



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 25 OF 2011

ESSAR TELECOM KENYA

LTD.....PLAINTIFF/APPLICANT

V E R S U S

GEMINI PROPERTIES LTD.....1ST

DEFENDANT/RESPONDENT

TIMOTHY OTIENO OWUOR T/A NAIROBI CONNECTION SERVICES.....2ND

DEFENDANT/RESPONDENT

R U L I N G

The 1st Defendant is the registered proprietor of L.R. No. 209/9295, New Muthaiga, Thigiri Road, Nairobi upon which it has erected a building known as Muthaiga Centre (hereafter known as the “suit premises”). The Plaintiff is the successor of Econet Wireless Kenya Limited and is a telecommunications operator licenced under the Kenya Information and Communications Act to provide universal telecommunications services. Sometimes in February 2009 the Plaintiff, through its agents Ericsson Kenya Limited, commenced negotiations with the 1st Defendant seeking to enter into a 10 year Licence Agreement over a portion of the suit premises. The Plaintiff wanted to install a base transceiver station on the roof top of the building. In the course of the negotiations, the Plaintiff gave a cheque of KShs. 1,044,000/= on account in respect of rent as the Agreement was awaited. The Plaintiff then executed the Agreement which was forwarded to the 1st Defendant to also execute. The 1st Defendant executed but endorsed made certain amendments in pen to the document. It is the Plaintiff’s case that the endorsements introduced material aspects to the Agreement and therefore re-opened negotiations; that there was therefore no Agreement as amendments constituted fresh offer. According to the 1st Defendant, the amendments were not material as they did not change the substance of the Licence Agreement and that, in any case, the signed document was passed on to the Plaintiff who did not raise any issue with it. Therefore, it is alleged, the parties were not re-negotiating the terms of the licence.

The Plaintiff alleges that following the re-negotiations the 1st Defendant forwarded the final Licence Agreement to it for execution. It (the Plaintiff) did not execute it. But, and it is not in dispute that, on or about 18th August 2009 the Plaintiff through its agent Vacom Systems Limited made an application:-

“to the City Council of Nairobi for extension of the permitted use of the premises the subject of the intended licence agreement to include the installation of a base transceiver station, as contemplated under the intended licence agreement”.

The City Council responded to the application by letter (“JN4”) dated 21st October 2009 in the following terms:-

“This is to advise that you are required to provide all the necessary application documents including the plot ownership documents and evidence of public notices to facilitate further processing of the application.”

The Plaintiff claimed in the supporting affidavit sworn on its behalf by Joan Ndune that the City Council had declined the application through the letter on the grounds that the suit property was public utility land and that Muthaiga Residents had presented objection to the development. However, the letter (“JN4”) merely seeks further documents. It does not say the application had been rejected, and on what grounds. On this I agree with paragraph 9 of the replying affidavit by Rahim Chatur of the 1st Defendant. The Defendant contends that the fact that the Plaintiff was applying to the City Council for permission to use the suit premises to install a base transceiver station, and this was being done 6 months after the cheque for payment of rent, shows that the Plaintiff acknowledged there was a contract between them.

On basis that there was a contract, the 1st Defendant gave notice on 13th April 2010 to terminate the same after a cheque of KShs.1,096,200/= to cover rent for 1st March 2010 to 28th February 2011 was not given. Subsequent to this the 1st Defendant sent auctioneers (2nd Defendant) to distrain for rent. That is when the Plaintiff filed this suit for a declaration that the intended Agreement was null and void; a permanent injunction; refund of KShs. 1,044,000/=, and so on. With the suit was filed a motion under sections 3, 3A and 63 of the Civil Procedure Act and Orders 3 rule, 40 rules 1, 2 and 8, 51 rule 6 and 51 rules 1 and 3 of the Civil Procedure Rules, 2010, for a temporary injunction to restrain the Defendants from interfering with its telecommunications equipment and business wherever situated in purported enforcement of the intended Licence Agreement over the suit property. What had apparently happened was that the 1st Defendant had instructed the 2nd Defendant to go to the suit premises and distrain the Plaintiff’s telecommunications mast with aerials to recover KShs. 1,096,200/= which was owing in rent (“JN 7”). It is claimed the intended distress was illegal as there was no contract between the parties that could have formed the basis of the action. Secondly, the Plaintiff alleged that it does not have any “telecommunications mast with aerials” at the suit property and that the 2nd Defendant had therefore gone to proclaim at the Plaintiff’s Head Office at Essar House, Africa, off Brookside Grove, Muguga Green Lane, Westlands, Nairobi. Distress can only be levied where a tenancy exists (**Gusii Mwalimu Investment Company Ltd And Others –Vs- Mwalimu Hotel Kisii Ltd., Civil Appeal No. 160 of 1995**). Further, distress can only be levied against goods subject of the suit premises, and, under section 8 of the Distress for Rent Act Cap. 293, if there is wrongful distraint the owner of the goods shall be entitled to double the value of good so distrained with full costs from the person so distraining.

The court received submissions on the application from counsel for the Plaintiff and 1st Defendant. The principles governing the grant of interlocutory injunction have been settled since the decision in **Giella – Vs- Cassman Brown & Co. Ltd [1973] EA 358**. The Applicant has to demonstrate a *prima facie* case with a probability of success; he has to show he will suffer irreparable damage if the injunction is not granted; and, if the court is in doubt, the matter may be decided on the balance of convenience.

Whether or not there is a contract between the Plaintiff and the 1st Defendant is such a contested matter that will only be resolved after full hearing and after all the documents have been considered. This means that, at this stage of the case the Plaintiff has not shown a *prima facie* case. This dispute is basically over

whether, or not the rent of KShs. 1,096,200/= is owing to the 1st Defendant. The question is whether if Plaintiff pays the money to avoid distraint the 1st Defendant is incapable of refunding the same. In other words, it has not been shown that irreparable loss or injury will be suffered if the injunction sought is not granted. I am also not persuaded that the balance of convenience tilts in favour of granting the injunction. In conclusion, the application dated 27th January 2011 is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2011

A. O. MUCHELULE

J U D G E