the Defendant is arbitrarily increasing the service charge.
29. With regard to the adequacy of the Notice of termination, I have perused the Letter of Offer dated 6th February 2009 and it seems the arrangement between the parties was such that the Plaintiff would pay rent quarterly. In that case the standard notice of termination would be 3 months. It is therefore my view that the five month's Notice would be sufficient.

30. The rules for granting an interlocutory injunction are now well settled in the case of **Giella –vs- Cassman Brown (1973) EA 358**. Those principles are first, that the applicant must establish a *prima facie* case with a probability of success; secondly that the applicant must demonstrate that damages will not be an adequate remedy; and thirdly, if in doubt, the court will determine the matter on a balance of convenience.
31. In view of the above findings, it is plain that the Plaintiff has not established a *prima facie* case to warrant the interim orders sought. The Plaintiff has not demonstrated any financial loss it may suffer that cannot be compensated for by way of damages. The Notice to terminate the tenancy as given by the Defendant is adequate for the Plaintiff to organize its affairs and find an alternative office space. The balance of convenience tilts in favour of the Defendant as the ownership of the suit property belongs to them. Furthermore, they have proved that the Plaintiff is indeed in arrears of rent entitling them to levy distress on rent.
32. The upshot of the foregoing is that the Plaintiff's Notice of Motion Application dated **14th February 2014** and filed in Court on **19th February 2014** is hereby dismissed. The costs of the application for the Respondent.

READ, DELIVERED AND DATED AT NAIROBI THIS 19TH DAY OF DECEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Milimo holding brief for Simiyu for Plaintiff

Wananda for Defendant

Teresia – Court Clerk