



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

(NAIROBI LAW COURTS)

Civil Case 88 of 2008

WESTPARK STUDY ENTRE LTDPLAINTIFF/APPLICANT

VERSUS

GEMINI PROPERTIS LIDDEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant moved to this court, by way of a plaint dated 17th day of March 2008 and filed on 18th day of March 2008. The grievance arises because of the following:-

- In or about the year 2006 the plaintiff was desirous of expanding provisions of Educational services in London IGCS and GCE and for this reason approached the defendant with a view of renting its premises located on LR.NO. 209/9295 situate in new Muthaiga within the city of Nairobi (“ *The Muthaiga Campus*”) to supplement its operations on LR No. 209/2058 Muthithi Road Westland, within the city of Nairobi (“*the Westland campus*”)
- In pursuance of the above intention, both parties signed an agreement of lease for the Muthaiga premises on 28th day of March 2006. The terms of the same among others are those set out in paragraphs 5 of the plaint.
- In furtherance of the said lease agreement parties signed an addendum dated 28th April 2006 making provision that the lease was terminable by either party, giving the other three months notice in writing.
- There was a crucial term concerning the security deposited by the lessee in this respect, the Plaintiff/Applicant. In the letter of offer, conditions 22 stipulated that in the event of termination of the lease, term, the security deposited was irrecoverable. Where as under condition 1 (b) of the lease agreement the security deposit is only irrecoverable where the termination is as a result of default on the part of the plaintiff.
- The lease agreement went further to provide that in the event of any dispute arising, the same was to be referred to arbitration in the manner provided in the said lease.
- It is their contention that the terms of the lease over ride the terms contained in the letter of offer.
- The plaintiff alleges that they complied with the terms of the letter of offer save for the execution of the lease, took possession of the Muthaiga campus enrolled students and thereafter dutifully observed the terms of the tenancy.

- Operations continued till the 2007 post election violence broke out forcing the plaintiff like any other institution to close, by reason of which closure, the January 2008 examinations were cancelled by the parent institution in London, forcing most students to relocate to other institutions. By reason of these matters, the plaintiff could not operate both campuses and offered to surrender back to the defendant the Muthaiga campus effective 31st January 2008.
- In consequence of the above request, it is the plaintiffs' assertion that the defendant allowed them to remove part of their property to the Westlands campus, with a request that they plaintiffs do reconsider relocating with a view to being allowed to retain both campuses with the Muthaiga campus going at half its rental value till the political situation in the country improved. Which offer the plaintiff declined to accept, since its business had been completely ruined, it the plaintiff, moved to the Westland's campus removing some of its assets from the Muthaiga campus thus completely severing the tenant and landlord relationship between them in respect of the Muthaiga, campus.
- By the time of withdrawal, the defendant still held on to the security deposit paid by the plaintiff as full rent upto 31st December 2007 had been paid.
- The plaintiff went on to aver that on or about the 12th day of March 2008, the defendant purported to levy distress on the plaintiffs West lands campus purporting to levy distress for rent of Kshs. 861,300/= allegedly owed on account of rent payable for the months of January, February and March 2008.
- It is their contention that the said distress is unlawful, irregular and unenforceable in law by reason of the particulars given in paragraph 18 of the plaint.
- Further that by reason of the averments afore set out above, the defendant by reason of its conduct, acts and representation is estopped from claiming the rent for January, February and March 2008.
- It the plaintiff has already invoked the arbitral provisions in the agreement, and for this reason as well as others in the averments in the plaint, it is proper to grant the reliefs sought in the plaint.

Against the afore set out background information, the plaintiff anchored an application by way of chamber summons dated 17th day of March 2008 and filed on 18th day of March 2008 filed simultaneously with the filing of the plaint. The application is brought under order XXXIX rule 12 and 3(1) and order L rule 1 CPR section 3A of the CPA and all other enabling provision of the law.

Five prayers are sought namely:

1. Spent

2-3 That pending the hearing and determination of the application in prayer 2, and pending the hearing and determination of the intended arbitration, in prayer 3 the defendant by itself or through its agents, servants or assigns, be restrained from levying distress or trespassing upon, harassing, causing disturbance or in any way being a nuisance to the plaintiff, at the plaintiffs' Westlands campus situate on L.R. No. 209/2058 Muthithi Road, Westlands, Nairobi.

