REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 300 of 2012

FLEX CONSTRUCTION SOLUTIONS LTD…...…….....PLAINTIFF

VERSUS

VERANDEL COURT LIMITED……..……..…. …….EFENDANT

RULING

This ruling is the subject of two applications dated 18th June 2012 and 14th November 2012. In the former application expressed to be brought under the provisions of Order 40 Rules 1(a) of the Civil Procedure Rules, Section 3A and 63(e) of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling powers and provisions of the Law, the Plaintiff/Applicant seeks the following orders:

1)This Application be heard ex-parte in the first instance and the same be certified as urgent.

2)Pending the hearing and determination of this Application the Respondent, its employees, servants and/or agents whatsoever, be restrained from evicting the Plaintiff from Office Unit No. B2 at Plot L.R. 1870/IX/139 WOODVALE GROVE-WESTLANDS

3)Directions be given t as to an early hearing date in respect of prayer 4 below.

4)Pending the hearing and determination of this Suit the respondent, its employees, servants and/or agents whatsoever, be restrined evicting the Plaintiff from Office Unit No. B2 at Plot L.R 1870/IX/139 WOODVALE GROVE-WESTLANDS.

5)Pending the hearing and determination of this Application the Respondent, its employees, servants and/or agents whatsoever, be restrained from levying distress for rent on the Plaintiff for Office Unit No. B2 at Plot L.R 1870/IX/139 WOODVALE GROVE-WESTLANDS.

6)Costs of this Application be provided for.

The application is based on the following grounds:

1. The plaintiff/Applicant is a tenant of Office Unit No. B2 at Plot L.R. 1870/IX/139 WOODVALE GROVE-WESTLANDS under a lease agreement with the defendant/Applicant.

2. There is a pending suit Plaintiff/Applicant against the Defendant/Respondent where the Plaintiff/Applicant is claiming for damages due to the negligence of the Defendant respondent to undertake repairs of the let premises.

3. The Defendant/Respondent has issued an eviction notice to the Plaintiff/Applicant's on account

of unpaid rent.

4. **This Application is brought in good faith and in the interest of justice and if it is not allowed the plaintiff/Applicant stands to suffer irreparable loss and damage and its suit may be rendered nugatory.**

The application is supported by an affidavit sworn by **Joseph Mwangi**, the Plaintiff's Director on 18th June 2012. According to him, the Plaintiff is the Defendant's lessee in respect of business premises at Surveyor's Court on Plot LR 1870/IX/138 Woodvale Groove, Westlands Nairobi (hereinafter referred to as the suit premises). During the months of September to December 2011, as a result of the short rains, the suit premises together with two other premises experienced water damage due to leakage of water into the premises through a damaged section of the roof as a result of which the plaintiff's stock was damaged. Despite the deponent informing the Plaintiff to attend to the said repairs pursuant to the provisions of the lease agreement, the defendant neglected to do so. However, by a letter dated 4th December 2011 requesting that the premises be opened over the weekend to enable it effect the repairs but instead of doing so lodged a claim against the adjoining owners to undertake the said repairs. As a result of the foregoing electricity power supply was interrupted and has never been restored. Despite repeated requests to the defendant to effect the said repairs which have led to immense losses resulting from the said water seepage and lack of electricity supply, the defendant maintained that it was not obliged to undertake any repairs and instead blamed the third party and demanded for unpaid rent. According to a report prepared on the instructions of the plaintiff by loss adjusters the in respect of the said loss which report the plaintiff forwarded to the defendant the amount of loss is Kshs. 2,503,122,00. As a result of non-action on the part of the defendant the plaintiff sought legal counsel pursuant to which a demand was dispatched to the defendant. The defendant, however, responded by issuing eviction notices and instructed Haki Traders to distress for rent. According to the deponent, the defendant is avoiding its legally bound duties and the consequences thereafter and only want to enrich themselves unfairly. In his view if the orders sought are not granted the plaintiff stands to suffer immeasurable loss and damage of business that cannot be compensated by damages and the hence this is a proper case for the exercise of the Court's jurisdiction.

