



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 592 OF 2011

NDARUGU STONES LIMITEDPLAINTIFF/RESPONDENT

VERSUS

WAKIGWE HOLDINGS LIMITED DEFENDANT/APPLICANT

RULING

1. There are two applications in this matter the Court has to deal with. The 1st application dated 27th October 2011 was filed by the plaintiff under order 3 Rule 2 (d), Order 40 Rules 2, 4 of the Civil Procedure Rules Sections 1A (2), 3A & 63 (c) and (e)of the Civil Procedure Act, Cap 21, Laws of Kenya, seeking the following orders

a) That this Honourable court be pleased to grant a temporary injunction restraining the defendant whether by itself, its servants or agents and/or otherwise whomsoever from barring the plaintiff from entering/accessing the parcel of land known as L.R. No. 25468/11 South West of Thika Municipality leased to the plaintiff by the defendant pending the hearing and determination of this suit.

b) That this Honourable Court be plead to grant a temporary injunction restraining the defendant whether by itself, its servants or agents and/or otherwise whomsoever from entering upon the parcel of land known as L. R. No. 25468/11 s

South West of Thika Municipality leased to the Plaintiff by the Defendant for the purpose of evicting or ejecting the plaintiff or for the purpose of removing the plaintiffs machinery/equipment and any other assets thereon pending the hearing and determination of this suit

c) That this Honourable court be pleased to grant a temporary injunction restraining the defendant whether by itself, its servants or agents and/or otherwise whomsoever from taking any action whatsoever that would interfere with the plaintiff's peaceful and quiet possession of the parcel of land Known as L. R. No. 25468/11 South West of Thika Municipality leased to the Plaintiff by the defendant pending the hearing and determination of this suit.

d) That the defendant be condemned to bear the costs of this application.

2. The application is based on the following grounds;

a) The plaintiff is the current lessee on a parcel of land known as L.R. No. 25468/11 South West of

Thika Municipality (hereinafter referred to as “the site”) where it has been carrying out stone mining since 1st August 2003 and is expected to continue to do so for the period of the lease being 10 years i.e until 1st August 2013.

b) By letters from the defendant dated 21st February 2011 and 31st July 2011, the defendant purported to serve the plaintiff with a notice to stop its operations and vacate the premises. The defendant also directed the plaintiff to level the waste material heaps from the excavated quarries which action in terms of the lease can only be undertaken at the end of the tenancy which in the eyes of the plaintiff is 1st August 2013.

c) The defendant has veered from its obligations in the lease by not allowing the plaintiff to peaceably and quietly enjoy the premises as it has issued notices to vacate and been threatening forceful expulsion of the plaintiff from the site in default.

d) There being no justifiable or other reasons for the plaintiff to comply with the defendant’s demands, the plaintiff has remained on the premises and has been continuing to receive threats and ultimatums from the defendant.

e) The plaintiff is paid up until 31st October 2011 in terms of rent, royalties and monies payable for the idle periods on site.

f) The plaintiff through its advocates received a letter on 26th October 2011 wherein the defendant has barred the plaintiff from entering the site effective 25th October 2011 and is now very apprehensive that if not restrained by this Court, the defendant may reclaim the premises by force and subject the plaintiff to irreparable harm yet the plaintiff is legally on the site and has no arrears on rent or other payments

g) The defendant has also maintained that it shall not be responsible for any loss/damage to equipment still remaining on the said premises which is alarming to the plaintiff as the said equipment is very expensive.

h) The defendant has on 27th October 2011 stationed guards at the site and the plaintiff cannot gain entry thereon. The defendant ought to be restrained from continuing to breach the terms of the agreement herein.

i) No prejudice will be caused to the defendant if this application is allowed. On the contrary the plaintiff stands to suffer greatly if its operations are hampered since the site is and is intended to be until 1st August 2013, the place of business for the plaintiff.

3. The 2nd application dated 24th November 2011 was filed by the defendant under Order 40 Rules 1, 2 and 7 Sections 3A and 63 of the Civil Procedure Act, Chapter 21 of the Laws Kenya and all enabling provisions of the Law, seeking the following orders;

a) This Honourable Court be pleased to vary, discharge and/or set aside the ex-parte interim orders issued herein on the 31st day of October 2011.

b) A temporary injunction be issued restraining the plaintiff by itself, agents, servants, employees or otherwise howsoever from exploring, excavating, exploiting, extracting, removing, transporting elsewhere and selling mines, minerals and in particular stones, chips, and other products from the defendants piece of land situated South West of Thika Municipality in the Kiambu District containing by measurement 6.826 Hectares and known as LR 25468/11 (hereinafter referred to as “ the demised premises”) pending the hearing and determination of this suit.

c) The costs of this application be provided for.

