



**Chatur Properties Limited v Eaf Galaxy Entertainment Limited (Environment & Land Case 17 of 2021) [2022] KEELC 13383 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13383 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 17 OF 2021  
OA ANGOTE, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**CHATUR PROPERTIES LIMITED ..... PLAINTIFF**

**AND**

**EAF GALAXY ENTERTAINMENT LIMITED ..... DEFENDANT**

***(FORMERLY HCCC NO E073 OF 2021)***

**RULING**

1. What is before this court for determination is the notice of motion dated October 19, 2021. In the application, the defendant/ applicant has sought for the following orders:
  - a. That this honourable court be pleased to issue an order granting access to the applicant into the premises located at Diamond Plaza II, 9<sup>th</sup> floor measuring 20,000 SQ Feet for purposes of taking an inventory.
  - b. That in the alternative, the applicant be allowed to break in, enter the premises under the supervision of the respondent, take an inventory, and thereafter reconstitute the premises to its original condition.
  - c. That this honourable court do issue such orders as it deems fit in the circumstances that will allow the applicant access into the suit premises for purposes of taking inventory.
  - d. That costs of this application be in the cause.
2. This application is premised on the grounds on the face of it and the supporting affidavit sworn by Mr Li Wenjun, a director of the defendant/ applicant. The defendant's director deposed that pursuant to a lease agreement dated November 22, 2017, the defendant/applicant is a tenant of the premises



located at Diamond Plaza II, 9<sup>th</sup> floor measuring 20,000 Square feet, which is owned and managed by the plaintiff/respondent.

3. The defendant/applicant's director deponed that during negotiations prior to entering into the lease agreement, the plaintiff/respondent assured the applicant that the nature of the business they wanted to conduct, a casino, was permissible and that the defendant/applicant thereafter entered in the lease agreement which commenced on December 1, 2017, with rental payments to begin in September 2018.
4. It is the applicant's case that it paid Kshs 16,848,000 on December 13, 2017; that the applicant thereafter took possession of the premises which was vacant, and installed fixtures and fittings amounting to Kshs 160,000,000 which are still in the premises to which the applicant has no access.
5. The defendant/applicant deponed that this matter came for pre-trial on September 21, 2021 before the Hon Deputy Registrar Elizabeth Tanui, during which the applicant sought to take an inventory of the items in the premises and a valuation of the works undertaken therein; that by consent, the court granted this request and that when the applicant visited the premises on October 7, 2021 for the mentioned purpose, they were denied access by the respondent's agents and or employees.
6. The plaintiff/respondent's legal officer deponed that while the appellant indeed requested to access the property and take an inventory vide a letter dated October 5, 2021, such request was made after the period granted to them to comply with pre-trial directions had expired and that the applicant had access to the suit property and its directors had the keys to the suit property which were given to them when they took possession.
7. The legal officer of the plaintiff deponed that pursuant to the lease agreement entered into between the parties, the applicant took possession of the premises, carried out the desired fixtures and fittings and continued in quiet possession; that the applicant has however defaulted in payment of rent, electricity bills and interests, and has accumulated arrears thereof in the total sum of Kshs 113,891,367.15 as of January 2021 when this suit was instituted and that as at December 16, 2021, the amount owed was at Kshs 157,881,964.
8. It was deponed by the plaintiff's legal officer that the respondent proceeded to distress for rent; that it instructed the firm of Auctioneers being Timothy Otieno Owuor T/A Nairobi Connections Services Auctioneers, who filed Miscellaneous Application No 359 of 2020 at Milimani Law Courts and that the court granted the Auctioneers orders dated May 22, 2020 to access the premises to attach and later seize goods if the rent was not settled within 14 days.
9. It was deponed that on May 29, 2020, the auctioneers issued a notification of sale of movable property pursuant to section 28 of the Auctioneers Act and that on June 11, 2020, the goods were advertised in the Star Newspaper for sale through a public auction. It is the plaintiff's case that on June 22, 2020, the auctioneers returned a copy of the goods sold totalling to Kshs 1,975,000 and that this amount could not cover the demanded arrears, which necessitated the respondent to institute this claim in court.
10. The plaintiff's legal officer urged that the application herein was intended to delay the expeditious hearing of the claim for rent, service charge and electricity bill; that the applicant already had access to the suit premises as the same has never been formally surrendered nor has the lease been formally terminated and that the defendant/ applicant does not need permission to be granted to access the suit property.
11. The defendant's/applicant's counsel submitted that the applicant entered the lease agreement and was to operate a duly licensed gambling casino, on the legitimate expectation that a license to operate would be granted by the Betting and Licensing Board and that the applicant took possession of the premises on the agreed date and proceeded to purchase top quality gambling casino equipment, and



