



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Suit 550 of 2011

ALPHA LOGISTICS KENYA LIMITED.....1ST PLAINTIFF

MICHAEL NJERU.....2ND PLAINTIFF

ANN EVERLYN WAMBUI.....3RD PLAINTIFF

VERSUS

EDCOM LIMITED.....1ST DEFENDANT

NELSON GITHUA.....2ND DEFENDANT

RULING

Before the Court are two applications dated 5th December 2011 and 13th January, 2012 respectively. The former is a Motion on Notice by the plaintiff seeking the following orders:

“1. This Application be certified as extremely urgent and for the reasons as will be recorded, for the Plaintiffs/Applicants are bound to suffer irreparable and serious mischief and therefore the urge for service of the same to be dispensed with in the first instance.

2. This Honourable Court be pleased to issue a Temporary Injunction Order restraining the Defendants whether acting by themselves or through their agents, servants or employees from doing any of the following acts, that is to say, interfering, interrupting or effecting any restrictions inconsistent with the Plaintiffs’ contractual or legal rights or prejudicial to the Plaintiffs’ peaceful occupation of the Lease premises on 2nd Floor, New Annexe, Kilimani Business Centre on Land Reference Number 2/642, Kirichwa Road, Nairobi pending the hearing and determination of this suit.

3. This Honourable Court be pleased to issue an order compelling the Defendants to allow the Plaintiffs, their employees, agents, servants, customers and guests unconditional access and

occupation of the Lease premises on 2nd floor, New Annex, Kilimani Business Centre on Land Reference Number 2/642, Kirichwa Road, Nairobi pending the hearing and determination of this suit.

4. This Honourable Court be pleased to issue a Temporary Injunction Order restraining the Defendants whether acting by themselves or through their agents, servants or employees from doing any of the following acts, that is to say, interfering, interrupting or effecting any restrictions inconsistent with the Plaintiffs' contractual or legal rights or prejudicial to the Plaintiffs' peaceful occupation of the Lease premises on 2nd Floor, New Annexe, Kilimani Business Centre on Land Reference Number 2/642, Kirichwa Road, Nairobi pending the hearing and determination of this Application inter partes.

5. A declaration that the acts and conduct of the Defendants of blocking the Plaintiffs from accessing or occupation of their offices at 2nd floor, New Annexe, Kilimani Business Centre on Land Reference Number 2/642, Kirichwa Road, Nairobi are unlawful in that:

(a) The acts and conduct of the Defendants are not contemplated or provided for in the Lease dated 5th February, 2009.

(b) The conduct and acts of the Defendants are prejudicial and detrimental to the rights and interests of the Plaintiffs/Applicants.

(c) The consequential effects of the conduct and acts of the Defendants have the effect of defrauding the Plaintiffs'/Applicants' rights and interests in the Lease dated 5th February, 2009".

6. Costs of this Application be borne by the Defendants in any event.

Of relevance to the present ruling are prayers 2, 3, 5 and 6 of the said application.

The later application is similarly a Motion on Notice brought by the defendant whose only relevant prayers are those seeking an order that the first plaintiff do deliver vacant possession of the suit premises namely office premises on 2nd Floor New Annex Kilimani Business Centre erected on L R No. 2/643 Kirichwa Road, Nairobi to the 1st defendant forthwith and unconditionally and for costs.

From the foregoing, it is clear that the consideration of the defendant's application will only become necessary if the plaintiff's application is found to be unmerited. Accordingly, I wish to determine the merits of the plaintiff's application first.