4. The application is based on the following grounds:-

i. The defendant/Applicant is registered as free hold proprietor, entitled to the possession of all that piece of land situated South West of Thika Municipality in the Kiambu District containing by measurement 6.826 Hectares and known as L.R 25468/11 (hereinafter referred to as “ the demised premises”)

ii. The defendant avers and states that on 1st August, 2003 or thereabouts, the defendant entered into a temporary lease agreement with the plaintiff herein for the lease of the demised premises which agreement was terminated on 31st August 2011.

iii. The plaintiff approached this Honourable Court on the 31st October 2011 claiming that it was the current lessee of the defendant which fact the plaintiff knew to be misleading as the temporary lease agreement between the plaintiff and the defendant was lawfully terminated on 31st August 2011 vide a notice issued to the plaintiff by the defendant on the 31st July 2011.

iv. On the basis of the above misrepresentation, the plaintiff obtained interim orders to inter alia stop the defendant from barring the plaintiff from accessing the demised premises which orders the plaintiff is using to waste away the demised premises to the detriment for the defendant who is the registered and beneficial owner for the demised premises.

v. The plaintiff is applying the said orders to unlawfully waste away the demised premises and to carry out quarrying activities which were not permitted by the said order and without any regard to the fact that the temporary by the said order and without any regard to the fact that the temporary lease agreement between the parties had since been terminated.

vi. The plaintiff's operation and possession of the demised premises was singularly premised on the compliance with the terms of the temporary lease agreement as expressed under clause 4(e) for the temporary lease agreement.

vii. The plaintiff blatantly breached all the above conditions and terms of the temporary lease agreement thus compelling the defendant to terminate the same on 31st August 2011.

Particulars of the plaintiff's breach of the temporary lease agreement.

a) Deliberately refusing to comply with clause 7 of the temporary lease.

b) Deliberately and willfully refusing to comply with clauses 2(c) and 3(a) and (b) of the temporary lease agreement by choosing to pay the rent as and when it feels like in direct contravention of the terms of the agreement by choosing to pay the rent as and when it feels like in direct contravention of the terms of the agreement.

c) Engaging in unlawful practice by failing to comply with the NEMA requirements and abandoning used quarry sites without refilling the same and thus degrading the environment and wasting the defendant's land.

d) Dumping the waste materials from its quarrying activities anywhere within the demised property thus creating health hazard to the people operating in the quarry.

e) Denying the defendant reasonable and sufficient revenue from its property by keeping the property idle for a long period and thus making no business sense of the temporary lease agreement herein.

f) Refusing to vacate the demised premises upon the termination of the temporary lease agreement

herein.

viii. The plaintiff/Respondent did not challenge the termination of the temporary lease as it was fully aware that the same was no longer tenable following its inability to comply with the terms thereof.

ix. The plaintiff has remained in occupation of the demised premises as a trespasser since the termination of the temporary lease agreement and is intentionally wasting the demised premises and will continue to do so unless this Honourable Court intervenes.

x. As result of the foregoing, the applicant's right to the suit property has been contravened and threatened and the plaintiff is unable to enjoy its property and risks losing the same as the plaintiff/respondent intends to unlawfully and mischievously occupy the demised premises and will proceed to do so unless this Honourable Court intervenes.

xi. The plaintiff's failure to disclose to this Honourable Court that the subject tenancy agreement herein had been since terminated and that the plaintiff did not challenge the termination but had instead stopped operating the quarry is inexcusable and a fraud on this Honourable.

xii. It is in the circumstance only fair and just that the orders sought herein should be granted.

5. The plaintiff filed a supporting affidavit dated 27th October 2011 sworn by Peter Ndungu Mwaura a director of the plaintiff company and a supplementary affidavit dated 9th February 2011 sworn by the said director. The defendant filed a supporting affidavit dated 24th November 2011, sworn by Joseph W. Kigwe the managing director of the defendant company to the application dated 24th November 2011 and a replying affidavit dated 24th November 2011 in response to the plaintiff's application dated 27th October 2011.

6. The undisputed facts in this case are as follows;- The defendant owns L.R 25468/11 South West of Thika Municipality. In August 2003, the defendant and the respondent entered into an agreement for lease for a period of ten years. The Respondent was to carry out stone mining/quarry business and related activities. That on the 28/7/2011 the defendant demanded that the respondent pays the sums outstanding at the time together with advanced payments for August, September and October 2011 amounting to kshs.559,573/-. The defendant also demanded that the plaintiff ceases operations, remove their machineries and level the waste materials heaps from their excavated queries. The plaintiffs paid the said sums and the defendant acknowledged. The defendants wrote to the plaintiff through their lawyer in a letter dated 19/9/2011 stating that they will not continue with the tenancy. The plaintiff continued to stay in the premises and on the 27th October 2011 they moved to court with the 1st application seeking injunctive orders.

