



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 404 OF 2013**

**FOREST GUMP INTERNATIONAL LIMITED .....PLAINTIFF**

**VERSUS**

**MITCHELL COTTS FREIGHT KENYA LIMITED .....DEFENDANT**

**AS CONSOLIDATED WITH**

**ELC CIVIL SUIT NO. 828 OF 2012**

**SEVEN STARS LIMITED.....PLAINTIFF**

**VERSUS**

**FOREST GUMP INTERNATIONAL LIMITED.....DEFENDANT**

**RULING**

**1. The Applications**

There are three Notices of Motion filed in the consolidated suits herein which are before the court for determination, seeking various orders. The first is one dated 25<sup>th</sup> September, 2012 and is filed by the Plaintiff in ELC Suit No. 404 of 2013 (hereinafter referred to as “Forest Gump International Ltd”). Forest Gump International Ltd is seeking an order that the Defendant therein be restrained from carrying out further construction within Land Reference Number 19141, along Mombasa road, and further from evicting or in any other manner whatsoever interfering with its quiet and peaceful enjoyment of, and access to the leased property known as godowns numbers 4 and 5 situate at Nairobi Land Reference Number 19141, along Mombasa Road (hereinafter referred to as “the suit property”).

The second Notice of Motion is dated 28<sup>th</sup> September, 2012 filed by the Defendant in ELC Suit 404 of 2013 (hereinafter referred to as “Mitchell Cotts Freight Kenya Ltd”) seeking to set aside or have discharged the temporary injunction granted by this court on 25<sup>th</sup> September, 2012. In addition, Mitchell Cotts Freight Kenya Ltd is seeking to have the application by Forest Gump International Ltd and Plaintiff in ELC Suit 404 of 2013 both dated 25<sup>th</sup> September 2012 struck out or dismissed. Mitchell Cotts Freight Kenya Ltd also filed a preliminary objection dated 2<sup>nd</sup> October, 2012 objecting to the application by Forest Gump International Ltd dated 25<sup>th</sup> September 2012 on grounds that the suit in ELC Suit 404 of 2013 was filed without authority under seal contrary to the provisions of Order 4 Rule 4 of the Civil Procedure Rules, 2010. Therefore, that the pleadings and affidavit filed by Forest Gump International Ltd are incurably defective for want of authority.

The third application for consideration is a Notice of Motion dated 28<sup>th</sup> January, 2013 filed by the Plaintiff in ELC Suit No. 828 of 2012 (hereinafter referred to as “Seven Stars Ltd”), seeking an order that a mandatory injunction does issue directing the Defendant therein to deliver vacant possession of the godown number 4 erected on Land Reference number 19141. The Defendant in in ELC Suit No. 828 of 2012 is Forest Gump International Ltd, who is also the Plaintiff in ELC Suit No. 404 of 2013. Seven Stars Ltd is also seeking an order that summary judgment be entered against Forest Gump International Ltd in the sum of Kshs.4,173,246.00 and further, that the suit be set down for hearing to determine the mesne profits payable.

All the above applications concern the proprietorship of the suit property, and the respective cases of the different parties as summarized from the pleadings filed in court are as follows.

## **2. The Arguments**

### **(a) The Case by Forest Gump International Ltd**

Forest Gump International Ltd claims to be a lawful and *bona fide* tenant of the suit property. It filed affidavits sworn on 25<sup>th</sup> September, 2012, 3<sup>rd</sup> October 2012 and 3<sup>rd</sup> May, 2013 by its director, Evans Kibia Kamau, The deponent annexed leases dated 7<sup>th</sup> September, 2009 and 1<sup>st</sup> November, 2006 entered between Forest Gump International Ltd and Seven Stars Ltd with respect to the said property. It is alleged by Forest Gump International Ltd that while the lease was still subsisting, it was notified through a letter dated 1<sup>st</sup> October, 2010 that Mitchell Cotts Freight Kenya Ltd had acquired all the properties owned by Seven Stars Limited on plot No. L.R. No. 19141, Mombasa Road.