The said application is supported by an affidavit sworn by **Michael Njeru** on 5th December 2011. In the said affidavit the deponent who claims to be a Director of the 1st Plaintiff and one of the Guarantors herein states vide a guaranteed lease entered into between the 1st plaintiff and the 1st defendant on or about 5th February 2009 in respect of premises on the 2nd Floor New Annex Kilimani Business Centre on Land Reference Number 2/642, Kirichwa Road, Nairobi which lease was meant to be in force until 31st December, 2014 the 1st plaintiff has been in peaceful occupation of the leased premises since 1st January 2009 and has faithfully met all its obligations including timely payment of rent. However, according to the deponent, on 1st December 2011, his accountant informed him that the premises' caretaker one Nelson Githua had informed him that he would prevent the plaintiffs from accessing the said premises with effect from 2nd December 2011. Faced with this threat the deponent protested to the 1st defendant vide a letter on 1st December 2011 which letter, according to the deponent, was neither acknowledged nor responded to. Apparently the said threat was carried out on 2nd December 2012 by G4S Security guards. When the deponent sought an explanation from one **Edward Ndirangu**, a director of the 1st defendant, he was informed that the latter would use all means possible to ensure no business was conducted on the suit premises by the plaintiffs. It is the plaintiffs' position that the said action was taken without notice, an

action which the deponent contends has placed the 1st plaintiff at the risk of being insolvent and being wound up as it has ceased business thus exposing it to third party claims. Without physical offices, the deponent deposes that the 1st plaintiff is exposed to adverse actions by the Kenya Revenue Authority, with respect to Customs License and restrictions from procurement entities and or Public Procurement Oversight Authority, for want of physical offices and therefore, lose its means of livelihood. According to legal advice, the present application was informed by the need to mitigate further losses and damages as a result of the defendants' actions.

The application was opposed by way of a replying affidavit sworn by **Edward Ndirangu Muigai** on 30th January 2012. According to the deponent, he is a director of the 1st defendant and in opposing the application the deponent relied on an affidavit sworn by him on 13th January 2012 together with the annexures thereto. According to the said affidavit, the deponent swore the same on behalf of the 2nd defendant who is an employee of the 1st defendant and **Patricia Wambui Muigai**, his co-director in the 1st defendant company. The gist of the said affidavit is that there was a lease between the 1st plaintiff and the 1st defendant for a term of six years effective from 1st January 2009 under which rent was payable in advance with the landlord's right to repossess in event of a default in payment thereof for a period of more than 14 days from due date. When the 2nd defendant went to collect the rent for the last quarter in the month of September 2011, the 2nd plaintiff informed him that he would not be paying rent because they were vacating the premises after which the 1st plaintiff abandoned the premises save for furniture and other equipment locked in the premise. No rent was hence paid for the last quarter of the year 2011 within fourteen days of October 2011 as provided under the lease effectively entitling the 2nd defendant to repossess. It was only after the filing of the suit, the deponent contends, that the 1st plaintiff drew a cheque which it backdated to 1st October 2011 and sent vide a letter dated 7th December 2011 which cheque was returned unpaid due to insufficient funds. Whereas the rent for the year 2012 was due on or before the 1st January 2012 the same remains unpaid making the outstanding amount to Kshs. 1,127,520.00. According to legal advice from their advocates, the lease has terminated by operation of law and the 1st plaintiff has lost the right of possession. It is further deposed, based on the advocate's advice, that under the lease agreement the right of possession reverts to the landlord after the lapse of 14 days; the right of possession is only available to a rent paying tenant who the 1st plaintiff is not; the 2nd plaintiff effectively abandoned the premises since last October 2011 and the 1st defendant is therefore entitled to vacant possession of the suit premises. According to the deponent, it is greatly unfair for the 1st Plaintiff to continue occupying the suit premises without paying rent thereby denying the 1st defendant returns on its investment.

The application was prosecuted by way of written submissions which submissions were highlighted by counsel. In their submissions, the plaintiffs submit that the payment of the rent for the last quarter of the year 2011 was delayed as a result of the defendant's refusal to collect or accept the plaintiffs' cheque therefor. Accordingly the plaintiffs rely on **Brooms Legal Maxims** at page 191 to the effect that no man shall take advantage of his own wrong to gain the favourable interpretation of the law. The alleged excuse given for failure to accept the cheque being that the plaintiffs had intimated an intention to vacate the suit premises is, in the said submissions, dismissed as a cruel gimmick to justify the plaintiffs' eviction. To interpret the refusal by the defendant to accept the rent as a default to pay rent, it is submitted, would amount to allowing the defendants to take advantage of their impugned conduct so as to evict the plaintiffs from the suit premises. The court is invited to take judicial notice of the fact that a legal person such as the plaintiff (sic) is incapable of verbal communication. It is further submitted that the 2nd defendant has not denied receipt of the letter protesting the defendants' intention to deny the plaintiff access to the suit premises.