7. According to the plaintiff, they are not in breach of the lease agreement as stated by the defendant; that the defendant's demand that they vacate the premise is not justifiable as they have paid the outstanding sum, that the delay previously caused was unintentional and should not elicit such a harsh reaction, that the defendant allegations in their letter of 19th September 2011 that they are in breach of statutory and local authority requirements relating to stone harvest cannot stand as the lease governing the parties herein provides that any apparent or perceived non compliance with the said requirements shall not be deemed to be a breach of the agreement actionable by the lesser. The plaintiff avers that the defendant cannot use this factor to evict them from the site whether it's true or not.

8. The plaintiff avers further that after 19/9/2011 whilst in the suit premises, they received threats and ultimatums to vacate the site and this culminated into a letter dated 25/10/2011 where they were barred from entering the site as from 25/10/2011. That they have equipment at the site for which the defendant states it shall not be responsible for any loss or damage. That the defendant has deployed watchmen at the site and it is apprehensive that the defendant may reclaim the premises and subject them to irreparable damage. That after a meeting between the parties where the alleged breach purged, the defendant allowed it to continue using the premises and therefore the defendant is estopped from pleading the same.

9. According to the defendant, the plaintiff has misled the Court claiming that it is the current lessee for the Defendant which fact the plaintiff knows is misleading as the temporary agreement for lease between the plaintiff and the defendant was lawfully terminated on 21st February 2011 vide a notice issued to the plaintiff by the defendant on the 21st February 2011; that on the basis of this misrepresentation, the plaintiff obtained interim orders to inter alia stopping the defendant from barring the plaintiff from accessing the demised premises, which orders the plaintiff is using to waste away the demised premises to the detriment of the defendant who is the registered and beneficial owner of the demised premises; that the plaintiff is applying the said orders to unlawfully waste away the demised premise and to carry out quarrying activities which were not permitted by the said order and without any regard to the fact that the temporary lease agreement between the parties had since been terminated; that the plaintiff's operation and possession of the demised premises was singularly premised on the compliance with the terms of the temporary lease agreement as expressed under clause 4(e) of the temporary lease agreement; that the plaintiff blatantly breached all the above conditions and terms of the temporary lease agreement thus compelling the defendant to terminate the same on 31st August 2011 (particulars of breach as stated in the grounds); that the plaintiff has remained in occupation of the demised premises as a trespasser since the termination of the temporary lease agreement and is intentionally wasting the demised premises and will continue to do so unless this Honourable Court intervenes; that the defendant's right to the suit property has been contravened and threatened and the defendant is unable to enjoy its property and risks losing the same as the plaintiff intends to unlawfully and mischievously occupy the demised premises and will proceed to do so unless this Honorable Court intervenes; that the plaintiff's actions if allowed to proceed will cause irreparable harm to the defendant who is the lawful and beneficial proprietor of the suit property herein and render this suit herein nugatory.

10. In the supplementary affidavit of the plaintiff, the plaintiff denies the defendant's allegation against it, in brief as follows; that it did not approach the Court fraudulently but did so as the current legal lessee of the said site since the tenancy period had not expired, and they had fully paid up rent up to 31st October 2012; that it is not applying the Court orders to unlawfully waste away the site as alleged by the defendant; that the plaintiff is in occupation of the site pursuant to the agreement herein and if the defendant felt that the plaintiff was not complying with any condition of the agreement, it ought to have at the earliest opportunity sought redress from the Courts since the agreement does not have a termination clause; that the defendant is the one who has breached the said lease agreement by interrupting the peaceful and quiet enjoyment of the site by the plaintiff as required by the lease agreement; that the defendant has failed to disclose that it has been a long time customer of the plaintiff's stones and in most cases the defendant would make credit purchases and pay in arrears (the plaintiff elaborates their business dealings with the defendant at paragraph 12); that they have never received any complaint from NEMA for engaging in unlawful practice by failing to comply with its statutory requirements and these allegations by the defendant are made in bad faith; that the plaintiff has no justifiable or any reason whatsoever to vacate the site before expiry of the lease period. The plaintiff states the defendant's breach of the agreement for lease at paragraph 15.

11. Counsels made oral submissions on the two applications which I have carefully considered together with the affidavits filed and the cases cited. The plaintiff cited two cases namely *Geilla Vs. Cassman Brown & Co. Ltd (1973) EA 358* and *Nairobi Court of Appeal –M/S Gusii Mwalimu Investment Co. Ltd vs. M/S Mwalimu Hotel Kisii Ltd Civil Appeal No. 160 of 1995*. The defendant cited the following case;- *Mrao Ltd V. First America Bank of Kenya Ltd 72 others and Agip (K) Ltd V. Vora*.

