



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 596 of 2012

WINNERS DELIGHT LIMITED.....PLAINTIFF

VERSUS

JAMES NDEGWA THUKU.....DEFENDANT

RULING

The Plaintiff has simultaneously with the plaint herein filed the instant Notice of Motion dated 11th September, 2012 under certificate of urgency and under Order 40 rules 1, 2, 3 & 4 and Order 50 rule 1 of the Civil Procedure Rules and Sections 1A 1B and 3A of the Civil Procedure Act in which the plaintiff essentially seeks orders the following that;

- 1). Spent
 - 2). Spent
 - 3). An injunction be issued restraining the Defendant whether by himself, his servants relatives and/or any of them from constructing occupying or carrying on business on the property known as L.R. No. 13330/502, off Thika Road and/or selling transferring leasing disposing off or otherwise interfering with or dealing in any way with the said property pending the hearing and determination of this suit.
 - 4). This Court be pleased to issue a mandatory injunction compelling the Defendant to handover vacant possession of the property known as L.R. No. 13330/502 off, Thika Road to the Plaintiff.
- (c) Costs of this application be provided for.

The application is based on the following grounds:

- A) The defendant is the registered proprietor of the property known as L.R. No. 13330/502, off Thika Road. (hereinafter referred to as the "Suit Property)
- B) By lease agreement dated 9.7. 2009 the defendant agreed to lease the suit property to the plaintiff for a term of ten (10) years on the terms and conditions more particularly set out in the said agreement.
- C) The purpose of leasing the said property was for the plaintiff to establish a commercial enterprise comprising of a bar and restaurant business together with hotel and accommodation (lodgings) for which the plaintiff planned to invest substantial funds for the construction of the buildings and other conveniences associated to such business.
- D) The parties mutually agreed to postpone the commencement of the tenancy and the handing over of possession to the suit property to the plaintiff to enable it design and obtain approval of the building plans

it intended to develop for the business.

E) It was accordingly agreed inter alia that possession of the suit property would be handed over to the plaintiff upon the approval of the said buildings plans and that the rent in respect thereof would become payable six (6) months thereafter.

F) The plaintiff performed its part of the agreement which it was required to perform while awaiting the approval of the said plans by making the agreed payments to the defendant receipt for which the defendant duly acknowledged.

G). The plaintiff has also expended huge sum of money pursuant to the agreement in conducting feasibility studies for the business designing the building plans and obtaining their approval by the city council pursuing change of user of the suit property at the city council and the certificate of title in respect thereof at lands office and at the request of the defendant together with payment legal fees and other disbursement for the drawing of the lease agreement and in constructing tables and seats with the approval and knowledge of the defendant.

H). Due to delay in the process of approval of the building plans (which was anticipated by the parties and a substantial part of which was contributed by the defendant) such approval was finally given by the City Council of Nairobi vide its letter addressed to the plaintiff's architect dated 9.1.2012.

I). Upon receipt of the said letter of approval the plaintiff by its advocate's letter dated 22.2.2012 immediately notified the defendant of the same and requested him to hand over possession of the suit property so as to facilitate the commencement of the construction.

J). However the defendant has expressly refused to hand over possession of the suit property to the plaintiff. This has been confirmed by the defendant's advocate's letter dated 19.4.2012 and another undated one which was received by the plaintiff's advocates on 27.3.2012.

K). The defendant has instead started constructing some illegal structures on the suit property which are not approved by the relevant authorities and which are at variance with the building plans that the plaintiff has designed and had approved at substantial costs.

L). The defendant has also revived the business of a bar and restaurant which he was running at the suit property prior to the said agreement and which he had closed down in anticipation of handing over possession of the premises to the plaintiff.

M). The defendant's actions in refusing to hand over vacant possession of the suit property to the plaintiff followed by construction thereon and recommencement of his old business on the suit property is an express breach of the agreement between the parties which ought not to be countenanced by this honourable Court.

N). Unless ordered by this honourable Court the defendant will continue to dishonour his obligations under the lease agreement by refusing to hand over possession of the suit property to the plaintiff while recommencing and running his own business thereon.

O). If possession of the suit property is not handed over to enable the plaintiff commence the construction works in readiness for the business it intends to run the plaintiff will suffer substantial loss in terms of input already made and anticipated income from the business.

P). It is therefore in the interest of justice that this application be heard urgently and the orders sought granted as prayed.

The application is supported by the affidavit and a further supporting affidavit sworn by the Plaintiff's director and dated 11th September, 2012 and 18th October, 2012 respectively.