Further, that Mitchell Cotts Freight Kenya Ltd in the said letter directed Forest Gump International Ltd to pay rent to its managing agent, and proceeded to proclaim assets owned by Forest Gump International Ltd for alleged non-payment of rent. Forest Gump International Ltd further alleges that Mitchell Cotts Freight Kenya Ltd has now threatened take lawful possession of its leased godowns for non-payment of rent arrears amounting to Kshs 3,038,436.00, and a copy of a demand letter dated 23<sup>rd</sup> August 2012 has been attached as evidence. It is also alleged that Mitchell Cotts Freight Kenya Ltd has already removed and vandalized Forest Gump International Ltd tools of trade, including motor vehicle among other valuables, and has dumped them in the open outside his leased godowns.

Forest Gump International Ltd relied on affidavits sworn and filed in Milimani CMCC No. 6317 of 2011 in which various deponents stated that Mitchell Cotts Freight Kenya Ltd was the proprietor and owner of the suit property. Forest Gump International Ltd claimed it had instituted Milimani CMCC No.6317/2011 to stop Mitchell Cotts Freight Kenya Ltd from selling its goods which had been proclaimed for non-payment of rent. Forest Gump International Ltd also relied produced as evidence correspondence from Mitchell Cotts Freight Kenya Ltd, notably letters dated 19<sup>th</sup> November, 2010, 7<sup>th</sup> February, 2012, and 23<sup>rd</sup> August 2012 containing instructions regarding the suit property, and also relied on a payment receipt dated 30.11.10 showing a deposit Kshs. 290,000/= it directly made into the account of Mitchell Cotts Freight Kenya Ltd.

According to Forest Gump International Ltd, Mitchell Cotts Freight Kenya Ltd was thereby estopped from denying ownership of the suit property, and the orders granted by the court on 25<sup>th</sup> September, 2012 were issued against the correct and *bona fide* owners of the suit property. Further, that Seven Stars Ltd therefore also lacks *locus standi* to sue or seek summary judgment against it. Forest Gump International Ltd admitted that its lease for the suit property expired on 31<sup>st</sup> January, 2012, and stated that the lease provided for extension which was frustrated by Mitchell Cotts Freight Kenya Ltd.

The counsel for Forest Gump International Ltd in submissions dated 3<sup>rd</sup> May 2013 argued that Mitchell Cotts Freight Kenya Ltd and Seven Stars Ltd had joined hands to ensure that it was evicted from the premises so as to avoid losses and damages occasioned to her properties. Further, that it was against the rules of natural justice to issue a tenant with a rental bill of over Kshs 4,173,246.00 while the tenant has been paying rent. Counsel urged the court to direct that an audited account be tabled by Mitchell Cotts

Freight Kenya Ltd to determine how much rent had been paid by Forest Gump International Ltd.

It was argued by the counsel that in the event the suit premises are found to belong to Seven Stars Ltd, Mitchell Cotts Freight Kenya Ltd be held accountable and ordered to refund all monies paid by Forest Gump International Ltd in respect of rent for godowns numbers 4 and 5. Lastly, the counsel urged that Seven Stars Ltd and Mitchell Cotts Freight Kenya Ltd be held accountable for the losses and damages suffered as a result of closure of her business and vandalized property, and that full accounts and inventory to be tabled before the court.

### **(b) The Case by Mitchell Cotts Freight Kenya Ltd**

Mitchell Cotts Freight Kenya Ltd on the other hand through affidavits sworn on 10<sup>th</sup> October 2012 and 28<sup>th</sup> September 2012 by its airfreight manager, Mr. Mugambi Muthamia, stated it was not the proprietor of the premises known as LR. No. 19141 and the godowns erected thereon. The said deponent annexed as evidence a copy of the title dated 20<sup>th</sup> May 1994 showing that the premises was registered in the name of Seven Stars Limited. Mitchell Cotts Freight Kenya Ltd averred that it is a shareholder of Seven Stars Ltd and exhibited a copy of a share certificate dated 15<sup>th</sup> October 2010 to this effect.

