REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 87 of 2010

MOHAMMED NOOR ADEN……..……..1ST PLAINTIFF

AKIDA ABDULHAKIM……..……..2ND PLAINTIFF

(Both trading as Nyali Integrated Academy)

VERSUS

BARACK ADAN ABUTO……..….…....DEFENDANT

RULING

In their plaint dated 25th March, 2010, the plaintiffs seek two main orders namely, a declaration that their lease of LR No. 6609/1/MN (hereinafter *"the suit premises"*) is valid for 10 years with effect from 23rd November, 2009 and that the defendant has no right to interfere with the same save for violation of the terms thereof and an injunction restraining the defendant from dealing with the suit premises in such manner as would interfere with the plaintiff's occupation of the same.

Simultaneously with the plaint the plaintiff lodged the application which is now before me mainly under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules. The primary order sought is a temporary injunction restraining the defendant or his agents from interfering with the plaintiffs' quiet and peaceful occupation of the suit premises pending the hearing and disposal of this suit.

The principal grounds for the application are that the plaintiffs have leased the suit premises on which they run a school for 10 years with effect from 23rd November, 2009 and notwithstanding the said lease, the defendant, has threatened to evict them and will do so unless he is restrained by protective orders of injunction.

The application is supported by an affidavit sworn by the 2nd plaintiff. Annexed to that affidavit are several documents including a copy of the lease executed by the parties. It is deponed in the affidavit, *inter alia*, that when the plaintiffs delayed paying rent for a few days in the month of January, 2010, the defendant served them with a notice of forfeiture-hence this application. The plaintiffs contend that they have invested heavily on the suit premises and have acquired goodwill which stands to be lost unless the defendant is restrained by a temporary injunction.

The defendant has opposed the application and in that regard he has filed a replying and a further affidavit both sworn by him. The gist of the opposition is that the plaintiffs have defaulted in their rent payments and the defendant was entitled to forfeiture of the lease. To the replying affidavit are annexed several exhibits including another version of the lease executed by the parties.

The application was debated before me on 7th June, 2010. Counsel reiterated the averments in their clients' affidavits and urged their client's respective stand-points.

I have considered the application, the affidavits filed both for and against the application and the submissions of

counsel. Having done so, I take the following view of the matter. The principles for the grant of a prohibitory injunction were crystallized in the precedent setting case of **Gielle – v – Cassman Brown & Company Limited [1973] EA 358.** They are as follows:-

1) **An applicant must show a prima facie case with a probability of success at the trial.**
2) **An interlocutory injunction will not normally be granted unless an applicant can show that he would suffer irreparable loss if the injunction is not granted.**
3) **If the court is in doubt it should decide the application on a balance of convenience.**

The affidavit evidence adduced before the court demonstrates that the parties indeed entered into a lease agreement on 23rd November, 2009 in respect of the suit premises for a period of 10 years at a monthly rent of Kshs. 280,000/=. The versions exhibited by both parties are not exactly the same as one would expect. Of significance to this dispute is clause 3 (a) of the two versions. The plaintiff's version reads as follows:-

"3. Provided always and it is hereby agreed and declared as follows:-

(a) If the rent hereby reserved or any part thereof shall at any time be unpaid for seven (7) days after becoming payable (whether lawfully demanded or not) or if any of the covenants on the part of the lessee herein contained shall not be performed and observed or…… if the lessee being a person or persons in whom for the time being the term hereby created shall be vested shall become bankrupt or enter into agreement or make any arrangement with his/her or their creditors for liquidation of his/her or their goods then and in any of the said cases it shall be lawful for the lessor to serve upon the lessee a notice in writing specifying such non-payment or breach as aforesaid and requiring the lessee forthwith to remedy the same and if the lessee shall not within fourteen days comply with such notice the lessor may at any time thereafter re-enter upon the premises or any part thereof in the name of the whole and thereupon this tenancy shall absolutely determine but without prejudice to the right of action of the lessor in respect of any antecedent breach of any of the covenants on the part of the lessee herein contained;"

On the other hand, the version exhibited by the defendant reads as follows:-

"Provided always and it is hereby agreed by and between the parties hereto as follows:-

