



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 526 of 2009
GARDEN SQUARE LIMITED trading as
GARDEN SQUARE RESTAURANT.....PLAINTIFF/APPLICANT
VERSUS
CITY COUNCIL OF NAIROBI.....1ST DEFENDANT/RESPONDENT
KENYATTA INTERNATIONAL
CONFRENCENTER.....2ND DEFENDANT/RESPONDENT
RULING**

The plaintiff operates as business in the city of Nairobi in the name of Garden Square Restaurant. It brought this suit against both defendants alleging several transgressions by the two defendants ranging from trespass, unlawful distraint for rent and inability to remit rent to either of the two defendants because of competing interests.

Alongside the said plaint, the plaintiff has moved the court by way of Chamber Summons under Sections 3A and 63 of the Civil Procedure Act Cap 21 Laws of Kenya and Order XXXIX Rules 1 and 2 of the Civil Procedure Rules for orders that the defendants be restrained from trespassing upon or evicting the plaintiff from the premises known as Garden Square Restaurant.

There is also a prayer that the defendants be restrained from levying, charging, collecting or receiving parking fees or clumping motor vehicles parked within the suit premises.

The other order sought is that, pending the hearing and determination of this suit, the plaintiff should be allowed to remit and pay to the Registrar of the High Court all rents currently payable in respect of its tenancy at the suit premises.

The application is supported by the grounds set out on the face of the application alongside an affidavit sworn by Armstrong F. Kasuku said to be a Director of the plaintiff company.

The application is opposed by both defendants who have filed replying affidavits and counsel appearing for all parties have also filed their submissions in this matter. It is clear from the pleadings, the affidavits and submissions on record that, there are competing interests between the two defendants in respect of the ownership of the suit premises. It is also clear that the plaintiff has been sucked into this dispute and that as a result, it is unable to decide who is the proper owner and or landlord to which the rent may be payable.

I note from the material before me that, there have been previous legal proceedings in respect of the suit premises and in particular High Court Civil Case No. 794 of 2001 where the plaintiff sued the 1st defendant and a firm of auctioneers after its goods were seized for non-payment of rent. That suit I am told, is still pending determination.

Be that as it may, the plaintiff has annexed sufficient evidence that it has been remitting rent to the 2nd defendant until it received a notice dated 17th August, 2009 from the 1st defendant to the effect that it was in arrears of rent of 11million and that the said sum should be paid within 48 hours to avoid eviction.

During the same month the plaintiff had also received a copy of a notice addressed to the Director of Guram Investments by the 2nd defendant requiring the auctioneers to levy distress and recover rent amounting to Kshs.491,832/-.

It will be noted that there is a marked difference between what the 1st defendant said was due to it compared to that of the 2nd defendant. Whatever the case, the plaintiff has offered to deposit the rent due and payable to whichever landlord that may be declared to be the rightful owner of the said premises. Ownership of these premises is a serious triable issue which cannot be wished away in view of the material before me.

If either of the two defendants is allowed to interfere and or manage the said premises, it will be the plaintiff who will be adversely affected. The premises as is clear, is a restaurant frequented by patrons who require the parking space outside the same. The plaintiff has stated that, where its patrons' park, has not been designated as a parking and therefore the clamping and levying parking fees cannot be justified. This averment has not been disputed by the 1st defendant.

For the plaintiff to succeed in this matter at this stage, it has a duty to establish a *prima facie* case with a probability of success and that if the order is not granted, it shall suffer irreparable loss that may not be compensated by an award of damages. The continued trespass and clamping of the plaintiff's patron's cars is likely to affect the business adversely. It has not also been alleged that the plaintiff has refused to pay rent or that it is in breach of any tenancy agreement. Until the dispute of ownership of the premises is resolved, it is not clear to which party the rent should be paid.

I know there is a concern and especially on the part of the 1st defendant that, the plaintiff obtained orders of injunction in the previous suit which it has not bothered to prosecute. However, where a party does not prosecute his suit for whatever reason, the law is clear as to what steps the part adversely affected should do.

On my part, I find that the plaintiff has established a *prima facie* case with a probability of success and that the orders sought should be granted. I say so because, even if I were in any doubt whatsoever, which I am not, the balance of convenience would still tilt in favour of the plaintiff who is in occupation of premises that are a subject of competing interests between the two defendants. Having offered to deposit the rent due and payable with a 3rd party that is an expression of good faith to maintain the tenancy therein.

Accordingly, I grant prayers Nos. D, E, and F of the Chamber Summons dated 9th October, 2009 and order that the plaintiff shall have the costs of this application payable by the two defendants.

For avoidance of any doubt, the plaintiff shall deposit all the arrears of rent due and payable to date, with the Registrar of the High Court and continue to deposit monthly rent with immediate effect until this matter is finalized or further orders of this court. Either party has liberty to apply.

Orders accordingly.

Dated, signed and delivered at Nairobi this 23rd day of September, 2010.

A. MBOGHOLI MSAGHA
JUDGE