It was its contention that the orders granted on 25<sup>th</sup> September, 2012 were issued against a wrong legal entity as it is a separate legal entity from Seven Stars Limited, and that the letter dated 1<sup>st</sup> October, 2010 tendered by Forest Gump International Ltd cannot be used to imply that it is the proprietor of the suit property. Further, that Forest Gump International Ltd had also failed to disclose that there is no subsisting lease over the suit property as its lease expired on 31<sup>st</sup> January 2012.

Mitchell Cotts Freight Kenya Ltd further stated that it had seconded its officers to assist in the management and operations of Seven Stars Ltd, and contended that although most of the correspondences addressed to the tenants in the suit property originated from her, the leases had been executed between the registered owner and the tenants. Further, that since the said leases have not been assigned to it, no rights over the same could accrue in favour of or against it, and that any action taken by the Mitchell Cotts Freight Kenya Ltd would be deemed to have been done as agents of Seven Stars Ltd.

The counsel for Mitchell Cotts Freight Kenya Ltd filed submissions dated 3<sup>rd</sup> July, 2013, wherein it was argued that Mitchell Cotts Freight Kenya Ltd was not the registered owner of the suit premises and therefore, that she had been wrongly sued. The counsel submitted that a copy of the title to the suit premises had been tendered in evidence and had demonstrated that the lease subject of the suit was between the Forest Gump International Ltd and Seven Stars Ltd. Lastly, the counsel submitted that Forest Gump International Ltd had sued Mitchell Cotts Freight Kenya Ltd as the landlord of the suit property, and had tendered no evidence to prove that the lease was legally assigned to it, or that it had assumed ownership of the suit premises.

### **(c) The Case by Seven Stars Ltd**

The case by Seven Stars Ltd is that Forest Gump International Ltd entered appearance on 29<sup>th</sup> November, 2012 and has not filed any defence. Further, that Forest Gump International Ltd continues to unlawfully occupy the suit premises despite the lease having been terminated, thereby occasioning huge losses and inconveniences to the Seven Stars Ltd. The application by Seven Stars Ltd was supported by the affidavit sworn on 28<sup>th</sup> January, 2013 by its manager, Mr. Mugambi Muthamia, where he states that Forest Gump International Ltd has no defence capable of defending its claim.

The counsel for Seven Stars Ltd argued in submissions dated 2<sup>nd</sup> July, 2013 that in an application for summary judgment, the Defendant bears the burden to show that there are triable issues. Counsel urged the court to take into account the defence by Forest Gump International Ltd dated 5<sup>th</sup> February 2013 where the Defendant alleged that the Seven Stars Ltd was not the registered owner of the suit property, while at the same time admitting to having entered into a lease for the suit property with the said

company. The counsel submitted that Forest Gump International Ltd did not deny owing rent, and only maintained that Seven Stars Ltd was not the registered owner.

The counsel further submitted that Seven Stars Ltd had established that it was the landlord of the suit property where Forest Gump International Ltd was in breach of the lease agreement, and was therefore entitled to vacant possession. The counsel stated that Seven Stars Ltd had tendered documents in support of its claim for rent arrears and argued that the only issue for determination at the hearing of the suit was how much mesne profits she was entitled to.

### **3. The Issues and Findings**

I have read and carefully considered the pleadings, annexed evidence and submissions made. I will firstly address the a preliminary objection raised by the counsel for Mitchell Cotts Freight Kenya Ltd as regards the filing of the suit by Forest Gump International Ltd in ELC Suit 404 of 2013 without authority under seal. The preliminary objection raised is based on the provisions of Order 4 Rule 4 of the Civil Procedure Rules which provides as follows:

**“Where the plaintiff sues in a representative capacity the plaint shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaint shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises”**

This preliminary objection is obviously misplaced as Forest Gump International Ltd was not suing in any representative capacity, and is therefore dismissed.