In opposition to the application the defendant filed a replying affidavit sworn by **Rajen Ruparel**, its Director on 13th July 2012. According to the deponent, while admitting the existence of tenancy relationship between the parties, he denies any wrongdoing on behalf of the defendant and avers that the plaintiff is by this suit seeking to frustrate the Lease Agreement by avoiding its express obligation to pay rent which obligation forms the basis of the relationship between the parties. According to him although there have been previous damage to the premises which affected two other tenants, which damages were occasioned by a third party known as **Meera Construction Limited**, the plaintiff has failed to disclose that the defendant has been actively engaged in repair works on the same. According to him the assertions of the plaintiff are entirely skewed to favour the plaintiff when clearly it is not in a position to remit the lawful rent as and when due which rent stands at Kshs One Million Five Hundred and Sixty Six Thousand Eight Hundred and Sixty Seven (Kshs 1,566,867/=) plus VAT which sum continues to accrue. In his view, the distress for rent is proper under the circumstances. By failing to disclose the entire indebtedness of the plaintiff the deponent contends that plaintiff has come to the aid of the Court with unclean hands. Since the defendant was not involved in the process of the assessment of the damage, it is contended that the plaintiff is not entitled to retain the rent lawfully due on account thereof. In his view, since the plaintiff's alleged complaint can be adequately compensated by way of damages, an injunction cannot issue.

With respect to the application dated 14th November 2012 the same is expressed to be brought under Order 40 rules 8 and 10 of the Civil Procedure Rules and the said section 3A of the Civil Procedure Act. The plaintiff seeks the following orders in this application:

1. **This application be certified as urgent.**

2. **Directions be given as to an early date for prayers 3 and 4.**

3. The application dated 18th June 2012 be heard expeditiously.

4. Pending the hearing and determination of this application dated 18th June 2012 the Defendant, by itself, employees, servants and/or agents, be ordered to reopen the premises and to allow access and to desist from any form of hindrance to the Plaintiff's quiet possession of the premises.

This application according to the plaintiff was necessitated by the fact that pursuant to the issued in respect of the application dated 18th June 2012 and orders issued in respect thereof negotiations were entered into leading to certain terms which terns the defendant has reneged on by locking the plaintiff out of the premises and denying it access. According to the plaintiff, it has paid the current rent as and when the same fell due and engaged the defendant to sort out the disputed rent when the premises were not in use in form of goods in lieu as requested by it. However, the defendant has insisted on frustrating the plaintiff by refusing it access to the premises which action the plaintiff contends amounts to construction eviction taking into account the fact that the premises are used as a showroom and store for wooden products for flooring in construction, for sale. These actions, in the plaintiff's opinion are meant to force the plaintiff out of the suit premises which actions have had the effect of disabling the Plaintiff in its operations, and destroying the plaintiff's goodwill and business reputation. In the plaintiff's view it stands to suffer irreparable loss as a result of the defendant's contemptuous actions hence the court ought to intervene and order that the defendant allow the plaintiff quiet possession of the demised premises to enable it carry out its business.

To this application, the defendant filed a replying affidavit sworn by the same **Rajen Ruparel** on 3rd December 2012 in which he deposed that the orders in question were issued through non disclosure of material facts relating to the non-payment of rents and the full terms of the lease. According to him, despite the orders having lapsed and with full knowledge, it took a period of close to four (4) months before the dispute festered again and all this time he had hoped that the matter would be settled. However, it is contended that the reason for the present stalemate is the failure by the plaintiff to commence rental remittances and it was only after consistence attempts by the plaintiff to vacate the premises without liquidating the current rental arrears were the premises closed down to prevent the concerned Auctioneers from proceeding with the lawful distress for rent which on 13th July 2012 stood at Kshs. 1,566,867/= plus VAT. In the deponent's view the distress is lawful as the plaintiff has defaulted in the performance of its obligations under the lease. However, in the event that the Court is inclined to grant the injunction, the deponent opines that it is prudent that the defendant's interests be protected by directing that the pending rental arrears be deposited in a joint interest earning account.

In a supplementary affidavit sworn by **Rajen Ruparel** on 7th December 2012, the deponent reiterated the contents of his earlier affidavits and ads that the orders issued by **Onyancha, J** on 18th June 2012 and reviewed and extended by **Waweru, J** on 2nd July 2012 lapsed. According to him once goods are attached under Distress for Rent Act Cap 293, the same ought not to be removed unless by an order of the Court. The contention by the plaintiff that it is up todate, according to the deponent is untrue and the lease is clear on its stipulations and rights it apportions to the Landlord and Tenant and should be construed as such.

It is important to note that at the hearing of the two applications **Mr Wandabwa**, learned counsel for the plaintiff was allowed to orally amend prayers (4) and (5) of the respective applications to reflect that the orders sought therein were sought to last the pendency of the hearing of the suit rather than the application as appeared in the applications.

