



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL SUIT NO. 694 OF 2007**

**KENGELE'S MANAGEMENT GROUP  
LIMITED.....PLAINTIFF/APPLICANT**

**-VS-**

**ENSIGN FOODS  
LIMITED.....DEFENDANT/RESPONDENT**

**BY WAY OF COUNTER-CLAIM**

**ENSIGN FOODS  
LIMITED .....DEFENDANT/RESPONDENT**

**KENGELE'S MANAGEMENT GROUP  
LIMITED .....PLAINTIFF/APPLICANT**

**RULING**

Notice of Motion dated 22<sup>nd</sup> July, 2009 is filed by the Defendant Ensign Food Ltd. in the main suit and which has also filed Counter-Claim, seeking orders, namely:-

- “1. The adjustment and satisfaction of the main suit in favour of the Respondent in terms of the order of 4<sup>th</sup> October, 2007 be recorded as a final judgment for vacant possession of KENGELE'S LAVINGTON GREEN.***
- 2. The rest of the claim in the main suit for compensation, general damages and costs be struck out and dismissed.***

**3. Final judgment be entered as against the Respondent in terms of prayers b, c, d and f of the counterclaim dated 20<sup>th</sup> April, 2009.**

**4. in the alternative to 3 above, summary judgment be entered as against Respondent in terms of prayers b, c, d and f of the counterclaim dated 20<sup>th</sup> April, 2009.**

The application is supported by Affidavit sworn by Esther Sollitt, director of the Defendant/Applicant on 22<sup>nd</sup> July, 2009.

It may be opportune to mention at the outset that the interlocutory judgment entered on 4<sup>th</sup> July, 2009 in respect of the Counter-Claim filed by the

Defendant/Applicant has been set aside by Hon. Mwera J. vide his Ruling delivered on 8<sup>th</sup> June, 2010.

It is also pertinent to note that the claim of vacant possession of Kengele's Lavington Green is adjusted and satisfied by an order of 4<sup>th</sup> October, 2007 and the Defendant/Applicant has accordingly yielded the vacant possession to the Plaintiff/Respondent.

The prayers made by the Plaintiff in the Plaint dated 3<sup>rd</sup> October, 2007 are:-

**“1. An interim injunction restraining the defendant together with her servants and/or agents from interfering with the plaintiff's peaceful enjoyment of the business.**

**2. A permanent injunction directing the defendant to hand over to plaintiff the business premises and assets thereof.**

**3. A declaration that the defendants act of closing the business and denying the plaintiff access there to amount to an unlawful act and the plaintiff should be compensated for loss of business by the defendant.**

**4. General damages.**

**5. Costs for the suit with interest.**

**6. Any other Relief or Orders the Court may deem fit to grant.”**

As against the claims made by the Plaintiff, the Defendant/Applicant filed Statement of Defence and counterclaim claiming refund of deposit of Kshs.3,000,000/= with interest thereon from 13<sup>th</sup> June, 2007 at the rate of 21.25% per annum till payment in full.

From the pleadings it is clear that the Defendant/Applicant was the landlord of the suit property on which a catering establishment was erected. The Defendant/Applicant was granted five years Franchise of the said restaurant at an agreed consideration of Kshs.13,000,000/=.

As per the agreed terms, the Defendant/Applicant paid immediate payment of Kshs.1,000,000/= and down payment of Kshs.2,000,000/=

Thereafter, according to the Defendant/Applicant, the landlord Plaintiff failed to avail required documents by the Bank so that its loan application could go through and the Plaintiff thus frustrated the completion of the transaction.

The counterclaim filed by the Defendant/Applicant seeks prayers for refund of Kshs.3,000,000/= as aforesaid as well as special damages and the management fees indicated in the pleading.

The Defence to Counter-Claim raises the issue of non-signing of the Franchise Agreement and has denied the allegation and claims made therein.

It is conceded by both parties that by the court order of 4<sup>th</sup> October, 2007 the vacant possession of the Kengele's Lavington Green has been adjusted and satisfied in favour of the Plaintiff.

In the background of the above pleadings and facts, the application on hand is filed and written submissions in support and in opposition thereof have been filed.

It is to be noted that the prayer No. 3 of the application has been dealt with wherein Hon. Mwera J. refused to enter interlocutory judgment for the Counter-Claim in default of the Defence.

Thus what remains to be determined is prayer nos. 1, 2 and 4 of the application.

Mr. Havi the learned counsel for the Defendant/Applicant submitted that once the possession is yielded by the Plaintiff, the substratum of the plaint has been removed and the order of 4<sup>th</sup> October, 2007 be recorded as a final judgment for vacant possession of Kengele's Lavington Green. The said order is annexed to the Application being "Annexure ES1"

The said order amongst other limbs thereof enjoined the Defendant/Applicant from interfering with the Plaintiff's/Respondent's peaceful enjoyment and occupation of the suit premises and that the Plaintiff/Respondent was to file an undertaking as to damages.

The Defendant/Applicant on receipt of the said order yielded vacant possession of the premises to the Plaintiff/Respondent. At this point, it may be opportune to consider paragraphs 10 and 11 of the Plaint which in brief avers, that the Plaintiff/Respondent has prayed that he be allowed to enter the suit premises and continue running the business and that the Defendant/Applicant be barred from the suit premises permanently.

I do think, considering the fact that the vacant possession of the suit premises was yielded to the Plaintiff/Respondent, the prayer Nos. 1 and 2 of the Plaint are obviously satisfied and adjusted and can be recorded as a final Judgment in respect to the claim of vacant possession and I do hereby find so. Prayer No. 1 of the Notice of Motion dated 22<sup>nd</sup> July, 2009 is thus hereby allowed.

However, the Plaintiff further seeks for compensation for loss of business and general damages.

Both parties have averred that the Franchise Agreement under which the Defendant was put in possession of the suit premises was not signed or at least no signed agreement is produced by either party.

The Defendant/Applicant contends that it was the Plaintiff/Respondent who terminated the contract and the Plaint has not pleaded specifically or has failed to particularize special damages. It simply seeks compensation and general damages for breach of contract.

The authority of *Waweru -vs- Ndiga (1983) eKLR 236* was relied upon (see holding no. 6 on page 2 thereof) namely:-

***"Damages for loss of use of a vehicle can be claimed as a special damages and not general damages and the loss suffered should be proved strictly. The Respondent in his Plaint had claimed the damages as a general damages and had set out no particulars of loss."***

I do tend to agree that the Plaint definitely lacks the particularization of the loss of business, which definitely should be categorized as special damages. It is trite law by now that the special damages has to

be pleaded specifically and proved strictly. The Plaintiff cannot by any manner seek to claim the same as general damages.

The issue of who is to be blamed for the early determination of the Franchise Agreement is live and remains to be heard and determined as per the pleadings both in the Plaint and the Counter-Claim. Even the Defendant/Applicant has pleaded that, though the agreement was not signed its written terms were agreed upon.

Apparently the Defendant/Applicant had possession of the suit premises for few months after the parties mutually agreed. It was only after filing of the Plaint that the Defendant/Applicant delivered back the possession.

The pleadings and facts as emerged from the record of this case definitely show that there are issues which need to be determined, the liability of breach of agreement being one of them. I would thus rely on the observations made by late *Madan J. A.* (as then he was) in the case of **D. T. Dobie & Co. -vs- Muchina (1982) KLR 1.** I shall thus give breath to the Plaint and Counter-Claim as regards the issues of alleged breach of contracts as well as the resultant issues of their respective claims for damages.

In the premises aforesaid, at this stage, I shall refrain from making any definite finding on other prayers of the Plaint except prayer Nos. 1 and 2. Similarly I shall not grant prayers Nos. 2 and 3 of the Application dated 22<sup>nd</sup> July, 2009 and filed on 10<sup>th</sup> September, 2009.

The costs of this application in cause.

Orders accordingly.

**Dated, signed and delivered** at Nairobi this 21<sup>st</sup> day of **March, 2011**

**K. H. RAWAL**

**JUDGE**

**21.03.2011**