It is the plaintiffs' contention that the defendants' conduct was illegal, unreasonable and a breach of the lease and unless the said conduct is restrained and rectified by the court, it will cause unmitigated loss and damage and bring the law into disrepute and breed unbridled impunity and lawlessness. As the plaintiff is a lawfully rent paying tenant it is entitled to quiet enjoyment of the tenancy and in event that there was a default, the plaintiff was entitled to a 14 day written notice which was never issued, it is submitted.

Accordingly, it is submitted, the plaintiffs are entitled to legal remedies which include but not limited to the return of the tenancy premises and restraint orders not to interfere with the plaintiffs' quiet occupation thereof. Since the averments in the supporting affidavit are not denied or traversed, it is submitted, they are deemed to be admitted. It is further submitted that in the absence of a replying affidavit sworn by the 2nd defendant the orders sought against the 2nd defendant are unopposed and hence admitted. From the foregoing, it is the plaintiffs' contention that they have established a *prima facie* case for the purposes of an injunction.

With respect to the issue whether the plaintiffs stand to suffer irreparable loss, it is submitted that the plaintiff's business is clearing and forwarding and related services which require that a person has a physical address before he can be issued with customs licence and procurement permits. If the said licences are denied due to lack of physical address, the plaintiffs state that the 1st plaintiff will be dissolved. According to the plaintiffs the defendants' action has caused the plaintiffs loss of credibility, reputation and goodwill which is its stock-in-trade which is cannot be quantified. The defendants, however, stands to suffer no prejudice since they will continue receiving rent. The plaintiffs have also invited the court to take into account the defendant's conduct in these proceedings. In his oral address to the court, **Mr. Mutuli**, learned counsel for the plaintiff submitted that in addition to the parties' rights set out in the lease, if the plaintiffs delayed in the payment of rent, the 1st defendant had a right to levy distress under **section 3** of the *Distress for Rent Act*. He reiterated that the *modus operandi* by the parties was that the rents were to be collected by the 1st defendant's caretaker who delayed in collecting the same. It is further submitted that even if the defendant had a right to take possession under the lease, the same right was not formally exercised but instead the defendants employed acts of harassment and intimidation. It is further submitted that the exercise of that right required a court order. On the issue of the backdated cheque the court was referred to paragraphs 8 and 9 of the amended plaint wherein it is pleaded that the delayed payment was due to the failure by the plaintiff's caretaker to collect the cheque and the same was returned unpaid due to the fact that the plaintiffs' bankers were unable to contact the plaintiff's to confirm payment since the plaintiffs had no access to their offices.

On their part the defendants submitted that the tenant having breached *clause 4(b)* and *5(b)* of the Lease by giving a cheque for the rent for October/December 2011 on 7th December 2012 through a backdated cheque which was returned unpaid and tendering the rent for January/March 2012 on 18th January 2012 outside the Fourteen days envisaged by the lease. Accordingly, it is submitted, the tenant has lost the right of possession under the said clauses. Reliance is placed on **Shah vs. Shah [1980] KLR**. Having failed to pay rent, the defendants submit, the tenant moved the court with unclean hands and therefore does not deserve the equitable remedy of injunction and the case of **Rinya Hospital vs. Co-operative Bank of Kenya Limited HCCC No. 23 of 2008** is relied upon as an authority for this proposition. It is for the foregoing reasons that the defendants submit that the tenant has no *prima facie* case with a probability of success and neither can it plead irreparable loss when it is the author of its own position. On the issue of balance of convenience the defendants submit that the landlord is entitled to a return on its investment and granting injunctive orders to a tenant who is not paying rent as covenanted would amount to denying the Landlord the return on its investment. It is also based on the foregoing reasons that the defendants want their prayer for vacant position upheld by the court. In his oral address, **Mr. Thiga**, learned counsel for the defendants submitted that the right of possession was 14 days after failing to pay rent on due date. The obligation to pay the rents was squarely on the plaintiffs and therefore the plaintiff's contention that the defendants' caretaker did not collect the cheque is dishonest. The tenancy not being a protected one, no court order was required to take possession, it is submitted.

