REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 80 of 2012

MOHAMED AHMED NOOR…...……...…..……...……...1ST PLAINTIFF

TAHA HAMMOD ALI…….……..2ND PLAINTIFF

HASSAN DAHRUSH HAJI.……..……3RD PLAINTIFF

HUSSEIN AMIN MOHAMED……..…….4TH PLAINTIFF

VERSUS

BORA DEVELOPERS LIMITED…...…...…..…….1ST DEFENDANT

ARSHAD UL HAQ…….……2ND DEFENDANT

AL HAQ HOLDINGS LIMITED……...……..3RD DEFENDANT

RULING

By a Notice of Motion dated 21st February 2012, filed on 22nd February 2012 and expressed to be brought under the provisions of sections 1A, 1B, 3A and 63(c) and (e) of the Civil Procedure Act and Order 40 rules 1, 2 & 9 of the Civil Procedure Rules and all others (sic) enabling provisions of the law, the Plaintiffs/Applicants seek the following orders:

1. That this application be certified as urgent and be heard immediately.

2. That there be a temporary injunction restraining the Defendants, their servants and or agents from interfering with the plaintiffs businesses or shops/space A and B entrance, shops numbers B007, B008, B015, B016, B009 and B10 and from distressing for rent or from evicting the Plaintiffs in any way interfering with the Plaintiff's quiet and peaceful possession occupation and tenancy within the demised Land Reference Number 36/VII/451 Eastleigh, Nairobi popularly known as AL HAQ PLAZA premises pending the hearing and determination of this application.

3. That there be a temporary injunction restraining the Defendants, their servants and or agents from interfering with the plaintiffs businesses or shops/space A and B entrance, shops numbers B007, B008, B015, B016, B009 and B10 and from distressing for rent or from evicting the Plaintiffs in any way interfering with the Plaintiff's quiet and peaceful possession occupation and tenancy within the demised Land Reference Number 36/VII/451 Eastleigh, Nairobi popularly known as AL HAQ PLAZA premises pending the hearing and determination of this suit.

4. That a mandatory injunction do issue compelling the 1st and 3rd Defendants to reconnect the electricity and water supply to the suit land Reference Number 36/VII/451 Eastleigh, Nairobi AL HAQ PLAZA.

5. That the Plaintiffs do give an undertaking as to damages.

6. That the costs of this application be provided for.

The application is based on the grounds that the plaintiffs were the 2nd and 3rd defendants tenants at the latter's premises in LR No. 36/VII/451 AL HAQ PLAZA situated at Eastleigh, Nairobi (hereinafter referred to as the suit premises) which premises were sold to the 1st Defendant in December 2011. The 1st Defence has however gone ahead to disconnect electricity and power to the premises despite the pendency of the leases between the plaintiffs and the 3rd defendant and hence it would be in the interest of justice that the Defendants be restrained from the said unlawful action. According to the plaintiffs the said action is malicious, unlawful oppressive and criminal and has resulted in grave and irreparable loss and damages yet the 1st defendant has declined to accept rent for January and February 2012 despite notifying them to pay he same and is now planning to evict the plaintiffs from the suit premises.

The application is supported by an affidavit sworn by **Hussein Amin Mohamed**, the 4th Plaintiff herein in which it is deposed that he is a tenant of the 2nd and the 3rd defendants in respect of the suit premises which have been purchased by the 1st defendant. According to him they operate clothing business in the said premises in Shops A and B Entrance, B007, B008, B015 and B016 and B009 and B010 respectively. They continued with the quiet and peaceful enjoyment of the suit premises till 1st February 2012 when the 1st defendant disconnected water and electricity supply to the suit premises. However, before that time the plaintiffs had on 6th January 2012 received a letter dated 5th January 2012 from the 3rd defendant's advocates notifying them to pay rents as from 1st January 2012 to the 1st defendant as the new owner of the suit premises. In compliance therewith the plaintiffs forwarded their identification and other requirements to the 1st defendant. On 9th January 2012 the 3rd defendant's advocates notified all the tenants that the suit property had been sold to the 1st defendant but that the said sale would not affect the existing tenancies. However, the 1st defendant subsequently notified the tenants to address the issue of goodwill previously paid to the previous owner by the tenants as the same was not transferred to the 1st defendant and subsequently termed the tenants including the plaintiffs as strangers which the tenants disputed. However, the 1st defendant demanded from the tenants the sum of US Dollars 20,000 to 140,000 goodwill with the aim of frustrating the tenants and eventually evicting them. When the tenants protested the 1st defendant went ahead and disconnected the electricity and water from the suit premises. Over time, the plaintiffs contend they have established successful business and goodwill at the said premises attributed to heavy financial investments and hard work coupled with the location of the premises and hence the defendants' persistent interference is likely to adversely affect their businesses. Despite the fact that some protected tenants have filed complaints before the Business Premises Rent Tribunal the 1st defendant continues to threaten, harass, intimidate and interfere with the plaintiff and have disconnected water and electricity thereto and has further declined to accept the rents hence exposing the plaintiffs to irreparable loss, damage and harm with the aim of evicting the plaintiffs.