Dr. John Karungai Nyamu a director of the plaintiff company filed a lengthy supporting affidavit giving details of the background of the application. In brief this is his case. He is a veterinary doctor by profession but also a businessman. That in early 2009 he was introduced to the defendant who told him that he had been allotted plot no. 583 (suit property) in Thome estate in Nairobi. The defendant had been running a bar and restaurant business at the said premises. He got interested in running a business at the said premises and they negotiated a suitable lease of the suit property. On the 9/7/09 they executed a lease agreement and he paid one million being the agreed advance rent payable. The lease had its terms. It was a lease for 10 years, rent payable per month was 250,000/,-, the possession of the suit property was to be handed over to the plaintiff on the date the building plans for the intended developments were approved by the relevant authorities, the plaintiff was to take over the possession and develop the suit property by constructing buildings that were to be designed by its architects, that the commencement date of the tenancy would be postponed by a period of six months from the handover date to enable the plaintiff obtain the necessary approvals and consents for the construction of the intended developments and commence the construction (grace period), that rent was not payable during the grace period, that the lease then was receivable for a further period of 10 years, that at the expiry of the tenancy the plaintiff would yield up the suit property together with the developments undertaken herein in good and tenable repair and condition.

The parties in negotiating the said terms were alive to the fact that the plaintiff would require time to design the building plans and it would also experience delay in obtaining the approval of the said building plans from City Council of Nairobi. The lease agreement was dated 9/7/09 but the tenancy was to commence on the 1/6/09 however it was clearly understood that the defendant would retain possession until such time as the necessary approvals for building plans were obtained by the plaintiff and at that juncture the defendant would hand over possession of the suit premises. The parties thereafter conducted themselves in accordance with the said understanding which was also stated in clause 5 of the lease agreement. Based on this agreement the plaintiff commissioned an architect to design the building plans. In the process the plaintiff found out that the defendant had been running a business on a property that had been designated as residential. The defendant was required to get a change of user from residential to commercial purposes from the planning department of City Council of Nairobi. On discovering this they agreed with the defendant that the plaintiff's architect applies for the change of user. The costs would be offset against the rent upon commencement of the tenancy. Along the way the plaintiff also discovered that the defendant had no Certificate of title to the suit premises a document that was required for the process of approval of building plans. They discussed with the defendant and they agreed to follow up the matter at his cost. The title was processed and released in mid-2011 at the initiative of the plaintiff and approvals from City Council were obtained by the letter dated 9/1/12 from the Director of City planning. The plaintiff's advocates thereafter informed the defendant's counsel of the approvals and they sought to have the suit handed over to the plaintiff on the 1/3/12 in accordance to the terms of the lease agreement. The defendant's response to the plaintiff's request was that he would not hand over the premises. The defendant through his counsel argued that the lease had provisions that were strange to him, that the plaintiff had breached the agreement by undue delay (despite the fact that the defendant had contributed to the delay).

The plaintiff argues that there is a valid lease agreement between the parties. That the defendant's refusal to hand over the premises is in breach of the defendant's express obligations under the lease agreement between the parties, that the plaintiff is ready and willing to perform its part of the agreement but is being frustrated by the defendant. That the plaintiff has also noted that the defendant has been constructing some structures on the property reviving his old business and the structures are at variance with the building plans that the plaintiff has designed and approved at a great expense. That the construction of the suit premises is prejudicial to the plaintiff's interest. That the plaintiff has invested heavily into the intended business by the payments made and furniture too. The plaintiff therefore seeks prayers 3 and 4 of its application dated 11/9/12.

The Defendant filed grounds of opposition and a replying affidavit in opposition to the application herein. The grounds of opposition in summary contend that the application has no basis in law; lacks merit; has been brought in bad faith and is untenable.

The defendant also filed a replying affidavit dated 5/10/12. In brief he depones, that he has been running a business a bar and restaurant business in the suit premises under the name "Bull Point" since the year 1997 to date .That the agreement dated 9th July, 2009 leaves a date for commencement of payment of rent very amorphous and uncertain, such that about three (3) years from the signing of the agreement, there is no certainty on when the proper payment of rent would commence and the long wait was frustrating. That he has seen the photocopy of agreement dated the 9.7.2009 between him and the plaintiff and it is contradictory. That the Plaintiff had stored fifty (50) tables in the premises for a long time without payment for rent. That there was no provision for his approval of the building plans that the Plaintiff was intending to work on and he has only saw the same after service of court documents. That his former counsel at the stage of drafting the agreement did not advise him properly. That he has now received advise from his current counsel on the said lease agreement as stated in his paragraph 17 and 18. That he is now undertaking new developments on the premises. That the plaintiff has not been deceitful in the photographs exhibited of his business as he has avoided taking and exhibiting the one storey building which is the main building of his business premises. That city council has ordered him to undertake repairs of the structures in his business premises which as per the agreement does not consist of the storey building. That if the plaintiff is granted the orders sought he will be shut out his business premises. That clause 6 of the lease agreement provides for termination clause and that the agreement is open to abuse. That he is ready to repay the plaintiff any monies paid to him together with any damages which might be adjudged due to him in respect of the lease agreement.

