



MAGGIE MBOGO MACNIVEN

T/A GARDEN OF EDEN RESTAURANT PLAINTIFF

VERSUS

NORTH LAKE LIMITED1ST DEFENDANT

TRANSALLIED LIMITED2ND DEFENDANT

CITY COUNCIL OF NAIROBI3RD DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 21st February 2012. The plaintiff prays for injunction to restrain the defendants from wasting, damaging, alienating or disposing of a property known as LR No 330/351. The property is in Thompson Estate, along Mbaazi road, Nairobi. There is also a prayer for mandatory injunction to compel the defendants to reinstate her to the premises. The motion is expressed to be brought under order 40 of the Civil Procedure Rules 2010 and section 3 A of the Civil Procedure Act. There is filed a deposition in support by Maggie Mbogo on even date.

2. In a synopsis, the plaintiff states she was a subtenant of the 2nd defendant and was running a business in the style of Garden of Eden Restaurant on the suit premises. The property is registered in the name of the 1st defendant. Her case is that in September 2010 the 1st defendant unlawfully levied distress for rent to coerce her to execute a direct lease with it. She avers that the 1st defendant then colluded with the 3rd defendant to enter the premises, forcibly remove her, destroy or loot stock, furniture, tents and fixtures of the plaintiff. This despite a restraining orders from the Business Premises Rent Tribunal. The plaintiff is apprehensive that the defendants will dispossess her of the premises unless they are restrained by the court.

3. The motion is contested. The 1st defendant's case is that there is no privity of contract between it and the plaintiff. It is the registered owner of the suit premises. No consideration under the lease alleged by the plaintiff has passed to it. The motion is also attacked for lacking merit and failing to reach the threshold for grant of prohibitive and mandatory injunctions. The substratum of the suit is also impugned for pleading general damages for breach of contract.

4. The 2nd defendant does not oppose the motion. The 3rd defendant, the City Council of Nairobi contests the motion in terms of grounds of opposition dated 26th June 2012. In a nutshell, the 3rd defendant contends that the claims by the plaintiff do not lie against it; that the plaintiff's lease has expired and she is no longer in possession; and that no cause of action is disclosed against the 3rd defendant. The 3rd defendant submitted that this is not a proper case for grant of interlocutory injunctive relief.

5. I have heard the rival submissions. I take the following view of the matter. The principles governing the grant of prohibitive and mandatory injunctions are now well settled. When a litigant approaches the court for prohibitive injunction, he must rise to the threshold for grant of interlocutory relief set clearly in

Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80. See also the Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

6. A mandatory injunction on the other hand, ought not to be granted on an interlocutory application in the absence of special circumstances. It is to be granted only in clear cases either where the Court thinks that the matter ought to be decided at once; or where the injunction is directed at a simple and summary act which could be easily remedied; or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the Court has to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being on a different and higher standard than was required for a prohibitory injunction. See the decisions in Technomatic Limited T/A Promopack Company Vs Kenya Wine Agencies Limited Nairobi HCCC 398 of 2005 (unreported) and Mucuha Vs Ripples Limited [1990 – 1994] E.A. 388. That position has been stated clearly in Halsbury's Laws of England 4th Edition Volume 24 paragraph 848.

7. When I juxtapose those principles of law to the evidence, I find as follows. The plaintiff does not own the suit premises. I have looked at the conveyance dated 14th March 2005 made between Kingorani Investments Limited and North Lake Limited over the suit property. North Lake Limited became the registered owner of the suit property. It is the 1st defendant. The plaintiff concedes the fact. I have then studied a tenancy agreement annexed to the motion between North Lake Limited and Transallied Limited, the 2nd defendant, for lease of the suit property. It was for a renewable term of 2 years from 1st June 2009 to 30th May 2010. There is no evidence that the agreement has been renewed. The 1st defendant approved a request by the 2nd defendant to sublet the premises. The 2nd defendant then sublet the premises to the plaintiff. I have looked at the consent from the head landlord dated 10th June 2009. It is an email from Joyce Mbuchu of Transallied to the 2nd defendant. It says:

“You can sublet the property only in so far as it will not have any legal implications and any cost arising from this will be borne by the lessee”.

The 1st defendant also confirmed that there was no change of user to commercial purposes and that such approval would take time.

8. The plaintiff has not annexed any new lease with the 1st defendant. Although she avers the 1st defendant was coercing her to do so, it is clear that no formal or registered lease was made. Any doubt is removed because the plaintiff filed an action at the Business Premises Rent Tribunal Nairobi in cause number 883 of 2010 against the 1st and 2nd defendants. She was *ipso facto* admitting that she was a protected tenant. She was asking the Tribunal to restrain the defendants from harassing her or distraining for rent. In any event, she admits at paragraph 4 of her affidavit that she entered into an oral sub-tenancy agreement to run a bar and restaurant at the premises. I have seen annexures marked **MM 4** which leave no doubt that she was carrying out that business with the acquiescence of the 2nd and 3rd defendants. She had a single business permit, liquor licence and a permit from the Nairobi City Council's health department. She was paying rent to the 2nd defendant. It is also clear that the 3rd defendant and 1st defendant have removed the plaintiff from the premises. From the photographs annexed by the plaintiff, the removal was forceful and destroyed property of the plaintiff.

9. Having said that, the plaintiff's case against the 1st defendant is on a quicksand. There was no lease between them. There was no direct consideration. There seems to have been no change of user to commercial premises. The plaintiff had an oral sub-tenancy agreement with the 2nd defendant. From a legal standpoint there was no privity of contract between the 1st defendant and the plaintiff. See generally

Chitty On Contracts: Sweet & Maxwell, London 1999 pages 961, 966. Fundamentally, the oral sub-tenancy between the plaintiff and 2nd defendant cannot override the title to the suit land registered in favour of the 1st defendant. For the same reason, the plaintiff's prayer to injunct the 1st defendant from dealing with its property is on shaky foundation. The plaintiff has thus failed to establish a strong *prima facie* case with a probability of success against the 1st defendant. I also find that this is not a clear cut, exceptional or straight forward case for grant of a mandatory injunction against the 1st or 3rd defendants.

10. The plaintiff concedes she has been evicted. The substratum for prohibitive injunction has thus collapsed. I have raised doubt that the 3rd defendant or the Commissioner of Land had authorized a change of user. The 3rd defendant is a statutory body with clear duties under the Local Government Act. The court cannot injunct it in performance of its duties of enforcement of city bye laws. The plaintiff has not laid a basis for the exceptions to that rule. In particular, the plaintiff has not shown the council has acted illegally or in a capricious manner. It is not even lost on me that the tenancy agreement between the 2nd defendant and 1st defendant may have expired. Those are matters properly within the true province of the trial court. But on a preponderance of the evidence before me now, the plaintiff has not made out a *prima facie* case for grant of prohibitive or mandatory injunction. The plaintiff has obviously suffered damage but her remedies point in the direction of the 2nd defendant. I am thus not surprised that the 2nd defendant did not oppose the present motion. The less I say about it, the better.

11. In the end, I find that the plaintiff's notice of motion dated 21st February 2012 lacks merit. I order that the same be and is hereby dismissed with costs to the 1st and 3rd defendants.

It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of August 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Wawire for the Plaintiff.

Mr. Mongeri for Ms Shaw for the 1st Defendant

No appearance for the 2nd Defendant

No appearance for the 3rd Defendant.