Having considered the applications, the affidavits and submissions both oral and written, I form the following view of the matter. The conditions necessary for the grant of interlocutory injunction in this country are generally accepted to be the ones laid down in **Giella Vs. Cassman Brown & Co. Ltd. [1973] EA 358** in which Spry, VP who delivered the leading judgement of the Court stated as follows:

“The granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially...The conditions for grant of an interlocutory injunction are now well settled in East Africa. First, 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

The foregoing conditions are, however, not exhaustive. At an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties. The remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of **section 1A(2)** of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under **section 1A(1)** of the said Act in exercising the powers conferred upon it under the Civil Procedure Act or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.

Therefore, the first issue for consideration by the Court is whether a prima facie case has been made out. It was held by the Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** that:

“The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case”.

From the affidavits and the submissions it is clear that under *clause 5(b)* of the lease agreement in

question, the non-payment of rent for a period of 14 days after due date whether demanded or not entitled the landlord to enter upon the premises and repossess the same without prejudice to any right of action or remedy of the Landlord in respect of any antecedent breach of any covenant by the tenant. In light of the clear provisions of that clause I am unable to infer the necessity of a court order in event of breach of the terms of the said clause. At common law one of the remedies available to a landowner against trespassers is the remedy of self-help and in this case this remedy seems to have been incorporated by the terms of the lease. The efficacy of this remedy was recognised by **Ringera, J** (as he then was) in **Mugo & Another vs. Kiragu & 5 Others [2002] 2 KLR 453**. Considering the said remedy the Court of Appeal in **East African Railways Corporation vs. David Chege Karangi [1988] KLR 108; [1988-92] KAR 41** stated as follows:

“Section 83(2) of the East African Railways Corporation Act (Cap 18) empowers the corporation, acting by its Director General to terminate the right of a retired employee’s occupancy of railway quarters by a written notice. Subsection 1 of that section imposes a correlative duty on the employee on leaving the service to relinquish possession of the premises or vacate it “as soon as practicable”...There has been a reasonable practice sanctioned by usage but not by law that, upon retirement, an employee is permitted to retain his use and occupation until his retiring awards are paid to him. This period normally varies from two to three months. But if the employee does not fill the form to enable his retirement awards be processed, he can be ordered out of the quarters immediately. The respondent fell in this category. Therefore the respondent having been given a notice to quit, which he did not comply with he, became a trespasser. The Act by section 83(2) says that in such circumstances the corporation may apply to a magistrate for an order empowering a police officer, among other things, to evict him from the premises. This is not the only legal remedy available to the corporation. This is only an enabling power but the Act leaves intact any other legal remedies that may be open to the corporation to obtain the respondent’s eviction. The Act says ‘the Director General may, without prejudice to any other means of recover apply...’...The other means of recovery is the right of re-entry, a species of self-help but nevertheless still good law and that is the right the corporation exercised. And the evidence is that it did not use any force or unreasonable force in securing the respondent’s eviction. Its servants merely entered the premises, put away the respondent’s personal belongings, locked the doors and obtained peaceably the possession of the keys. The corporation is therefore not liable...It is common knowledge that in view of the tardy and time-consuming process of the courts, suits for possession of land are notoriously difficult and, for businessmen, singularly frustrating. Whereas it may make good sense for the corporation to suspend its decision to evict the respondent until the result of the respondent’s appeal to the board was known, it was not obliged to do so. Sound reasons of the corporation’s policy may have decided management to proceed with its decision to evict the respondent at once. Accommodation may well have been required for serving officers. In which way the corporation should exercise its discretion, either to suspend action or proceed with the eviction, is peculiarly a matter for the commercial judgement of businessmen. It is not the business of the courts to condemn the corporation to pay damages, for doing what the law empowers it to do”.