(a) If the rent hereby reserved or any part thereof shall be unpaid for seven (7) days after becoming due and payable whether formally demanded or not or if any condition on the lessee's part herein contained shall not be performed or observed or if the lessee in whom for the time being the term herein shall be vested shall enter into liquidation (whether compulsory or voluntary but not being a voluntary liquidation merely for the purpose of reconstruction) or shall have a receiver of his property appointment of if any person in whom for the time being the term hereby granted shall be vested shall become bankrupt or make any arrangement or assignment with his or their creditors for the liquidation of his or their debts by compensation or otherwise then and or in any such case it shall be lawful for the lessor at any time thereafter to re-ender upon the leased premises or any part thereof in the name of the whole and thereupon this lease shall absolutely determine but without prejudice to the right of action of the lessor in respect of any breach of the lessees' covenants herein contained……."

Both versions of the lease are dated 23rd November, 2009 and were duly executed. The version exhibited by the plaintiffs was executed before an advocate called Abdullahi G. Aden whilst the one exhibited by the defendant does not appear to have been attested. Of significance however, is the provision of notice in the clauses cited above. Whereas the

version exhibited by the plaintiff provides for a compliance period of 14 days on being served with a notice of default, no such period is given in the version exhibited by the defendant. The defendant freely admits executing both versions of the lease. On a strict construction of clause 3 (a) in the version exhibited by the plaintiffs, the plaintiffs had 14 days from the date of notification within which to remedy the default. If the defendant's letter dated 12th January, 2010 is taken to be a notice of default, the plaintiff had upto 26th January, 2010 to remedy the default. They say that they did so on 18th January, 2010.

Prima facie therefore, the defendant's right to forfeit the lease had not accrued when he purported to do so in his letter dated 12th January, 2010 aforesaid. Indeed the letter would prima facie not qualify as a notice under clause 3 (c) of the version of the lease exhibited by the plaintiffs. I am, in the premises, persuaded that the plaintiffs have demonstrated a prima facie case with a probability of success at the trial that the defendant's right of forfeiture and re-entry had not arisen by the time he served his aforesaid letter.

The second necessary condition to consider is where the plaintiffs' injury could adequately be compensated in damages if an injunction were not granted at this stage. The plaintiffs say they have invested heavily in their school which comprises the suit premises. They further aver that they have acquired goodwill which will be lost unless the injunction is granted. The investment and goodwill may be quantifiable in money terms but parties should be bound by what they have voluntarily put their hands to. A party should not be permitted to back out of a transaction because the other side's loss is quantifiable. In any event it is not always easy to quantify goodwill. Further the rule is not cast in stone. In **Aikman – v – Muchoki [1984] KLR 353,** the Court of Appeal held, inter alia as follows:-

> **"A wrong doer cannot keep what he has unlawfully taken just because he can pay for it."**

That finding was made in an appeal where the High Court had held that the injury suffered by the appellants as a result of trespass was capable of being compensated by damages. The same position was taken by Ringera J. as he then was in **Simiyu – v – Housing Finance Company of Kenya [2001] 2 EA 540.** The Learned Judge expressed himself as follows:-

> **"……..as I understand the Law, it is not ordained that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them. That is the normal course but not the invariable course. In my view the court has and must exercise a judicial discretion in the matter. In exercising such a discretion it is entitled to take into account the conduct of the respondent and the gravity of the breaches of law or contract alleged. If for example it is shown that the respondent has behaved in a highhanded or overbearing manner or that he has flagrantly disregarded clear and mandatory provisions of the Law, equity may yet come to the assistance of the applicant."**

On balance of convenience, I am persuaded that the same tilts in favour of granting the temporary injunction sought. I say so, because the suit premises are utilized as school. That means that, other interested parties are directly affected by the dispute between the plaintiffs and the defendant. An injunction at this stage will accord the parties an opportunity to incorporate the pupils' interest in the resolution of the dispute. The defendant may even get a buyer who will purchase the premises together with the existing lease.

The upshot is that I allow the application dated 25th March, 2010 in terms of prayer 3 thereof. The temporary injunction is granted on condition that the plaintiffs shall, within seven (7) days, file separate undertaking as to damages. The undertakings shall be under oath.

Coasts shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF JULY 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Gikandi for the plaintiffs and Mr. Ouma for the Defendant.

F. AZANGALALA

JUDGE

6TH JULY 2010