The application was opposed by a replying affidavit sworn by **Samuel Njuguna**, a director of the 1st defendant company on 13th August 2012. According to him, the 1st defendant bought the suit property pursuant to an agreement of sale dated 7th December 2011 and took possession thereof on 1st January

2012. By a notice dated 16th January 2012 the 1st defendant notified the tenants of the fact of the sale and the attendant issues. However, electricity to the premises was disconnected by the Kenya Power and Lighting Company on instructions of the 2nd and 3rd defendants after the said sale and closure of the account and recall of deposit. . According to him the 1st defendant has since reconnected the power to the premises pursuant to a consent order recorded in BPRT cases but only for the tenants who are up todate in rent payments. However, as the plaintiffs herein are in arrears of rent, it would be unconscionable and tantamount to slavery for the plaintiffs to expect services at the suit premises yet they do not pay rent and the 1st defendant is servicing loans in respect of the suit property from which the 1st defendants relies to obtain income for the said purpose. According to the deponent the orders sought ought not to be granted unless the plaintiffs pay up their rent arrears as well as deposits for their individual electricity and water accounts.

The plaintiffs filed a supplementary affidavit sworn by Hussein **Amin Mohamed** on 20th September 2012 in which he reiterated that they are lawful tenants and that the 1st defendant is using the issue of electricity to evict them from the suit premises. Despite recording a consent before the said Tribunal the landlord refused to reconnect the power to the suit premises notwithstanding the fact that the tenant paid rent and electricity deposit as per the consent order. Despite the request by the Kenya Power and Lighting Company that the 1st defendant issues its consent or authorisation for the opening of accounts, the 1stdefendamt has, with a view to frustrating the plaintiffs, declined to do so to detriment of the plaintiffs' businesses.

In their submissions the plaintiffs relying on the case of **Kobil Petroleum Limited vs. Almost Magic Merchants HCCS No. 1970 of 2000**, contend that the defendant having bought the premises is expected to operate within the law and hence its acts of violence and show of force at the suit premises should be deprecated in the strongest language. The plaintiffs further relied on **Francis Muringu Mureu T/A Jem Corner Bar vs. John Muranguri Karuga HCCS No. 119 of 1998 [2004] eKLR**; **Photos Ltd vs. Meru Central Farmers' Co-operative Union Civil Case No. 506 of 2004** and submitted that the Plaintiffs have established a *prima facie* case with a high probability of success and damage would not be appropriate remedy where a defendant has been bent upon violating the clear provisions of the law. Citing **Kamau Mucuha vs. The Ripples Ltd Court of Appeal Civil Application No. Nai. 186 of 1992** and **Belle Maison Limited vs. Yaya Towers Limited HCCC No. 225 of 1992**, it is submitted that a mandatory injunction ought and must be invoked to aid the law and that it offends public policy to flagrantly disobey the law, if it can be shown that such is the case. On the evidence before the Court, it is submitted that the Plaintiff's Motion dated 22nd February 2012 ought to be granted as prayed.

On the part of the 1st defendant, it is submitted that the plaintiffs have not proved that they are up todate in the payment of all rent arrears pursuant to the consent orders entered into at the BPRT. It is further submitted that prayer 4 of the Motion is onerous and beyond the control and/or performance by the 1st defendant since the 1st defendant has no control over the purveyor of electrical energy, the KPL Co. Ltd hence the application ought to be dismissed with costs.

The principles guiding the grant of interlocutory injunctions are well settled. Firstly, 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. See **East African Industries vs. Trufoods [1972] EA 420; Giella vs. Cassman Brown & Co. Ltd [1973] EA 358.**

However, the conditions enumerated above are not the only conditions for consideration by the court. **Tanui, J** in the case of **Hesbon Owuor Oluoch vs. Enos Omollo Misiani Kisumu HCCC No. 22 of 2002** held that it is not true that the only conditions for grant of injunction are the 3 enunciated in the case of ***Giella vs. Cassman Brown & Co. Ltd. [1973] EA 358*** as there are more conditions which the Courts have found over a period of time essential and an undertaking by the applicant as to the security for damages is one. The Court, under Order 40 rule 2(2), is empowered to make an order for injunction on

such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise as the court deems fit. Therefore, in appropriate cases, the court may grant a conditional injunction with respect to the duration and even impose such terms as may be appropriate to the circumstances of the case.

In an interlocutory application, it must be emphasised, 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. It is, nevertheless, not excluded from expressing a *prima facie* view of the matter and is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.

In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal held as follows:

"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".

