REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 505 of 2012

DR PETER KAMAU NJOROGE………..…..……..... PLAINTIFF/APPLICANT

VERSUS

CAROLINE WAGUTHI NDINDI..…......……1ST DEFENDANT/RESPONDENT

ANTHONY THOMAS NGOKONYO………2ND DEFENDANT/RESPONDENT

CHARWINS LIMITED…………………..…….3RD DEFENDANT/RESPONDENT

RULING

On 15th October 2012, the plaintiff/applicant filed a Notice of Motion dated the same day seeking the following orders:

1. That this application be and is certified urgent and be heard ex-parte at first instance.

2. That a temporary injunction do and is issued restraining the Defendants/Respondents, their servants and agents, from evicting or otherwise interfering with the Plaintiff's/Applicant's occupation of all that property commonly known as Office Unit Number 10 on 8th Floor of 5th Avenue Building being part of that property known as Land Reference Number 209/289/2/1, pending the hearing and determination of this application.

3. That an interlocutory injunction do and is issued restraining the Defendants/respondents, their servants and agents from evicting or otherwise interfering with the Plaintiff's/Applicant's occupation of all that property commonly known as Office Unit Number 10 on 8th Floor of 5th Avenue Building being part of that property known as Land Reference Number 209/289/2/1, pending the hearing and determination of this suit.

4. That costs of this application be awarded to the Plaintiff/Applicant.

The application is based on the following grounds:

1. That on or about the 23rd November, 2009 the 1st Defendant offered the Plaintiff in writing a lease or sub-lease of the suit premises for a period of six (6) years commencing on 1st December, 2009 up to the 20th November, 2015 with an option to renew for a further similar period on such terms as were to be agreed between the parties, which was duly executed by both parties.

2. That on or about the said 26th November, 2009 the Plaintiff did duly confirm by appending his signature at the requisite portion of the letter that the offer to be granted a lease of the suit premises, and the summary terms of the lease for the suit premises, had been accepted by him.

3. That on or about the 1st December, 2009 the Defendants did give the Plaintiff vacant possession of the suit premises, and the Plaintiff has since been in occupation and possession of the suit premises and has been faithfully paying rent and abiding by the terms of the lease agreement herein afore referred.

4. That in any event and at the very least the Plaintiff/Applicant is a periodic tenant in occupation of the suit premises paying rent quarterly.

5. That on 12th October, 2012 the 1st defendant did, without any colour of right and in breach of the Lease Agreement, through a letter from Messrs Sichangi Partners Advocates dated 10th October, 2012, purported to notify the Plaintiff that he was in breach of the letter of offer for lease of the suit premises between himself and the 1st and 2nd Defendants and that consequently he was to vacate the suit premises within three(3) days of the date of the said letter, which was a mere one (1) day from the date of receipt of the letter, and which said letter purported to declare and render him a trespasser.

6. That the Plaintiff/Applicant has now filed this suit against the Defendant/respondents to pursue his contractual rights and for breach of contract, but in the meanwhile he stands to suffer irreparable harm, loss and or damage unless the defendants are restrained by way of injunction by this Honourable Court from evicting him, particularly at such short notice.

The application is supported by an affidavit sworn by **Dr Peter Kamau Njoroge**, the plaintiff on 16th October 2012 in which he deposed that on or about 23rd November, 2009 he was offered by the 1st defendant a lease in writing or sublease of an office space in 5th Avenue Building in Nairobi in which she held out to the plaintiff was jointly owned by herself and her husband, the 2nd defendant, for a period of six (6) years with effect from 1st December 2009 up to 30th November 2015 with an option to renew for a further similar period on terms to be agreed. The 1st defendant confirmed that since the offer was in respect of lease as opposed to a tenancy there would be no exit clause. According to the plaintiff the terms of the lease were contained in a letter addressed to the plaintiff on or about 26th November 2009 which terms were accepted by the plaintiff by appending his signature thereon. On or about 27th November 2009 the defendant delivered to the plaintiff a lease agreement in triplicate purportedly drawn and engrossed by her in terms of the said letter which was to be executed by the plaintiff and then registered by the 1st defendant. The plaintiff duly executed the same and returned the same to the 1st defendant for the said purpose and on 1st December 2009 the 1st and 2nd defendant gave the plaintiff vacant possession of the suit premises. The plaintiff then contracted an interior designer to construct partitions, ceiling works and fittings of the suit premises with a view to opening a doctor's office and clinic in the suit premises at the cost of Kshs 620,000.00 upon completion of which he commenced his medical practice holding the said premises as the suit premises from which he was operating to the public at large, patients, members of the medical fraternity, medical insurance industry and hospitals. According to him he has faithfully paid and the 1st defendant has received consideration as per the agreement up to and including the quarter for 1st September 2012 to 30th November 2012. The 1st defendant has however not supplied the plaintiff with a copy of the lease under the pretext that the same is under the process of registration. On or about 6th December 2011 the 1st defendant notified the plaintiff to vacate the suit premises on the ground that she intended to sell her interests in the suit premises to a third party. Despite that the defendant continued receiving rents in respect of the suit premises for the quarter of September 2011 to November 2012. The 1st defendant has however vide a letter dated 10th October 2012 delivered on 12th October 2012 notified the plaintiff to vacate the suit premises within three (3) days of the letter on the allegation that the plaintiff has breached the terms of the letter of offer. The said letter according to the plaintiff reached him on 15th October 2012. According to him he is not in breach and denies collecting rent from any person