4. That pending the hearing and determination of the intended arbitration a mandatory injunction do issue compelling the defendant to forthwith release to the plaintiff, the plaintiffs goods namely:-

- Office furniture

- Classrooms furniture

- School library furniture e.g. lock shelves library books, laboratory equipment and chemicals, computer lab furniture examination room safes, table tennis rackets, netball goal posts etc held by the defendant at the defendants premises L.R. NO. 209/9295 New Muthaiga Nairobi.

5. *That costs of the application be provided for.*

The application is grounded on the grounds in the body of the application, supporting affidavit, annexures, written skeleton arguments, oral highlights in court, and case law.

The salient features of the same are mainly a reiteration of the averments in the plaint and the major ones for purposes of the record are as follows:-

- The plaintiffs run an educational institution in Westlands Nairobi.
- It was desirous of expanding its services to a campus located in Muthaiga which the plaintiff was desirous of leasing to expand its services.
- Indeed negotiations were embarked upon by both sides and this gave rise to the issuance of letter of offer and a lease which the plaintiff accepted but did not execute the lease but executed the letter of offer.
- Of importance to this ruling, the term for occupation of the Muthaiga campus was 5 years and 3 months commencing 1st September 2006.
- Indeed the applicant took possession of the Muthaiga campus and carried out its operations till the 2007 election violence forced the institution to be closed and January 2008 exams cancelled which activity forced some of the students of the Muthaiga campus to relocate elsewhere, thus making it impracticable for the applicant to carry out operation on both campuses.
- By reason of what has been stated above, the applicant duly notified the defendant of their inability to operate both campuses and gave notice to the defendant of their intention to close the Muthaiga campus by 31st January 2008.
- It is their stand that rent had been fully paid upto 31st December 2007 and any excess up to 31st January 2008 was to be catered for by the three months security which had been paid by the applicant to the defendant in pursuance of the execution of the letter of offer.
- Following the intimation to the defendant of their intention to pull out from the Muthaiga campus, the applicant duly gave notice of termination of the lease of the Muthaiga campus and asked the defendant to allow them remove some of their equipment from the Muthaiga campus to the Westlands campus which we did.
- Thereafter without any reasonable justification the defendant purported to refuse to accept the applicants' notice of termination of the tenancy for the Muthaiga campus alleging that the lease was for 5 years and 3 months meant to run the full length and could not be terminated before end of term and for which reason the defendant chose to detain some of the goods valued over 1,000,000.00 as an enumerated in the plaint and the supporting affidavit.
- Maintain the removal of goods from the Muthaiga campus to Westlands campus, was done with the permission of the defendant and as such it was not done clandestinely and or fraudulently.
- That despite the defendants detention of some of the applicants goods, and the security deposit, the defendant purported to levy distress for purported rent on the Westlands campus on a premises where they defendant are not landlords. It is therefore their stand that the said purported levying of distress in the manner done, was and still is illegal, unprocedural and unlawful.
- They contend the defendants actions are bent on disrupting the operations of the applicants' Westlands campus and in the circumstance, it is only proper to grant to the applicant the interim reliefs sought herein pending the determination of the arbitration proceedings which the applicant has already commenced.

Reliance has also been placed onto exhibits and there is no harm in highlighting them here. Annexures EOI is the letter of offer duly executed by both parties. Of importance to this ruling are the following clauses:-

(i). Clause 3 which stipulates that *“if the lease shall be terminated prior to the expiry of the lease terms on account of any default on your part or if there is any default in your part during the currency of the lease, then in such case the security deposit will be forfeited to the landlord absolutely. In the event that the security deposit is forfeited during the currency of the lease, then in such event you shall within 7 days from the date of our demand to you for the same, pay to us a further security deposit in replacement of the forfeited security deposit. In the event that any action is taken by you during the currency of the lease which requires our consent but which consent has not been obtained by you, then in such event such action shall without limitation constitute a default for the purpose of this clause.”*

(ii). Clause 4- usage was for purposes of Educational only.

(iii). Clause 8- on the possession and execution of formal lease which states in part:- *“ In the event that you are given possession of the premises before the execution of the formal lease, then in such event you will occupy the premises as a tenant subject to the terms and conditions herein contained and the lease, a copy of which is annexed here to which by execution thereof you are deemed to have accepted and on the condition that you will forthwith sign the formal lease as soon as it is presented to you for your signature. In the event of any dispute and or discrepancy between this letter of offer and the lease, the terms and condition of the lease shall prevail (whether fully executed or not)”*

EO2 forwarded an addendum on a termination clause which had inadvertently been left out in the terms of the letter of offer. It reads:-

“The tenancy agreement may be terminated prior to the expiry of the tenancy period by either party giving three (3) months notice in writing and sufficiently served if delivered by hand or sent by recorded delivery to the other party at their registered office”