I will accordingly proceed to consider the substantive issues arising herein which are as follows:

1. Whether the application and Plaint by Forest Gump International dated 25<sup>th</sup> September 2012 in in ELC Suit 404 of 2013 should be struck out or dismissed.
2. Whether summary judgment should be entered against Forest Gump International Ltd in in ELC Suit 828 of 2012.
3. Whether Seven Star Ltd has met the requirements for a mandatory injunction to issue against Forest Gump International Ltd for vacant possession of the suit property.
4. If the findings on the above issues are in the negative, whether Forest Gump International has met the requirements for the grant of the temporary injunctions sought in its application dated 25<sup>th</sup> September 2012 in in ELC Suit 404 of 2013.

On the issue of striking out of pleadings, Order 2 Rule 15 (1) of the Civil Procedure Rules provides as follows:

**“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

**(a) it discloses no reasonable cause of action or defence in law; or**

**(b) it is scandalous, frivolous or vexatious; or**

**(c) it may prejudice, embarrass or delay the fair trial of the action; or**

**(d) it is otherwise an abuse of the process of the court,**

**and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. “**

**It is also settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A.as follows:-**

**“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”**

It is evident from the foregoing arguments by the parties that triable issues have been raised in ELC Suit 404 of 2013, particularly the issue of whether Mitchell Cotts Freight Kenya Ltd was the registered proprietor or acted as agent of the registered proprietor of the suit property, and whether it received rent from, or dealt with the assets of Forest Gump International in this regard. These issues can only be decided upon after a full trial and the benefit of further evidence and examination of the same. It is therefore the finding of this Court that neither the application nor the Plaint filed in ELC Suit 404 of 2013 are amenable for striking out. Prayer 3 of the Notice of Motion dated 28<sup>th</sup> September 2012 filed by Mitchell Cotts Freight Kenya Limited in ELC 404 of 2013 is accordingly denied.

On the issue whether the prayer for summary judgment can issue in ELC Suit 828 of 2012, Order 36 Rules 1 and 2 of the Civil Procedure Rules provide as follows in this regard:

**1. (1) In all suits where a plaintiff seeks judgment for—**

**(a) a liquidated demand with or without interest; or**

**(b) the recovery of land, with or without a claim for rent or *mesne* profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,**

**where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or *mesne* profits.**

**(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.**

**(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.**

**2. The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.**

I have perused the Plaintiff dated 24<sup>th</sup> October 2012 filed in ELC Suit 828 of 2012, and note that apart from the prayers for vacant possession of the suit property and mesne profits, Seven Stars Ltd is also seeking payment of a liquidated claim in the form of rent arrears of Kshs 4,173,246.60 from Forest Gump International Ltd. It was held by the Court of Appeal in **Gurbaksh Singh & Sons Limited vs Njiri Emporium Ltd, (1985) KLR 695** that held that for purposes of summary judgment, a sum does not become liquidated just because it is claimed, but only if it is agreed or the events on which it is based reveal it can be calculated independently of the sum claimed. If the ascertainment of the sum claimed requires investigation beyond mere calculation, then the sum is not a debt or liquidated demand, but constitutes damages at large.

In the present suits the sum of Kshs 4,173,246.60 claimed as rent arrears is disputed by Forest Gump International Ltd, who claim that they have paid rent to Mitchell Cotts Freight Kenya Ltd. The amount of rent arrears due will therefore require to be canvassed and proved by the parties herein, and does not therefore qualify to be a liquidated demand for which summary judgment can issue. I also note in this regard that Forest Gump International did file a Defence dated 5<sup>th</sup> February 2013 in response to the claim by Seven Stars Ltd which will need to be considered by the court.