In its written submissions which were highlighted by its learned counsel **Mr Wandabwa**, it is contended that the lease between the plaintiff and the defendant subsists by reason of acceptance of the rents by the defendant up to and including for the month of November 2012. While reiterating the contents of the supporting affidavit, it is submitted that despite the plaintiff complying with the orders issued on 18th June 2012, the defendant refused to allow the plaintiff access to its premises and has chased away the plaintiff's customers and locked up the premises. It is submitted that the defendant has no colour of right to interfere with the Plaintiff's quiet possession of the premises and or evict it from the premises in the

manner it is doing since the lease as well as section 108 (b) and (c) of the ITPA entitles the Plaintiff to quiet possession thereof without exercising its right of re-entry under clause 6(b) of the lease notwithstanding the allegations of rent arrears. It is submitted that the acceptance of rent operates as a waiver of the right to re-entry on the basis of default in rent payment and is being done contrary to the court order already in force. According to the plaintiff to claim rents without complying with its obligations under the lease as a result of which the plaintiff has suffered loss and damage in inequitable. Clause 6(a) of the lease suspends the payment of rent in event the premises are destroyed partially or completely by fire thus rendering them unusable for its purposes. By parity of reasoning, it is submitted, the same position applies where the premises are rendered unusable on account of water leakage. As long as the damage cause to the plaintiff subsists, it is submitted the Defendant's act of levying distress for the period when the plaintiff's stock was damaged is unjust and uncalled for in the circumstances. **Mr Wandabwa**, reiterated that the plaintiff's business was hampered until April 2012 when the said roof was repaired. Relying on Transfer of Property Act, it is submitted that a tenant's right to possession is absolute and that even non-payment of rent does not take away the said right and that is why the remedy for distress for rent and the right of re-entry exist. However, in light of the fact that the defendant subsequently accepted rent the right of re-entry could not be exercised. Although the plaintiff was at liberty to repair and recover from the rent, it is submitted that in light of the correspondence exchanged between the parties, the plaintiff cannot be faulted for not exercising that right. The plaintiff, it is submitted is entitled to fall back on the doctrine of suspension of rent for the period of 6 months and the court ought to invoke the same under its equitable jurisdiction and exercise its discretion and allow the applications. With respect to the missing page in the lease annexed, it is submitted that the same was not material and was not meant to mislead the court.

On his part **Mr Kandere**, learned counsel for the defendant submitted that the dispute herein really relates to rent and the remedy sought is in the realm of equity. According to him the plaintiff has been less than equitous. Since the orders issued by **Onyancha, J** were reviewed by **Waweru, J**, the same lapsed when they were not extended subsequently. Despite that the plaintiff continued enjoying the possession of the suit premises till the month of November. According to him clause 3 of the lease dealing with indemnity was not brought to the attention of the Court at the ex parte stage when the orders were obtained without disclosing the actual rent in arrears. According to counsel the damage was caused not by acts of the defendant but by those of a third party. Since there is another indemnity clause 6(c) the court should not impute intention on the part of the parties who have executed a contract and the contract ought to be allowed to run as it is. Distress, it is submitted, is an inherent right to recover rent and this is what the landlord is seeking and therefore the plaintiff should not be permitted not to pay rent. While conceding that there were negotiations, learned counsel submitted that the plaintiff despite persisted in non-payment of rents from June till November and the cheque fro November was according to him in respect of the arrears. Section 108(f) of the ITPA, it is contended does not entitle retaining of rent. In his view the property was not locked with a view to evict but was to preserve the items distressed. Since injunction is an equitable remedy and the landlord has also suffered, the application should be dismissed. Alternatively the money should be deposited.

In his rejoinder, **Mr Wandabwa** submitted that the orders issued by **Onyancha, J** were not interim orders so that on payment of the amount stated was therein they were to stay and were not subsequently reviewed. In his view, the plaintiff's relationship with the defendant was contractual and had nothing to do with the third party. The only rent outstanding is for the period in dispute since the plaintiff has been paying rent since coming to court.

The principles guiding the grant of interlocutory injunctions are trite and these are, 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; and thirdly, if the court is in doubt, it will decide an application on the balance of convenience. See **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358.**

However, though in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, on the basis of contradictory affidavit evidence or disputed propositions of law, it is properly entitled to express a *prima facie* view of the matter and to consider what else the

deponent to the supporting affidavit has stated on oath which is not true. A *prima facie* case, it has been held, 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. See **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.**

In exercising its discretion under the Civil Procedure Act or in determining whether or not to grant the injunction sought the Court is enjoined 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. In **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** **Ojwang, AJ** (as he then was) expressed himself as follows:

"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".