The lease is annexure EO3. As averred in the plaint and deposed in the supporting affidavit, the same was not executed by the parties. Of importance to this ruling, and as averred and deposed by the applicant in the plaint and supporting affidavit, clause 1 (b) concerns the security deposit, the clause is found at page 4 of the document. At line 18 from the bottom it is indicated that the security deposit comes to Kshs. 675,000/=. At line 5 from the bottom it reads:-

“ If the lease shall be terminated prior to the expiry of the lease term on account of any default on the part of the lessee, or if there is any default on the lessee's part, during the term of the lease, then in such event the security deposit shall be forfeited to the lessor absolutely. In the event that the security deposit is forfeited during the term of the lease for whatever reason then the lessee shall within seven (7) days from the date of the lessor's demand and to the lessee for the same, pay to the lessor a further security deposit in replacement of the forfeited security deposit, then required. In the event that any action is taken by the lessee during the term of this lease, which requires the lessor's consent, but which consent has not been duly and properly obtained, in writing, by the lessee, then such action shall without limitation, constitute a default for purposes of this clause. The lessee's covenants herein shall be continuous and apply throughout the terms and any indulgence, for want of or non action on the part of the lessor with respect to any breach or default of the lessee, under this clause, shall not be construed as a waiver or release of the lessor's rights hereunder for any future breach or default by the lessee under this clause”

Clause 5 thereof provides:-

“ 5 in the event of any disagreement and/ or dispute between the parties herein pertaining to this lease, and/or interpretation of any of the terms and/or clauses herein contained which the parties have been unable to resolve amicably shall be determined by arbitration as hereunder.....

(e) In all matters of arbitration under this lease, the arbitration Act of Kenya, 1995 as amended from time to time and/or replaced from time to time, shall apply in so far as it is not in consistent with the terms referred to herein”

EO4 is an Email dated 3rd January 2008 from the Edexcel International Regional Manager to the applicants’ management cancelling the January 2008 exams. The reasons given for the cancellation were that it was due to the then current prevailing political violent situation in the country and the fact that most students were out of the country.

EO5 appears from the content to be a reply by the applicants advocates to the respondents offer to reduce rent for the Muthaiga campus to 50% which was declined by the applicants EO6 on the other hand appreciates the applicants gesture of allowing them to remove some of their property (applicants) from the Muthaiga campus to the Westlands campus. The correspondence being acknowledged by EO6, is EO7, whereby the defendants authorized the applicants to remove some furniture from the Muthaiga campus to the Westlands campus allegedly due to the then prevailing situation presumably, political insecurity following the 2007 general elections violence and or financial as a result of students going out of the country. The letter is dated January 22, 2008.

This was followed by a letter from the applicants not marked but dated 30th January 2008 conveying the applicants’ intention to terminate the lease for the Muthaiga campus. This was responded to by the defendant/respondents letter of February 11, 2008 the portion relevant to this ruling in this courts’ opinion run from line 16 from the bottom thus:-

“As much as we sympathize with your concerns, we cannot accept your purported notice to terminate the tenancy which is binding and in force pursuant to the Tenancy Agreement between you and ourselves, dated March 28, 2006 which clearly states inter alia that the tenancy is for a term of six (6) years from September 1, 2006 expiring on August 31st, 2012.

Further more there is no provision in the said tenancy Agreement for a unilateral termination of the said tenancy by you. The said tenancy Agreement also states, inter alia that if the tenancy is terminated earlier than the expiry date i.e August 31, 2012, then the security deposit would be forfeited absolutely to the landlord. You shall forfeit the security deposit absolutely in the event of either termination on your part and hold you responsible for payment of rent until August 31, 2012 reserving any other rights that we may have against you for breach of the said tenancy Agreement. Please note that your total outstanding rent is Kshs. 514,200.00 as per the attached schedule, which we request you to pay to enable us update your records”

EO8 on the other hand is dated 12th March 2008 emanating from the applicants who were seeking permission to remove the remainder of the applicants’ furniture from the Muthaiga campus.

EO9 is dated March 11th 2008 emanating from the defendants addressed to Marchet Auctioneers instructing them to levy distress for rent for the month of January to March 2008 to the tune of Kshs. 861,300.00. It is apparent that the distress was levied and a proclamation issued. EO 11 on the other hand is a declaration of dispute and appointment of an arbitrator dated 14th March 2008.