The first issue for determination is therefore whether the plaintiffs have established a prima facie case with probability of success. The plaintiffs have exhibited copies of the agreements dated 1st September 2011, 15th February 2011, 10th August 2011 and 1st September 2011 made between respective plaintiffs and the 3rd defendant. That the 1st defendant derives his title from the 3rd defendant is not disputed. According to the said agreements the term "Lessor" included "successors and assigns" of the 3rd defendant and the 1st defendant is a successor in title to the 3rd defendant. By virtue of the said agreement the 1st defendant took title of the suit property subject to the existing tenancies. If the 1st defendant did not want to be burdened by the said tenancies it should have ensured that the 3rd defendant delivered to it vacant possession of the suit premises. These tenancies were each for a period of not less than 5 years and 3 months with the effect that as at the time the 1st defendant, purchased the suit property, the said term had not lapsed. The plaintiffs contend that their rights to occupy the premises are being threatened by the 1st defendant who has imposed new terms in order to run them out of the premises. The 1st defendant's position is however that the plaintiffs are not paying rents and have not paid the required deposits to Kenya Power and Lighting. Annexed to the supplementary affidavit are, however, payments in respect of Deposits for KPLC as well as rents for January to April bearing dates after 17th April 2012 when the 1st defendant's advocates furnished the plaintiffs' advocates with particulars of the former's account.

Having considered the foregoing I am satisfied that the plaintiffs have established a prima facie case with probability of success for the purposes of grant of a restraining interlocutory order of injunction. With respect to the second condition, the plaintiff's position is that they have operated in the said premises for a considerable length of time during which they have built goodwill with their customers. In **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589 Ojwang, AJ** (as he then was) expressed himself as follows:

"The plaintiff has averred that all along during his occupancy of the suit shop, the defendant has noted, acknowledged, acquiesced in, and approved the alleged sub-tenancy; and that on the strength of that status quo of the business relations, the plaintiff has over the years set up what appears to be a large and successful business on the suit premises dealing with curios and gifts – items intimately linked with the tourist industry. That fact is nowhere disputed; and neither is it denied that the plaintiff's trade is a unique and sensitive one, which, as it is now, has a substantial goodwill that is greatly endangered if the plaintiff should be evicted. In law, these circumstances, new rights may have emerged which ought, as a vital question of ends of justice, to be litigated and determined by the best method of the judicial system and that method is the full trial, with examination of witnesses, taken through examination-in-chief, cross-examination and re-

examination. At the end of that process the question of rights and liabilities will be determined with finality, and a new status quo in relations amongst the parties will have been put in place. It is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice…The argument that the law governing the grant of injunctive relief is cast in stone is not correct, for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before. Traditionally, on the basis of the well-accepted principles, the Court has had to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant".

In my view what the Judge was saying was that the Court has to consider what has become known as the principle of proportionality under the overriding objective which objective the Court is enjoined to give effect to in the exercise of its powers under the Act or the interpretation of any of its provisions.

I am accordingly satisfied that unless the injunction is granted the plaintiffs stand to suffer irreparable loss. The law, in my view, is not that in all cases where the damage is capable of being quantified injunction will not be granted but rather that normally injunction will not be granted in such cases. However as was stated by **Ringera, J** in **Martha Khayanga Simiyu vs. Housing Finance Co. Of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540:**

"the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them. That is the normal course but not the invariable course. The court has to take into account the conduct of the Respondent and the gravity of the breaches of law or contract alleged otherwise it would confer a carte blanche on those who are rich enough to pay all quantums of damages to ride roughshod over the rights of other persons. The rich do not fear to pay damages and they must be compelled to submit to the authority of the law by being put to other perils".

Since I am not in doubt in respect of the foregoing I do not have to consider the balance of convenience.

With respect to Prayer 4 what is sought is mandatory injunction. In the case of Kenya Breweries Limited & Another vs. Washingtone O. Okeyo Civil Appeal No. 332 of 2000 [2002] 1 EA 109 the Court of Appeal stated as follows:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application…A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction".

In **Suleiman vs. Amboseli Resort Limited** (supra) it was held on the authority of **Belle Maison Ltd vs. Yaya Towers Ltd Civil Case No. 2225 of 1992** that a mandatory injunction ought and must be invoked

to aid law and that it offends public policy to flagrantly disobey the law, if it can be shown that such is the case.

Accordingly the orders that commend themselves to me and which I hereby grant are as follows:

1. That a temporary injunction is hereby granted restraining the Defendants, their servants and or agents from interfering with the Plaintiffs' businesses or shops/space A and B entrance, shops numbers B007, B008, B015, B016, B009 and B10 and from distressing for rent or from evicting the Plaintiffs or in any way interfering with the Plaintiffs' quiet and peaceful possession, occupation and tenancy within the demised Land Reference Number 36/VII/451 Eastleigh, Nairobi popularly known as AL HAQ PLAZA premises pending the hearing and determination of this suit on condition that the Plaintiffs comply with the terms and conditions of the tenancies existing between the Plaintiffs and the 3rd defendant.

2. That the 1st defendant does issue appropriate authorities and/or documents to the concerned authorities for the purposes of facilitating the connection of water and electricity to the suit premises within 7 days.

3. That the Plaintiffs to file appropriate undertaking as to damages within 7 days.

4. That the costs of this application be in cause.

5. That there be liberty to apply.

Dated at Nairobi this 30th day of October 2012

G.V. ODUNGA
JUDGE

Delivered in the presence of Mr. Lakicha for the Plaintiffs