In the plaintiff's further affidavit he does not dispute part "B" of the lease agreement. He gives an explanation on why the 50 tables are at the defendant's premises. That the defendant was not to approve the development plans as averred. That the lease agreement was explained to the defendant in all the languages he understands and he eve contributed to the discussions. That the defendant is not saying the truth when he alleges he is being kicked out of the premises. That he is not interested in getting the refund of his money, his interest is in getting the premises which he leased and has incurred money in getting all the permits , business plans and other opportunity costs which cannot be valued in monetary terms.

The Plaintiff in its submissions essentially argues that since there was a valid agreement in force between it and the Defendant and it having fulfilled its part by obtaining title and building approval plans together with NEMA authorization, the Defendant is therefore obliged to handover possession of the plot to the Plaintiff.

The Defendant on his part has reiterated his averments in the replying affidavit. He submits that cause B of the preamble to the lease agreement and clause 1 (b) recognizes existence of one storeyed building in the suit premises wherein he runs a bar and restaurant business. This was expressly excluded from the lease agreement and is not part of the intended demise premises of the suit property. He laments that he is at risk of losing his source of livelihood in the event the orders herein are granted since the application sought vacant possession of the entire suit premises.

Further the Defendant contends that the agreement is not capable of being legally enforced since the bar business with its parking space and other utilities were not well defined in the lease agreement. It is also the Defendant's contention that the orders sought cannot be granted at this stage as they can be best dealt with at the hearing stage. Finally, it is the Defendant's submission that the Plaintiff has not satisfied the principles for granting the orders sought and he relies in the case of ***Giella v. Cassman Brown and Co Ltd (1973) E.A 358.***

For the Plaintiff herein to succeed it has to demonstrate, first, that it has a *prima facie* case with a probability of success. Secondly that an interlocutory injunction will not normally issue unless the applicant stands to suffer irreparable loss which is not capable of being compensated in damages if the injunction is not issued, but in case the Court is in doubt then the matter must be decided on a balance of convenience. While considering whether the application has a *prima facie* case the Court is not called upon at this stage to make any definite findings of either points of law or facts. What constitutes *prima*

facie case was considered by the Court of Appeal in the case of **Mrao Ltd V. First American Bank of Kenya Ltd, (2003) KLR 125**. It is a case in which, on the material available to a court, it can be concluded that the applicant's right appears to have been infringed by the respondent as to require the latter to explain or rebut the allegation. It is also now settled that mandatory injunction can be issued both at the interlocutory stage and at the trial. However, it will not issue at interlocutory stage unless in very a clear and uncontroverted case. Mandatory orders are by their nature final (**see *Locabil International Finance Ltd.vs. Agro Export (1986) 1ALL ER***).

The plaintiff's case is that he has a valid lease with the defendant which the defendant has refused to comply with now that he has fulfilled what he had undertaken to do. The premise does not belong to the plaintiff. The defendant does not deny that the lease agreement exists. Is the plaintiff entitled to the orders sought in this application? Prayer 3 seeks to restrain the defendant from constructing occupying or carrying out business on L. R. 13330/502 selling, transferring leasing disposing off or otherwise interfering. It is apparent that though the parties had the lease agreement the defendant conducted business in some part of the premises. The orders being sought are mandatory orders which in my view cannot be granted at this interlocutory stage. Prayer 4 seeks a mandatory order to compel the defendant to hand over the premises vacant possession of the suit premises. In my view I find that these are mandatory orders that cannot be granted at this stage. The plaintiff has failed to demonstrate from the facts deponed that he has a prima facie case with a probability of success. It had a lease with the defendants and the defendant has decided to pull out. The plaintiff has never occupied the premises but has spent monies on the approvals he has mentioned. The plaintiff can be easily compensated if he sought damages from the defendant. The balance of convenience does not till in the plaintiff's favour. I therefore decline grant the orders sought. Costs of the application will be in the cause.

Orders accordingly.

R. OUGO
JUDGE

Dated, signed and delivered this 27th February 2013.

In the presence of :-

.....for Plaintiff/Applicant

.....for Defendant/ Respondent

.....Court Clerk