and avers that **Dr Jane W Kariuki** is a professional colleague whom he accommodated from May 2010 to February 2012 *pro bono* with the full knowledge of the 1st and 2nd defendants. In his view, these threats have been occasioned by the fact that the 1st and 2nd defendants have assigned their interest in the suit property to the 3rd defendant with on the understanding to give vacant possession. On 15th October 2012 the plaintiff received a text message indication that one **Chargwings** intended to take possession of the suit premises the next day. It is the plaintiff's position that it is practically impossible to undo the said partitions within the time frame given and that he has appointments with patients who may be caught up in the melee and suffer harm and injury during the process of the execution of the threats by the defendants. In his view, he stands to suffer irreparable damage to his professional undertakings, business and reputation that cannot be compensated by damages as well as inconvenience to his patients.

The application was opposed by way of a replying affidavit sworn by **Caroline Waguthi Ndindi**, the 1st defendant, on 16th November 2012. According to her, the 2nd defendant and herself were the registered owners of the leasehold interest over property Office Unit Number 10 on 8th Floor Avenue being part of LR No. 209/289/2/1 until 4th October 2012, when they transferred the same to the 3rd Defendant after terminating the plaintiff's tenancy. While conceding that she offered the plaintiff the use of the suit property as an office, she contends that the plaintiff has misrepresented the fact by alleging that there was to be no exit clause. The deponent while admitting receipt of Kshs 180,000.00 deposit denies that she prepared a lease or delivered a lease agreement for signature by the plaintiff hence no lease was entered into and the plaintiff's interest was not registered against the property. In the premises the allegations that she promised delivery of the lease are denied. The premises, according to the deponent, were to be merely used for medical practice and therefore the defendants have nothing to do with the partitioning. It is however admitted that despite the non-existent of the lease the plaintiff continued paying the quarterly rent under the terms of the said letter of offer. It is deposed that he plaintiff was all the time are that the acquisition of the property was financed by Co-operative Bank Ltd who held a charge over the suit property by virtue of which any subsequent sub-lease or sale required the Bank's consent or discharge in whose custody the title documents are. Following the raising of the Base Lending Rate by the Central Bank of Kenya, the defendants were unable to service the loan from the proceeds of the rents received from the plaintiff hence the option to sell the leased premises to another party. To compound the problems the 2nd defendant was declared redundant from his work place and despite attempts to get the plaintiff to discuss the issues, she was unable to track him hence the option to send the email giving him three months notice of termination based on clause 10 of the letter of offer which allowed for termination in event of the existence of extra-ordinary circumstances which the deponent contends the situation portended. In the premises the deponent instructed the defendants' advocates on record to issue a notice of termination grounded on the breach of the terms of the letter of offer. It is further contended that the plaintiff has not disclosed the fact the rent paid for the quarter of September-December was returned less the period utilised and that the plaintiff still holds the said cheque. Further the plaintiff without knowledge of the defendants parted with possession of the suit premises by subletting part thereof of to **Dr Jane W Kariuki**. Ads a result of the said termination notice coupled with the said extra-ordinary circumstances, the said premises were sold to another party to whom they intend to hand over vacant possession on completion of registration of the lease in his favour. In her view the plaintiff seeks equitable injunctive relief without disclosing the fact of termination and breach of the terms of the letter of offer which the defendants complied with in terminating the agreement which disclosure had it been made would have disinclined the court in granting the interim relief. Without refunding the quarterly rent, it is contended that the plaintiff is unjustly enriching himself to the detriment of the 3rd defendant who is now the registered owner of the suit property an act which constitutes a criminal offence of Forcible Detainer under section 91 of the Penal Act (sic), Cap 63. In his view the plaintiff has not come to court with clean hands and hence the interim orders ought to be discharged and the application dismissed as opposed to the deponent who has been frank about her predicament. It is her view that the applicant has not shown a prima facie case with a probability of success and has not shown how he stands to suffer loss that cannot be compensated by an award of damages. It is further contended that the balance of probability (sic) tilts in not granting the orders sought since the grant of the same will affect the 3rd defendant, a *bona fide* registered owner of the suit premises who has no agreement with the plaintiff.