12. The parties in this suit have each sought orders of injunction. In determining whether they are entitled to the orders sought I have considered the principles set out in the case of *Geilla Vs. Cassman Brown & Co. Ltd EA. 1973*, that;

- i. *That an applicant has a prima facie case with a probability of success;*
- ii. *That an applicant will suffer irreparable injury if the injunction is not granted*
- iii. *If the Court is in doubt, it will decide the application on the balance of convenience.*

13. The plaintiff's case is that there is a valid agreement for lease between them and the defendant for ten years terminating in August 2013, that they have fully complied with the terms of the agreement, that there was no termination clause and that the defendant is in breach of agreement for lease. The defendant's case on the other hand is that the plaintiff was given a termination notice of the agreement for lease through their letter dated 21st February 2011 and further in their letter dated 31st July 2011 notified the defendant to stop any further operations at the site. The parties have agreed that they had an agreement for lease and under clause 7 of the said agreement a formal lease was to be drawn. This was not done. The plaintiff blames the defendant for failing to avail the title to enable their lawyer prepare the lease. The defendant claims that the lease had a termination clause and they give their reasons for terminating the agreement in their letter dated 21st of February 2011, that there was noncompliance of the payment terms as contained in the lease agreement of both the monthly rent and royalties. The defendant state that the plaintiff was in breach of clause 4(e) of the agreement which states that

“the lessee paying the rent hereby reserved together with the payments herein before the agreed and performing and observing the covenants agreements conditions restrictions stipulations and provisions herein contained or implied and on his part to be performed and observed shall peaceably and quietly possess and enjoy the premises during the said term without any interruption from or by the lessor and or any person rightfully claiming from or under him”.

14. From the letter dated 26th August 2011 from Tongoi and Company Advocates it is clear that the plaintiff was paying for the outstanding debts of Kshs.559,573/- as at 31st July 2011. It is clear that the plaintiff was in arrears and was clearing an outstanding debt. Under clause 3 of the agreement the parties agreed on the rent to be paid. It is the plaintiff's failure to pay the rent that led to the notice of termination dated 21st February 2011. The plaintiff only moved to Court when it was asked to move the machinery and barred from using the premises. As correctly point out by Mr. Agwara the plaintiff never challenged the said termination notice. I find that the plaintiff has failed to establish *prima facie* case to warrant the injunction sought. Even if there was no termination clause in the agreement for lease the defendant gave the plaintiff notice of termination with reasons for doing so. The plaintiff cannot use the reason that since the continued to stay in the premises, the defendant is estopped from seeking his premises back or effecting the termination notice. The plaintiff in the supplementary affidavit has raised issues in the business transactions that they had with the defendant but that is not the subject of this suit. The plaintiff is out of the premises as of now and was still in rent arrears at the time the application was heard inter partes. I find that it will not suffer any irreparable loss as it can file a suit on any claim it has for loss of business if at all. I find that the facts in the case of *Gusii Mwalimu Investment Co. Ltd vs. M/S Mwalimu Hotel Kisii Ltd* is not at par with this suit but I note the findings. I therefore find no merit in plaintiff's application dated 27th October 2011. I discharge the interim orders granted on the 31st of October 2011 and dismiss the application dated 27th October 2011 with costs to the defendant.

15. The defendant has sought an injunction against the plaintiff in their Notice of Motion dated 24th November 2011. The defendant states it is the proprietor of the site and state that it gave the plaintiff a notice after breaching the agreement for lease. I find that they have shown the plaintiff was in breach of the agreement for lease by not paying the rent. The defendant's fear is that if the plaintiff continues to remain in possession of the premises the property will be laid to unlawful waste. I agree with them and find that they have established a *prima facie* that warrants the injunction that is sought. There is danger that the property will be wasted if the orders sought by it are not granted. The balance of convenience in this case tilts in the favour of the defendant being being the persons with an interest in the land. I find defendant is entitled to the injunction sought. I therefore grant a temporary injunction restraining the plaintiff by itself, agents, servants, employees or otherwise howsoever from exploring, excavating, exploiting, extracting, removing, transporting elsewhere and selling mines, minerals and in particular stones and quarry products and processing all building and construction stones, chips, and other products from the defendant's piece of land situated South West of Thika Municipality in the Kiambu District L. R 25468/11, pending the hearing and determination of this suit. The plaintiff shall pay cost of application. Orders accordingly.

Dated and delivered this 26th Day of April 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk