REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 898 OF 2010

OSTERIA ICE CREAM LIMITED.....PLAINTIFF

VERSUS

THE JUNCTION LIMITED (TJL).....DEFENDANT

RULING

By this application, the plaintiff prays for an injunction to restrain the defendant from in any way evicting, removing, disturbing, stopping and/or alienating the plaintiff's possession and business operations situate on all that parcel of land known as LR No. 330/1271 Nairobi pending the hearing and determination of this suit. The application is brought by a Notice of Motion dated 30th December, 2010 and taken out under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010.

The application is supported by the annexed affidavit of Moritzo Corti, a Director of the Plaintiff company and is based on the grounds that –

(1) The Respondent's intended termination and eviction of the applicant and its possession of the suit premises is unjustified and wrongful, the same lacking any legal basis.

(2) The defendant is in fundamental breach of its agreement with the plaintiff and has persistently frustrated the plaintiff in its operations and possession.

(3) The defendant is wrongfully and unjustly attempting to circumvent its controversial obligations by its intent to force out the plaintiff from the suit premises.

(4) The plaintiff reads an ulterior motive in the defendant's intended action which is against the rules of natural justice.

(5) The plaintiff stands to suffer considerable and irreparable harm and loss if the defendant is allowed to continue with its wrongful and unjust actions which are contrary to the policy of this Honourable Court.

The application is opposed by the replying affidavit sworn by Patrick Walker, a Director of the Plaintiff Company, on 12th January, 2011. In the said affidavit, he deposes, *inter alia*, that an injunction such as the one sought by the applicant can only be granted where the applicant has an interest in the land, a situation which does not obtain in this matter. He further states that the agreement entered into by the parties did not confer any proprietary interest on the plaintiff, nor did it create any equity upon which an application for injunction can be based. He therefore contended that an order for specific performance cannot be issued where the contract sought to be enforced has already expired by effluxion of time.

With leave of the court, each of the parties filed written submissions which were highlighted by Dr Khaminwa for the applicant, and Mr Njeru holding brief for Mr Gachuhi for the respondent. In his submissions, Dr. Khaminwa said that a tenancy may be described as a lease or a license. He argued that there were various understandings between the parties and in the circumstances the plaintiff should be heard in court. He submitted that to dispose of the suit on an interlocutory application for injunction would not meet the ends of justice. It was his further contention that the new Constitution requires that parties be heard in court, and especially that in this case there were triable issues.

On his part, Mr Njeru submitted that the relationship between the plaintiff and the defendant was by a license agreement dated 16th January, 2010, which was to expire on 31st December, 2010. Although the said license has since expired, the plaintiff continues to occupy the premises as a trespasser. He submitted that the only remedy for the plaintiff lies in damages and that this was not a proper case for the issue of an injunction. He urged the court to refrain from confirming the temporary injunction which had been granted and to dismiss the application.

In a short reply, Dr Khamiwa submitted that whether the agreement between the parties was a license or a lease was an issue for determination by the court. Whether all the terms of the understanding between the parties were embodied in the agreement or not was also an issue. He asked the court to make an order for maintenance of the status quo pending the hearing.

After considering the pleadings and the submissions of the parties, I find that the main issues to be determined are whether there was an agreement between the parties; whether there has a breach of the terms thereof; and whether it is prudent for the court to grant an injunction pending the hearing of the case.

That there was an agreement between the parties is a fact which is not in dispute. Copies of the agreement are attached by both the applicant and the respondent to their respective pleadings, and the said agreement was made on or about 16th January, 2010. If there were any matters which were not expressed in the agreement as suggested by learned counsel for the applicant, then they are not before the court. The court can only go by the terms of the agreement which has been placed before it.

According to that agreement, the applicants were granted the licence to run an Ice Cream parlour within the respondent's premises, commencing from 1st January, 2010. Clause 6 stipulates that "**…The license will be for a period of Twelve (12) months from the commencement date. It will be on a fully exclusive License with a stipulation that assignment will not be permitted."**

Although the license was for a fixed term of 12 months, Clause 17 thereof provided for termination. It states as follows -

"**TERMINATION: Either party may terminate this license by giving the other party in advance, a written notice of one month license fee in lieu of the same" (sic).**

This provision was followed by Clause 18 on possession and it reads thus - **"POSSESSION: This will commence on 01 January 2010.**

At the expiration of the license period, the licensee vacate the designated space and repair and in accordance with the terms of the license and to give up all keys, if any, of the designated space to the licensor."

By a letter dated 15th November, 2010, the defendant wrote to the plaintiff as follows –

"**Dear Sir**,

LR No 330/1271 NAIROBI LICENSE OF PREMISES AT THE JUNCTION SHOPPING CENTRE FROM THE JUNCTION LTD TO OSTERIA ICE CREAM LIMITED

Reference is made to your license agreement dated 01 January, 2010 for the purpose of operating an Ice Cream Parlour at the Junction Shopping Centre.

We draw your attention to Clause 17 of your permit which states, "*Either party may terminate this license by giving the other party in advance a written notice of one month*". The Lessor does not intend to extend your license further and we would be grateful therefore to receive your work plans for restoration works to the premises prior to handover on or before the expiry date on 31st December, 2010.

Your co-operation is highly appreciated."

According to the defendants, they were subsequently told, verbally, to ignore this letter. However, if there was such advice from the respondents, it would have been foolhardy for the applicants to go by such advice since it would be very difficult for them to prove that such advice which was contradicting a written word, was ever written. Even if they could prove it, it would not have carried any weight in the context of the termination of the license which had a definite period of existence. The license stood to be terminated by effluxion of time after 12 months, with or without such advice.

In order to qualify for the grant of an injunction, it is imperative that the applicant satisfied the conditions laid down in **GIELLA** v **CASSMAN BROWN AND CO., LTD** [1973] EA 358. These are, firstly, whether an applicant has shown a prima facie case with a probability of success. Secondly, an interlocutory injunction will not 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.

It is to be noted that there was no provision in the agreement for extension of the duration of the license. It was to be for a period of only one year. If the parties had intended to have it renewable, they would have said so. Since the term agreed upon has expired by effluxion of time, there is nothing to extend and there is no basis for such extension. Any attempt by a court to extend the period would amount to rewriting the contract between the parties. Only the parties themselves can rewrite their contract. The duty of the court is to interpret and enforce contracts entered into by the parties but not to rewrite them. Ordinarily, it is not the function of a court of equity to allow a party to escape from a bad bargain as was observed by the Shah JA., in **FINA BANK LTD** v **SPARES AND INDUSTRIES** [2000] I EA 52.

Considering the grounds advanced by the applicant in support of its application, I note that the first of them is along the lines that the respondent's intended termination and eviction of the applicant and its possession of the suit premises are unjustified and wrongful as they lack any legal basis. With respect, this cannot be the case for the simple reason that the license was given for a definite period of 12 months after which it would expire by effluxion of time. Clauses 6 and 18 of the agreement, respectively, provided that "**the license will be for a period of twelve (12) months from the commencement**" and that "**at the expiration of the license period, the licensee would vacate the designated space …**". By these provisions, it was envisaged that the licensee would automatically vacate the premises after the expiration of the license period of twelve (12) months. Therefore, the license expired automatically and

the respondent was not under an obligation to extend it.

The second ground is that the defendant is in fundamental breach of its agreement with the plaintiff and has persistently frustrated the plaintiff in its preparation and possession. Again, considering that the agreement between the parties came to an end by effluxion of time, the respondent would not have had a hand in its expiration. If there were any breaches of the agreement between the parties during the life of the license, then it was up to the applicant to take up such issues during the existence of the license and not after its expiry.

The third and fourth grounds are that the respondent wrongfully and unjustly attempted to circumvent its controversial obligation by its intent to force out the plaintiff from the suit premises, and that the applicant reads an ulterior motive in the respondent's intended action which goes against the rules of natural justice. Once again, the short answer to this is that the applicant is not being forced out of the suit premises, but that the duration of its stay therein came to an end by itself in terms of the agreement between the parties. Therefore, *prima facie*, the termination was not brought about by any ill motive. Whether there was an ill motive or not, the license was bound to expire after twelve (12) months from its commencement.

By reason and wholly on account of the foregoing, I find that the applicant has not established a prima facie case with a probability of success in order to deserve the grant of an interlocutory injunction. The prayers for such injunction and specific performance have not merit and this application is accordingly dismissed with costs to the respondent.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 5th day of April, 2011.

L NJAGI

JUDGE