Therefore whereas the traditional considerations in applications for injunctions will remain relevant, the Court must develop the law in such a way as to meet the emerging trends in tandem with the ever changing circumstances.

In this case it is not disputed that there is in existence a landlord and tenant relationship between the plaintiff and the defendant which is, subject to the law, regulated by the lease executed by the said parties. It is further not disputed that the defendant has locked the suit premises. In the defendant's view, its reason for doing so is the non-payment of rent by the plaintiff and the said action has been taken in order to preserve the properties under distress. This issue brings into focus the extent to which a landlord ought to go and the steps to be taken by the landlord in exercising its undoubted right to distress for unpaid rent. Section 4(1) of the Distress for Rent Act, Cap 293, Laws of Kenya provides:

Where any goods or chattels are distrained for rent reserved and due upon a grant, demise, lease or contract, and the tenant or owner of the goods or chattels so distrained does not, within fourteen days after distress has been made, and notice thereof (stating the cause of the making of the distress) left on the premises charged with the rent distrained for, pay the rent together with the costs of the distress, or replevy them, with sufficient security to be given to the licensed auctioneer according to law, the person distraining may lawfully sell on the premises or remove and sell the goods and chattels so distrained for the best price which can be obtained for them, towards satisfaction of the rent for which they are distrained, and of the charges of the distress, removal and sale, handing over the surplus (if any) to the owner.

According the procedure is to notify the tenant that the goods have been distrained and leave them at the premises for 14 days. One the goods are distrained section 10 of the Act provides:

If a tenant or lessee referred to in section 9 fraudulently removes and conveys away his goods or

chattels, or if any person wilfully and knowingly aids or assists a tenant or lessee in fraudulent conveying away or carrying off of any part of his goods or chattels, or in concealing them, the tenant, lessee or other person shall be liable to pay to the landlord or lessor from whose estate the goods and chattels were fraudulently carried off double the value of the goods so carried off or concealed, and that liability shall be a civil debt recoverable summarily.

The law does not therefore permit the landlord at the first instance to lock the premises with the goods distrained with a view to ensuring that the same are not carted away. Nor is the landlord permitted to remove the goods from the premises before the lapse of the said 14 days. In **Kariuki Vs. Wang'ombe [2005] 1 EA 107** the Court of Appeal held that held that by section 4(1) of the Distress for Rent Act, the distrained goods should be left in the premises and the tenant must be given a notice stating the cause for making the distress and the goods can only be sold on the premises or removed for sale off the premises only if the tenant has not within the 10 days after the distress, paid the rent together with the costs of the distress. This decision was delivered before the amendment to section 4 by Legal Notice No 5 of 1996 which increased the period to 14 days.

Similarly, it was held by **Scriven, J** in **Raghavji Madhavji Vs. B M K Ogol Kisumu HCCC 122 of 1980** that:

"The landlord's right of distress for rent is a common law remedy available to the landlord, without legal process, to secure payment of rent by seizing his tenant's goods and chattels upon the premises in respect of which the rent is due. Whilst its practical application is now circumscribed by statutory protection in England as to make the remedy almost obsolete it is nevertheless still a common law remedy, which is statutorily enshrined in section 3(1) of our Distress for Rent Act Cap 293, and is a remedy much favoured by Kenya landlords...The method by which the distress was effected was that the whole of the plaintiff's premises were externally secured against the plaintiff who was thus denied entry to his own premises. The tenant plaintiff had done nothing clandestine or fraudulent to entitle the bailiff to secure even his goods let alone his property and the bailiff did not effect the usual courtesy and well-established practice of formal "seizure" by declaring goods, to the value of the warrant attached. By the same token as that by which the Bailiff generally cannot break into the premises this bailiff therefore unlawfully excluded the tenant plaintiff from his own premises and denied him the right of access to his own property and cash therein which he needed to "buy off" this illegal distress. The plaintiff wisely desisted from breaking into his own premises as he would have been entitled to but which would have undoubtedly endangered the peace. This prudence and reticence in the face of this appalling intrusion into his freedom does not leave him penalised".

