



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 880 of 2009

FREDICO INVESTMENTS LTD. PLAINTIFF

VERSUS

GRAPHIC INVESTMENTS LIMITED DEFENDANT

RULING

Chamber Summons dated 2/12/2009 is brought under **Section 3A, 63 (c) Civil Procedure Act** and **Order XXXIX (a), (b) and 2 Civil Procedure Code** seeking prayer 3. Other prayers are spend. That pending final determination of this suit an injunction do issue against the defendant/respondent restraining them, either by themselves, their agents, employees, their servants from evicting the plaintiff from its business and/or shutting down the plaintiff's business premises known as SKY-MART EXHIBITION on L.R. 209/1913/1 Nairobi.

The grounds upon which the application is made are that threatened eviction is illegal and that the defendant holds 4 months' deposit of rent. Also the defendant has committed breach of the agreement between plaintiff and defendant which provide for renewal of the lease between the parties and which also provides for quiet enjoyment of the property leased. And that the plaintiff has a good case with high chances of success. That this court has unfettered discretion to grant orders sought.

The application is supported by affidavit sworn by Maria Josephine Nduma, a resident of Mara Savannah, Nairobi described as director of the plaintiff company. She swears that the plaintiff is a tenant on all that premises SKY-MART EXHIBITION on L.R. 209/1913/1 under the agreement/lease marked "MJN2". She swears that there were negotiations between plaintiff and defendant on or about 7.9.2009 and it was agreed that the plaintiff may renew the plaintiff's lease which was due to expire on 30/11/2009, a letter from defendant's advocate is exhibited "MJN3".

The letter is by Kivuva Omuga Waweru & Co. Advocates which states:

"We act for Graphic Investments Ltd. who are your landlords in above mentioned property (lease over L.R. 209/1913/1 Nairobi).

We are glad to inform you that our client has agreed to renew your lease for five years and three months. The lease will commence from 1/12/2009 to 28th February 2014."

That the renewal was subject to payment of goodwill Kshs.4,000,000/= and increased monthly rent of Kshs.150,000/=. This letter was dated 1/9/2009 offering new terms of the new lease. On 7/9/2009 the defendant through its advocates wrote to the plaintiff making another offer of the renewal lease.

"We shall revert to you on the new conditions and details of the lease."

It ended.

The plaintiff applied for finance from a bank to enable it to meet the landlords requirements and on 23/11/09, the plaintiff explained the delay and confirmed that as at that day it had obtained the funds. On the same date the defendant threatened to terminate the lease by closing the premises with effect from

1/12/2009.

The plaintiff has invested money. It purchased the business from another tenant by agreement marked "MJN7" at price of Kshs.3,500,000/=, on 6/5/2004 and if the defendant carries out the eviction the plaintiff will suffer loss. In its amended plaint the plaintiff now pleads that defendant has accepted rent for the month of December 2009 and therefore the plaintiff has become a controlled tenant entitled to protection of tenants under **Cap. 301 Laws of Kenya**.

In reply, the defendant has authorized Martin Muthama to swear an affidavit in reply. He confirms that the plaintiff was defendant's tenant upto 31/11/2009 when by agreement the tenancy was due to terminate. It was the defendant who wrote to the plaintiff asking if they desired to renew the lease and it was confirmed by Maria Josephine Nduma and it was agreed that the new lease would have new conditions including:-

- (a) *payment of non refundable goodwill of Kshs.5,000,000/=;*
- (b) *three months' rent in advance;*
- (c) *three months' deposit as security of lease.*

This agreement was in writing. A letter was given to the plaintiff to enable her to raise money amounting to Kshs.10,000,000/=. Notice that the plaintiff is still in possession and this agreement entitled her to keep possession until 15/12/09. The defendant accepted money which should have been paid to plaintiff. The defendant now states that there was a meeting on 27/11/2009 where it was agreed a deposit of Kshs.3 million by 30/11/2009 and Kshs.2,000,000/= by 15/12/2009 with rent in advance Kshs.450,000/= and if difference in deposit was paid, the defendant would renew the lease.

Defendant had another tenant who will take possession on 1/1/2010 now past. Upon consideration of the matters before the court it is clear that there are issues in dispute of which the defendant has become aware of, the protection of the law (**Cap. 301**). The defendant has exhibited document "MM5" which is obviously deceptive. It is only first page of what is purports to be a first page of a lease which is exhibited.

This is dishonest, intended to deceive the court that the defendant has already obtained another tenant before the court has determined this dispute. **Order 39 (a)** specifies that where property is about to be alienated or damaged, a temporary injunction may be issued to restrain such activity. Also where there is (1) (b) a breach of contract threatened and order is invoked a contract to grant the lease for a period of 5 years and 6 months is outside the protection **Cap. 301** but a contract for less period is covered. This is a dispute to be resolved by court.

The plaintiff has paid December rent and has gone into trouble to raise funds to pay rent and other payments demanded by defendant. These are issues which are to be considered by court. The defendant would therefore not be expected to embark into engaging other tenants injunction may be issued. These orders are discretionary and equitable and are not granted to a person who comes to court with unclean hands. The defendant has attempted to cheat the court in replying affidavit paragraph 21.

For reasons stated above, I grant injunction as per prayer 3 of the application.

Costs to the plaintiff.

Orders accordingly.

DATED, SIGNED and DELIVERED this 4th day of January 2010.

JOYCE N. KHAMINWA
JUDGE