The plaintiff swore a supplementary affidavit which though undated was filed on 4th December 2012.

According to him, the fact of the 2nd defendant's redundancy was never brought to his attention and neither were any serious attempts made by the 1st defendant to meet him on the said extra-ordinary circumstances. It is his contention that the refund cheque was sent after he instituted these proceedings. While conceding that he received an envelope from the defendant's advocates, he contends that the same was dispatched to his advocates unopened. He reiterated that he never sublet the premises and denies misleading the court or acting in bad faith. According to him based on the defendants' failure to address the issue of the lease, the lease must have been registered. Without an affidavit sworn by the 3rd defendant there is no evidence that the suit property has been sold or transferred to the 3rd defendant.

The application was prosecuted by way of written submissions. According to the plaintiff, while reiterating the contents of the supporting affidavits, it is submitted that the lack of a replying affidavit by the 3rd defendant is very telling, and pivotal to the determination of this suit on the question of the existence of a prima facie case with respect to the effect of unregistered lease, adequacy of damages and balance of convenience. Without evidence of the assignment of lease having been effected the averment is simply a red herring intended solely to secure the plaintiff's eviction. This, according to the plaintiff raises several issue which can only be determined by and upon taking evidence at a full trial. Citing Central Bank of Kenya & Another vs. Uhuru Highway Development Ltd & 4 Others [2000] KLR 386, it is submitted that the remedy by injunction is so useful that it should be kept flexible and must not be made the subject of strict rules. On the authority of **Souza and Figueiredo and Co Ltd vs. Moderings Hotel Co. Ltd [1960] EA 926** and **Bachelor's Bakery Ltd vs. Westlands Securities Ltd [1982] KLR 366**, it is submitted that where a lease is not registered, it is nonetheless binding as a contract as between the parties themselves, but cannot be used to impede third party rights. Accordingly, it is submitted based on **Aroko vs. Ngotho & Anor. [1991] KLR 178** and **Nderitu & 2 Others T/A Trustees of African Club vs. Harun [1992] KLR 211** that as between the plaintiff on one hand and the 1st and 2nd defendants on the other hand, the plaintiff was pursuant to sections 116 as read with section 106 of the Indian Transfer of Property Act, 1882 deserving of a notice equal to the period of rent that he paid, that is quarterly. In the plaintiff's opinion, he has fulfilled the conditions guiding the grant of interlocutory injunction and based on **Muigai vs. Housing Finance Co. of Kenya Ltd & Anor [2002] 2 KLR 336-336**, it is submitted that it is not an inexorable rule that where damages may be an adequate remedy an interlocutory injunction may never issue. Since the plaintiff has stated that he is a medical doctor running a clinic wherein he has created goodwill, he has proved that he stands to suffer irreparable damage taking into account the concession by the 1st and 2nd defendants that they are in financial dire straits. On the balance of convenience it is submitted that if the lease has been assigned to the 3rd defendant then the 1st and 2nd defendants stand to suffer no inconvenience if the status quo is maintained hence the orders sought should be granted.