In my view, the mere fact that a landlord does not obtain a court order does not *ipso facto* render the exercise of his right of re-entry illegal where the tenant has been in breach of the terms of the tenancy. Common sense and good order require that such an order be obtained; failure to apply common sense, however, is not necessarily illegal. That issue, in my view, does not establish a *prima facie* case.

The plaintiff’s case is that the mode of operation was that it was the duty of the 1st defendant’s caretaker to collect the rent from the defendant and that it was as a result of the non-collection that led to the aforesaid delay. In effect the plaintiffs place their failure to pay the due rents at the doorsteps of the 1st defendant and prays that the 1st defendant should not benefit from its own wrong doing. This issue was raised in the amended plaint and the submissions. Regrettably, however, the affidavit in support of the application is silent on this issue. On their part the defendants have also maintained silence on this issue which silence is worsened by the fact that the said caretaker, the 2nd defendant herein, has not sworn any affidavit in reply. Whether or not this was the practice is a matter which can only be decided at the trial where should it turn out that the plaintiff’s delay in paying the due rents was occasioned by the defendant’s own actions, the plaintiff’s case may well succeed. As the court is forbidden from making

definitive conclusions at this stage, I will go into the matter no further and leave the same for the determination by the trial court. However, that issue raises a *prima facie* case.

The next issue for consideration is whether the 1st plaintiff stands to suffer irreparable loss. The plaintiffs' case is that the business in which the 1st plaintiff is engaged requires one to have a physical address without which the necessary licences will not be granted thus exposing the 1st plaintiff to legal actions by thirds parties which may lead to its folding up. This contention is not disputed by the defendants. In cases where the subject matter is simply a right to possess, it is difficult to see how this can be preserved unless the *status quo* is maintained because the fact remains in cases such as these it is practically impossible to refuse a restraining order for not to do so might remove the tenant's power to possess beyond recall. See **Nyals (K) Ltd. vs. Unitod Housing Estate Ltd. Civil Application No. 129 of 1995; National Dry Cleaners Limited vs. Ezekiel Karanja Ndune Nairobi HCCA Nos. 79 & 80 of 1987[1987] KLR 565; Chogley vs. Bains Civil Appeal No. 67 of 1952.**

I must however, make it clear that there is hard and fast rule that in all disputes between a tenant and a landlord an injunction ought to be granted. Each case must be decided on its own facts and the principles guiding the grant of injunctions must generally apply.

With respect to the issue of the balance of convenience, the 1st defendant's main concern is the ability to recoup from its investment in form of rents. It is therefore clear that the only prejudice that the 1st defendant stands to suffer if the injunction is granted is the non-payment of rents on due dates. Accordingly, I do not see any prejudice that will be occasioned to the defendants if a conditional injunction is granted. The balance of convenience, in my view tilts in favour of granting an injunction.

Accordingly, the Notice of Motion dated 5th December 2011 is allowed in terms of prayers 2 and 3 of the said Motion on condition that the plaintiffs do within 14 days settle all outstanding rents, if any, and strictly observe the terms of the lease especially with regard to the payment of rents on due dates. To this end the defendants will within the 7 days furnish the plaintiffs with particulars of bank accounts in respect of which the said rents will be deposited in order to avoid further disputes. The plaintiffs will also file an appropriate undertaking as to damages within 7 days. With respect prayer 5 I decline the orders sought therein as to grant the same at this stage would have the effect of determining the suit at this stage. The determination of the prayers sought therein will have to await the hearing of the suit. The attention of the parties is however drawn to the provisions of **Order 40 rule 6** of the *Civil Procedure Rules*. The costs of this application will be in cause.

In the foregoing circumstances the application sought by the defendants in their motion dated 12th January 2012 unnecessary at this stage and the prayers therein are accordingly disallowed for now with no order as to costs.

Ruling read, signed and delivered in Court this 10th day of May 2012

G.V. ODUNGA
JUDGE

In the presence of:

Mr. Mutuli for Plaintiffs
Mr. Rombo for Mr. Thangei for Defendants