- installed fixtures and fittings worth Kshs 160,000,000, with some of the equipment remaining new and unopened.
12. Counsel submitted that on May 16, 2019, the Betting Control and Licensing Board dismissed the defendant's application for a betting license as the proposed location was 'found unsuitable for gambling purposes given that it is located on the 9<sup>th</sup> floor of the building overlooking a sensitive government facility.'
  13. It was submitted that the applicant was unable to proceed with the intended business and closed down the premises while seeking for a solution; that the plaintiff thereafter moved the court and appointed auctioneers to access the premises to seize and attach the defendant's items if rent was not settled within 14 days and that the respondent secured ex-parte orders which were never served upon the defendant, neither was the notification of sale of movable property, despite the court granting the applicant 14 days to comply with its orders.
  14. It was submitted by counsel for the defendant/applicant that if the items were allegedly sold, the amount purported to have been recorded is far less and does not equate to a fair market value, considering that all the items were new since the casino did not open its operations; that the amounts listed in the letter by Nairobi Connection Services Auctioneers dated June 22, 2020 are shocking, creating doubt as to whether the items were indeed auctioned and that this court should grant them access to the suit premises for purposes of taking an inventory and record the actual value of the items through an independent valuer.
  15. Counsel argued that if the items were indeed auctioned, they were undervalued and ought to have been priced at a reasonable market price; that the plaintiff through its auctioneer carried out a sham auction and deprived the applicant of its property and that under section 99(4) of the *Land Act 2012*, a person prejudiced by an improper or irregular exercise of the power of sale shall have a remedy of damages against the person exercising that power. Counsel relied on several authorities which I have read.
  16. The plaintiff/respondent's advocate submitted that the court allowed auctioneers to enter the defendant/ applicant's premises and attach the goods in satisfaction of the rental arrears of Kshs 113,891,367.15/- as of January 2021 and that there is therefore nothing on the suit property to take an inventory of owing to the developments wherein the defendant/ respondent proceeded to distress for rent.
  17. It was submitted that the plaintiff has never denied the applicant access to the suit premises; that it would be an abuse of the court process to stall the proceedings in order to determine an application which is not meritorious and that the application is intended to delay the hearing of the substantive claim which ought to be determined speedily as the rent, electricity and service charges continue to accrue.

### **Analysis and Determination**

18. The only issue for determination before this court is whether the court should grant orders allowing the applicant access to the suit premises for purposes of taking inventory and valuation of the works undertaken therein.
19. It is not in dispute that the parties herein entered into a lease agreement dated November 22, 2017 with respect to the suit premises, Diamond Plaza II, 9<sup>th</sup> floor measuring 20,000 square feet, with the applicant as the tenant and the respondent being the owner of the suit property. The applicant contends that during negotiations and prior to entering into the lease agreement, the respondent assured the applicant that the nature of the business they wanted to conduct, a casino, was permissible.



20. According to the defendant's/applicant's Director, the defendant took possession of the suit premises which was empty, and installed fixtures and fittings amounting to Kshs 160,000,000 which it avers are still in the premises and that the defendant/ applicant has been denied access.
21. The applicant is seeking for a mandatory order to compel the respondent to allow it to access the suit premises. It has contended that the court granted its request to access the suit premises upon the parties' agreement on September 21, 2021 and that when it sought such access on October 7, 2021, having requested access vide a letter dated October 5, 2021, they were denied access by the respondent's agents and or employees.
22. On its part, the respondent has asserted that the applicant already had access to the suit premises as the same has never been formally surrendered nor has the lease been formally terminated. According to the plaintiff, the defendant does not need permission to be granted access.
23. Order 40 rule 10 of the *Civil Procedure Rules 2010* empowers the court to grant an order for inspection upon application of a party to a suit. The said rule provides as follows:
  - “(1) The court may, on the application of any party to a suit, and on such terms as it thinks fit –
    - a. make an order for the detention, preservation, or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;
    - b. for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; or
    - (c) for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.”
24. It is the applicant's case that pursuant to a lease agreement between the parties to this suit, it installed fixtures and fittings amounting to Kshs 160,000,000. Although the defendant/applicant contends that these fixtures and fittings are still on the premises, the respondent asserts that such fixtures were auctioned for Kshs 1,975,000, a value that the defendant has disputed.
25. Considering that the plaintiff has admitted that the defendant is entitled to access the suit property, and the lease agreement between the parties having never been terminated, this court should grant the defendant an order to allow it to access the suit premises for purposes of inspection, inventory taking and valuation of the fittings therein.
26. The inspection of the suit property is material to the applicant's claim because it will determine the extent to which the fixtures and fittings remained intact, if at all and the value of the same.
27. While the applicant in its submissions has made a plea for damages, such request is premature because the applicant has not presented any evidence of the value of the fittings and fixtures in the suit premises that were auctioned pursuant to a court order. The defendant has also not tendered evidence to lead this court to conclude, on a balance of probability, that the auctioned items were undervalued and ought to have been priced at a reasonable market price.
28. For these reasons, the application dated October 19, 2021 is allowed on the following terms:



- a. The applicant be and is hereby granted access to enter into the premises located at Diamond Plaza II, 9<sup>th</sup> floor measuring 20,000 square feet for purposes of taking an inventory and record the actual value of the items in the premises through an independent valuer.
- b. Costs of this application shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Chumo for Manwa for the Plaintiff/Respondent

No appearance for the Defendant

Court Assistant: June