Similarly, in **Gusii Mwalimu Investment Company Ltd. & 2 Others vs. Mwalimu Hotel Kisii Ltd. Civil Appeal No. 160 of 1995 [1995-1998] 2 EA 100** **Shah, JA** was of the view that:

"To obtain possession by levying illegal distress is per se wrong. It is also wrong for a court bailiff (in this instance it was mischievous) to cart away the tenant's goods under the guise of such distress as happened here. Section 4(1) of the Distress for Rent Act clearly envisages having goods at the premises in question for at least ten (10) days to enable the tenant either to pay the rent or replevy them. It does also envisage impounding of goods within a limited area of the premises. But this subsection does not empower a bailiff to remove the goods or chattels for storage elsewhere without the consent of the owner. The tenor of the whole section 4 of this Act is that the goods or chattels seized should remain in situ for 10 days...In the old days chattels were either impounded on the premises or removed to a pound off the premises. In England Distress for Rent Act 1737 enacted the provision (inter alia) that goods may be impounded on the premises. Normal distresses are impounded on the premises unless the tenant otherwise requests...The landlord effectively obtained possession by the said illegal distress...The court has no hesitation whatsoever in holding that the landlord did all it could to obtain the possession unlawfully and the learned judge was entirely right in making the orders he made. If what the landlord did in this case is allowed to happen we will reach a situation when the landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of

affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the land lord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession...A litigant cannot wrongfully and illegally bring about a state of affairs and then apply to court to preserve that state of affairs as the status quo by way of an injunction. The status quo that would be preserved was the *status quo* before these illegal and criminal acts on the part of the defendant. It is strange argument to address to a court of law that it ought to help the defendant who has trespassed and got himself into these premises in the way in which he has done and say that that would be preserving the status quo and that it would be a good reason for not granting an injunction...It is fallacious for a person who forcibly and riotously enters premises to maintain that his occupation of these premises is the *status quo* which must be maintained".

In other words, the mere fact that a tenant is in default in payment of rents does not deny him his right to quiet possession of the premises unless the default amounts to a breach of covenant which thereby entitles the landlord to a right to re-entry. In this case, it is contended that the fact that the defendant has continued to receive rents is an indication that it has waived its right to exercise the said option. Whether or not the rents received are in respect of rent arrears is a matter that will require evidence. Suffice to say that if the defendant pursuant to its undoubted right to distress for rent in event of default in payment thereof locked the premises, the said action was unjustified and would constitute a prima facie case for the purposes of an interlocutory injunction.

The plaintiff has further contended that the defendant was not entitled to distress for the rent when the premises were rendered unusable due to the leakage of the roof. In its view clause 6(a) which deals with destruction or damage to premises by fire is also applicable to situations where the premises are rendered unusable due to leakage of the roof. I am not prepared to buy into that argument at this stage since clause 6(a) specifically deals with destruction and damage caused by fire.

With respect to the second condition for grant of interlocutory injunction it is the plaintiff's case that it stands to loose goodwill. In **Suleiman vs. Amboseli Resort Limited** (supra) it was held:

"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".

Accordingly, I am satisfied that the interest of justice will be better served by maintaining the status quo while the Court investigates the dispute. The status quo to be maintained herein is the status quo before the suit premises were locked.

However, the Court takes into account the fact that the issue whether or not the plaintiff was entitled to abstain from paying the rent for the alleged period when the premises were not in a tenantable state is yet to be determined.

Accordingly the orders that commend themselves to me are as follows:

(a) Pending the hearing and determination of this suit the Defendant, by itself, employees,

servants and/or agents, be ordered to reopen the premises and to allow access and to desist from any form of hindrance to the Plaintiff's quiet possession of Office Unit No. B2 at plot LR 1870/IX/139 Woodvale Grove-Westlands.

(b) Subject to (c), pending the hearing and determination of this suit the respondent, its employees, servants and/or agents whatsoever are restrained from levying distress for rent on the Plaintiff in the said premises.

(c) The plaintiff to within 30 days from the date of this order deposit into court the rents which were payable for the alleged period when the suit premises were unusable less the sum already deposited in Court pursuant to the orders of this Court on 18th June 2012 and to continue paying due rents according to the lease executed by the parties herein.

(d) The plaintiff to file appropriate undertaking in damages within 10 days from the date hereof.

(e) Each Party be at liberty to apply.

(f) The costs of this application be in the cause.

Dated at Nairobi this 18th day of December 2012

G.V ODUNGA
JUDGE

Delivered in the presence of:

for the Plaintiff

for the Defendant