



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 993 of 2012

SUNATCO LIMITED.....PLAINTIFF

VERSUS

NEW KIREITA COMPANY LIMITED.....DEFENDANT

RULING

1. The Plaintiff by a Chamber Summons dated 11th December, 2012 brought under the provisions of **Order 40 Rule 1** and 2 of the **Civil Procedure Rules, Sections 3A** of the **Civil Procedure Act** and all the enabling provisions of the law essentially seeks orders that:

- a) This court be pleased to issue an order for injunction restraining the Defendant, their agents, servants or any person purporting to be acting on their behalf from interfering, doing any act that jeopardise the interest of the Plaintiff as a tenant in Plot No. L.R. No. 209/139/54/55, shop Number 56 situated at Nairobi, Kirinyaga Road (herein after referred to as '**the suit property**') pending hearing and determination of this suit.
- b) The Plaintiff be allowed possession and quiet enjoyment of the suit property pending hearing and determination of this suit.
- c) Costs of this application be provided for.

2. The application is based on the grounds on the face of the application which grounds have been reiterated and given evidentiary basis in the supporting affidavit of the Plaintiff's Managing Director, Parita Karelia dated 11th December, 2012. He states that by a lease agreement dated 17th March, 2009 made between the Defendant on the one part and the Plaintiff on the other part, the Defendant leased the suit property to the Plaintiff for a term of six (6) years commencing 1st January, 2007 for an agreed monthly rent of Kshs. 16,500/=. That it was a term of the lease that at the end of the lease, the Plaintiff had an automatic right to a further term of six years provided it gave a four months prior notice to renew the lease, paid rent and followed the stipulations provided for in this lease agreement. That the Plaintiff gave its notice of the intention to renew the lease on the 20th February, 2012 and the Defendant through its chairman, Samuel M. Njuguna confirmed that they would extend and or give the Plaintiff a further lease of six years. Subsequently, the Defendant's advocates forwarded a draft lease (**PK-3**) to the Plaintiff for approval.

That sometime in October, November the Defendant's chairperson visited the Plaintiff's shops and told the deponent herein that the Defendant would not renew the lease unless and until the Plaintiff paid a goodwill of Kshs. 6,000,000/= to the Defendant.

That despite writing to the Defendant through its lawyers to request for a meeting to forge a way forward, the Defendant declined to respond to the letter rather the Defendant's advocate only called the Plaintiff's to inform them that they did not intend to renew the lease.

He depones that the Defendant having sentimented it would renew the lease, the Plaintiff went ahead and stocked its business which stock costed over Kshs. 12,000,000/= and if the shop is closed the Plaintiff stands to incur loss. Finally, he states that clause five (5) of the lease agreement provide for automatic renewal of the lease agreement for a further period of six years provided the Plaintiff gives four months' notice and with all other terms of the lease.

3. The application is opposed by the Defendant who has filed a replying affidavit dated 30th January, 2013 and sworn by the Director of the Defendant, Samuel Mwaura Njuguna.

He avers that the Plaintiff had leased the suit premises for a term of six (6) years which term expired on 31st December, 2012. That the Plaintiff wrote to the Defendant on 20th February, 2012 requesting for a renewal of the lease term as in Annexure 'PKII'. The Defendant then forwarded a draft lease. However, the Plaintiff did not respond either by confirming or amending the draft lease and the Defendant by its letter dated 26th July, 2012 ('SMN 1') reminded the Plaintiff that it would not be permitted to operate in the premises after 31st December, 2012 without a new lease document duly signed by the parties. It was until 28th November, 2012 that the Plaintiff wrote to the Defendant's advocates expressing their displeasure with the proposed monthly rents. The deponent avers that it was upon the Plaintiff to ensure that a newly executed lease was in place before 31st December, 2012 which it did not. Further, it is averred that the renewal of the term of the lease in terms of clause five (5) of the expired lease agreement was subject to new terms including rent being agreed on and reduced into a new lease agreement to be executed by the parties herein before the expiry date of the now expired lease. He contends that there is therefore no tenancy between the Plaintiff and Defendant and the Defendant has a right to vacant possession of the suit property.

4. The Plaintiff has filed further supporting affidavit and the Defendant a further affidavit which affidavits reinforce the issues already articulated in their supporting and replying affidavits. Counsels submitted orally in court, I have considered the submissions together with the facts as deponed in the affidavits.

5. Both the Plaintiff and the Defendant rely on the terms the lease agreement dated 17th March, 2009 to support their case. They both rely on Clause 5 of the lease which provides thus:

"If the lessee shall be desirous of extending the term hereby created for a further period beyond the term hereby created and shall at least FOUR (4) CALENDER MONTHS before the expiration of the term hereby granted give unto the Lessor a notice in writing of such its desire and shall pay rent and perform the several stipulations herein contained and on its part to be performed and observed up to the termination of the term hereby created then the Lessor will at the expense of the Lessee grant further lease of the demised premises unto the Lessee for a term and at the rent to be agreed(underline my own) and subject in all other respects to the same stipulations as are herein contained except this clause for renewal."

6. On the 20th February, 2012 the Plaintiff wrote the Defendant's chairman requesting for renewal of lease. The letter read as follows:

"...We refer to the above lease that expires this year.

We have recently re-organised our business and shall be willing to renew the same for a further term of SIX (6) YEARS commencing immediately.

Kindly let us know if you are willing to grant the same and the rent payable..."

7. The Defendant's advocates Muturi Kamande & Company on 26th July, 2012 wrote the Plaintiff as follows:-

"...On the instructions of our above named client, we write to remind you that your current lease term expires on 31.12.2012. Should you desire to renew the lease, our client requires you contact their chairman, Mr. Samuel M. Njuguna for the purpose of discussing the new lease terms. Should you desire not to renew the lease, kindly make arrangements to surrender the premises to our client on or before 31.12.2012. Do further note that our client will not permit you to carry on with your operations come 1.1.2013 without a newly signed lease document in place..."

8. When the Plaintiff received the above notice, it wrote a letter dated 28th November, 2012 expressing that they were not comfortable with the monthly rent in the draft lease agreement; they did not forward to the Defendant an amended draft lease for the Defendant's consideration.

9. The law as to the principles under which such order can be issued are well settled in the well-known case of *GIELLA VS. CASSMAN BROWN & CO. LTD* 1973 EA 358 which are that an applicant seeking a prohibitive injunction needs to establish that he has a prima facie case with a probability of success and he also needs to show that if the orders are not granted then he stands to suffer irreparable loss or damage. If the court is however in doubt, on the foregoing then it will decide the matter on the balance of convenience.

10. Clause five (5) of the lease agreement amounts to a future promise and is conditional thus it depended at a rent to be agreed upon between the Plaintiff and the Defendant. To confirm this, when the Plaintiff wrote to the Defendant to request for the renewal of the lease, he required to be advised on the new rent payable.

11. There is no possibility of the Plaintiff being granted the orders sought due to uncertainty of the terms of the agreement. If specific performance is granted it would be with other issues unresolved thus; at what rent will the Plaintiff take possession of the Defendant's premises. This would amount to the court rewriting the contract for the parties if it attempts to decide on the issue of rent. Specific performance is an equitable remedy and the court has a discretion whether to grant it or not and cannot be granted in the absence of a valid legal contract. Accordingly I find no merit in the application herein. It is dismissed with costs.

**R. OUGO
JUDGE**

Dated, signed and delivered this 14th day of March 2013

In the presence of:.....PLAINTIFF/APPLICANT

In the presence of:.....DEFENDANT/RESPONDENT

.....COURT CLERK