As to the issue as to whether a mandatory injunction can issue against Forest Gump International Ltd to deliver up vacant possession of godown 4 in the suit premises, it was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. The reasons given in the foregoing as to why summary judgment cannot issue in ELC 828 of 2013 show that this is not a clear case to warrant a mandatory injunction, as there are outstanding issues that still need to be addressed by the parties herein, particularly as to the amount if any of rent payable by Forest Gump International Ltd to Seven Stars Ltd.

In addition, it is not in dispute that Forest Gump International entered into a lease agreement with respect to godown 4 situate at Nairobi Land Reference Number 19141 with Seven Stars Ltd on 7<sup>th</sup> September 2009 for a period of 5 years and 3 months. This lease has therefore not yet expired, and Seven Stars Ltd did not bring any evidence to show that there has been lawful termination of the same. The lease entered into on 1<sup>st</sup> November 2006 for a period of 5 years and 3 months is the one that expired on 31<sup>st</sup> January 2012, and was in relation to godown 5 on the same premises.

It is thus the finding of this court that neither the summary judgment nor mandatory injunction sought can issue in the circumstances of ELC Suit 828 of 2012, and the prayers in the Notice of Motion filed in the said suit by Seven Stars Ltd dated 28<sup>th</sup> January 2013 are accordingly denied.

I will therefore proceed to determine the last issue as to whether Forest Gump International have met the requirements for the grant of a temporary injunction as laid down in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**. Forest Gump International Ltd has therefore shown their entitlement and interest in godown 4 in light of the lease agreement entered into with Seven Stars Ltd on 7<sup>th</sup> September 2009.

Forest Gump International Ltd has also brought evidence to show that Mitchell Cotts Freight Kenya Ltd gave instructions to it as to the payment of rent and management of the suit property, purporting to be owners of the suit property. Mitchell Cotts Freight Kenya Ltd is also alleged to have dealt with the assets of Forest Gump International Ltd in this capacity. Mitchell Cotts Freight Kenya Ltd as on the other hand denied such ownership, but has stated that any instructions it may have given were as agents of the registered proprietor. It has also admitted to being a shareholder of Seven Stars Ltd which is the

registered proprietor of the suit property.

To this extent it is the finding of this court that Forest Gump International Ltd has established a *prima facie* case, as Mitchell Cotts Freight Kenya Ltd did interfere with its leasehold interest over the suit property and particularly godown 4 thereat. I note in this regard that Order 40 Rule 1 and 2 of the Civil Procedure Rules do not require a Defendant to be a registered owner of property for a temporary injunction to issue, the only requirements being that the said Defendant is threatening to either waste, damage, or alienate, dispose or commit any other injury with respect to the property that is the subject matter of the suit. I need to add in this respect that the reliefs sought by Forest Gump International Ltd of audited accounts of the rent paid to Mitchell Cotts Freight Kenya Ltd and that due to Seven Stars Ltd will need to be canvassed and determined at the full trial of the suits herein.

I accordingly allow the Notice of Motion dated 25<sup>th</sup> September 2013 filed by Forest Gump International Ltd in ELC Suit 404 of 2013, and order that Mitchell Cotts Freight Kenya Ltd, by themselves, their servants, agents or otherwise be and are hereby restrained from undertaking any further construction on, or interfering with the quiet and peaceable enjoyment and free and unhindered use and access by Forest Gump International Ltd of the property known as Godown Numbers 4 situated at Nairobi Land Reference Number 191411, along Mombasa Road and their assets thereat, pending the hearing and determination of the suits filed herein or until further orders. Prayer 2 of the Notice of Motion dated 28<sup>th</sup> September 2012 filed in ELC Suit 404 of 2013 by Mitchell Cotts Freight Kenya Ltd is accordingly denied with respect to the orders given in relation to godown Numbers 4 situated at Nairobi Land Reference Number 191411 .

The costs of the Notices of Motion dated 25<sup>th</sup> September 2012, 28<sup>th</sup> September 2012 and 28<sup>th</sup> January 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_14<sup>th</sup> \_\_\_\_ day of \_\_\_\_October\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**