The defendants, while reiterating the contents of the replying affidavit contend that the conditions stipulated under the case of **Giella vs. Cassman Brown and Co. Ltd [1973] EA 358 at 360** are sequential and so the second condition can only be addressed if the first one is satisfied and that when the Court is in doubt can the third one be addressed. For this proposition the defendants rely on **Beatrice Chelangat Rop & Another vs. Housing Finance of Kenya Ltd [2006] eKLR** and **Kenya Commercial Finance Exchange vs. Afraha Education Society [2001] 1 EA 86**. The plaintiff having breached the terms of the letter of offer it is submitted that the fact that the 1st and 2nd defendants continued to receive rent from the Plaintiff did not constitute a compromise to the defendants' position in law to evict the plaintiff and the plaintiff's right over the suit property was effectually extinguished when the notice of termination was issued and reliance is placed on **Hornbill Pub Ltd vs. Ambassadeur Investment Kenya Ltd [2006] eKLR**. Based on **Nyanza Fish Processors Limited vs. Barclays Bank of Kenya [2009] eKLR** it is submitted that the loss to the applicant being financial there is no evidence that the plaintiff will suffer irreparable damage since the plaintiff has not heavily invested in the suit premises. Since the third defendant, the registered owner has no agreement with the plaintiff, it is submitted that the balance of convenience does not favour the applicant. It is further submitted by based on **Francis Ekutu Washika & Another vs. Vincent Sambulia & Another [2005]** that since the plaintiff's hands are tainted he does not deserve the order sought since he ought not to benefit from the mess created by his own breach.

The conventional and customary conditions upon which the grant of interlocutory orders of injunctions are hinged are firstly, an applicant must show *a prima facie* case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and thirdly, if the court is in doubt, it will decide an application on the balance of convenience. See **East African Industries vs. Trufoods [1972] EA 420; Giella vs. Cassman Brown & Co. Ltd [1973] EA 358.**

Caution must however be taken that in an interlocutory application, the Court is not required to make any conclusive or definitive findings of fact or law, on the basis of contradictory affidavit evidence or disputed propositions of law though its is properly entitled to express a *prima facie* view of the matter and to consider what else the deponent to the supporting affidavit has stated on oath which is not true are deliberate concealment of material facts. A *prima facie* case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. See **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.**

It is however now established that in exercising its discretion under the Civil Procedure Act or in determining whether or not to grant the injunction sought the Court is enjoined to consider what has become known as the principle of proportionality under the overriding objective which objective the Court is enjoined to give effect to in the exercise of its powers under the Act or the interpretation of any of its provisions. In **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** **Ojwang, AJ** (as he then was) expressed himself as follows:

"It is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice…The argument that the law governing the grant of injunctive relief is cast in stone is not correct, for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before. Traditionally, on the basis of the well-accepted principles, the Court has had to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant".

It is clear from the foregoing and more so on consideration of the provisions of section 1A(2) that the court is required in mandatory terms in the exercise of its powers under the Civil Procedure Act or the interpretation of any of its provisions, which provisions include the grant of interlocutory injunctions under Order 40, to seek to give effect to the overriding objective specified in subsection (1) of the section. The said overriding objective under subsection (1) on the other hand seeks to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

Therefore whereas the traditional considerations in applications for injunctions will remain relevant, the Court must develop the law in such a way as to meet the emerging trends in tandem with the ever changing circumstances.

The first issue for determination is therefore whether the plaintiff has have established a prima facie case with probability of success. That there was a letter of offer emanating from the 1st and 2nd defendants with a view to letting the suit premises to the plaintiff for a period of 6 years is not in contested. That partitioning of the suit premises was in the contemplation of the parties is indicated in clause 11 of the letter of offer. The defendants, however, contend that the plaintiff was in breach of the terms of the said

letter by subletting the suit premises to **Dr Jane W Kariuki.** Whereas it is true that clause 9 of the said letter of offer clearly prohibited subletting or parting with possession of the premises without the express prior written consent of the landlord, it is contended that the plaintiff neither sublet nor parted with possession of the suit premises but only allowed the said colleague to occupy the premises on pro bono basis. There issue to be decided is therefore whether the pro bono occupation by the said doctor amounted to "subletting or parting with possession of the suit premises". That is not an issue that can conclusively be decided in this application. Suffice it to say that the issue is alive. Again it is noteworthy that the alleged breach took place between May 2010 to February 2012 it was not until 10th October 2012 that the issue seems to have been taken until the letter dated 10th October 2012 more than seven months later. The issue that will fall for determination is whether or not the 1st defendant by his conduct led the plaintiff to believe that the issue would not be taken up hence giving rise to the invocation of the doctrine of estoppel. This is pertinent taking into account the fact that rent was received thereafter. Whereas the defendants contend that the issue does not arise, a determination of the issue cannot be made based on the material before the Court. Again there is the issue whether or not the raising of the base lending rate constituted extraordinary circumstances for the purposes of clause 10 of the letter of offer taking into account the length of the period for which the lease was to be in existence. Taking into account these issues I am satisfied that the plaintiff has established that there exists a right which has apparently been infringed by the defendants to call for an explanation or rebuttal from the latter.

With respect to irreparable loss, both parties were aware that the premises were to be used by the plaintiff for the purposes of a medical facility. That a medical facility depends on goodwill cannot be overemphasized. Medical services are personal in nature and it cannot be lost on the court that relocation by a doctor from his place of business may have consequences that go beyond the immediate financial loss. Dealing with goodwill it was stated in **Suleiman vs. Amboseli Resort Limited** (supra):

"The plaintiff has averred that all along during his occupancy of the suit shop, the defendant has noted, acknowledged, acquiesced in, and approved the alleged sub-tenancy; and that on the strength of that status quo of the business relations, the plaintiff has over the years set up what appears to be a large and successful business on the suit premises dealing with curios and gifts – items intimately linked with the tourist industry. That fact is nowhere disputed; and neither is it denied that the plaintiff's trade is a unique and sensitive one, which, as it is now, has a substantial goodwill that is greatly endangered if the plaintiff should be evicted. In law, these circumstances, new rights may have emerged which ought, as a vital question of ends of justice, to be litigated and determined by the best method of the judicial system and that method is the full trial, with examination of witnesses, taken through examination-in-chief, cross-examination and re-examination. At the end of that process the question of rights and liabilities will be determined with finality, and a new status quo in relations amongst the parties will have been put in place."

Whereas the period of occupation of the premises may not strictly speaking amount to a long period it is not lost to the court that the nature of the plaintiff's trade and calling is a sensitive one. Accordingly, it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice.

It is also not lost to the Court that so far there is no evidence presented to the Court showing that the ownership of the suit property has changed hands. The 3rd defendant who is the alleged owner has dexterously chosen to stay in the background when it is the entity that stands to suffer most by the grant of the orders sought herein. In the absence of its input in this matter there is no evidence upon which the Court can find that the grant of the orders sought herein is likely to prejudice it. Therefore considering the twin principles of proportionality and the need to ensure equality of arms as required under the overriding objective the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. In other words there would be a much larger risk of injustice if the court found in favour of the defendants, than if it determined this application in favour of the applicant.

As properly submitted by the defendants in the circumstances I do not have to consider the third condition

whether or not the balance of convenience tilts in favour of the plaintiff. However, the aim of an interlocutory prohibitive order is to preserve the property by maintaining the status quo and unless there is overwhelming hindrance where issues are disclosed that require investigation by the Court the Court ought as far as possible ensure that the subject matter of the dispute is preserved so as not to render the process of trial an academic exercise. As no overwhelming hindrance is disclosed in the circumstances of this case where the alleged registered owner has decided to keep out of the picture I am satisfied that the plaintiff has fulfilled the conditions necessary for the grant of the orders sought herein.

Accordingly the applicant's Notice of Motion dated 15th October 2012 succeeds and is allowed in the following terms:

1. An interlocutory injunction is hereby issued restraining the Defendants/Respondents, their servants and agents from evicting or otherwise interfering with the Plaintiff's/Applicant's occupation of all that property commonly known as Office Unit Number 10 on 8th Floor of 5th Avenue Building being part of that property known as Land Reference Number 209/289/2/1, pending hearing and determination of this suit.

2. Since it is not clear to the Court who is entitled to the proceeds of the rental in respect of the suit premises, the Plaintiff do deposit all arrears of rent in Court within fourteen (14) days and ensure that due rents are similarly deposited in court until the determination of this suit or until further orders of the Court.

3. That the plaintiff files appropriate undertaking as to damages within 7 days.

4. That the costs of this application be in cause.

5. That there be liberty to apply.

G V ODUNGA
JUDGE

Dated and Delivered at Nairobi this 5th day of February 2013

J B HAVELOCK
JUDGE

Delivered in the presence of:

for the Plaintiffs

for the Defendants