The Defendant/Respondent have opposed the application on the grounds set out in the replying affidavit, sworn by one Simiyu Masinde on 1st April 2008. The deponent has described himself as the property manager of the defendant company. The sum total of the content is that:-

- Maintain that the applicant is in rent arrears.
- Since notice to terminate was given on 31st January 2008, the applicants were obligated to pay rent for January, February and March 2008.
- Distress for rent was proper

- Security deposit relied upon was as per provisions of the letter of offer and the lease agreement to be forfeited to the landlord upon default by the lessee.
- Denied allowing the Plaintiff/Applicant to take away some of their property from the Muthaiga campus.
- Since the termination of the lease was calculated to take effect on 31st April 2008, the applicant acted fraudulently by carrying away their property from the leased premises.
- Denied holding applicants goods worth 1,000,000.00.
- It is their stand that on the facts before court since the applicants are in rent arrears and have not furnished any security, and since the application is simply meant to block the defendants from recovery of their rent arrears, they rely on annexure SM1 which is a tabulation of rent arrears and the letter of offer SM2 whose salient features have already been high lighted herein.

Parties also filed written skeleton arguments. That of the plaintiff/applicants is dated 1st day of December 2008 and filed on 2nd December 2008. Scheming through it reveals that it is merely a reiteration of the grounds in the body of the application, supporting affidavit and annexures. That notwithstanding there is no harm in summarizing them here under:-

- Plaintiff provided Educational services in two campuses at Muthaiga and West lands.
- The Plaintiff was a tenant at the Muthaiga campus.
- The contract documents are the letter of offer which was executed and the lease which was unexecuted. Despite the non execution of the lease, provisions, of the letter of offer stipulated that the terms of the lease would be binding on the parties which stipulation goes contrary to the requirement of the provisions of section 3 (3) of the law of contract Act cap 23 laws of Kenya which requires that a contract for sale or disposition of any interest in land must be evidenced in writing signed by both parties and attested by a witness.
- Once the terms of the lease are removed, the parties are left with the terms of the letter of offer which by the stipulated period of the tenancy the tenancy falls into the category of controlled tenancies and therefore protected.
- There was provision for termination which the applicant invoked when the prevailing situation in the country after the 2007 election violence could not allow the applicant to operate both campuses.
- This was passed on to the defendants who allowed them, applicants, to remove part of their furniture from the Muthaiga campus to the West lands campus.
- They applicants thereafter gave the notice of termination which the defendant refused to accept and instead moved to unlawfully distraint for rent contrary to law.
- Without prejudice to the foregoing the applicants is willing to pay rent for January 2008, forfeit the deposited security and the defendant be compelled to release all the applicants property detained by them.
- They contend they are within the ingredients for granting an injunctive relief as set out in the case of **GIELLA VERSUS CASSMAN BROWN (1973) EA 358.**
- For the reasons given they pray that their application be allowed as prayed.

On the defendants' side, their written skeleton arguments dated 4th December 2008 and filed on the same date stressed the following:-

- Since the plaintiff gave a three months notice to terminate the tenancy in January 2008, it meant that the rent for the period up to end of April 2008 was payable and as such the applicants is in rent arrears of kshs. 1,148,400.00.
- By reasons of this, the applicants cannot be granted an injunctive relief unless they pay the outstanding rent.
- Maintain that this is not a controlled tenancy since the same has been reduced into writing.
- Alternatively if the assertion of the applicants were to be believed, that the tenancy is controlled, then this court, has no jurisdiction as the jurisdiction to deal with that is vested in the Business Premises Tribunal.

On case law the court, was referred to the case of **OMAR MWANGI GATIBUI VERSUS CITY COUNCIL OF NAIROBI, NAIROBI HCCC NO. 813 OF 2005**. In this case, the city council had a lease with a person who later died. The plaintiff filed suit claiming that he is a beneficiary of the lease. Simultaneous with the filing of the suit was filed C/S seeking an injunctive relief to prevent the defendant, from evicting or threatening to evict the plaintiff from the suit premises. The case was decided by Kihara Kariuki J on the 10th day of March 2006. At page 2 of the ruling line 7 from the bottom, the learned judge made observation that:-

“..... Clause 3 (b) of the lease provides that the right to peaceably hold and enjoy the same without any interruption by the defendant is conditional upon payment of rent and the observance and performance of all the stipulations and obligations therein contained. The plaintiff has admitted in the plaint that he owes rent and has further stated on oath in paragraph 11 of his affidavit sworn on the 30th June 2006- “That the said confusion has led to accumulation of rent arrears which I have agreed on without prejudice basis to clear”

“The defendant in the replying affidavit of Arden Racho sworn on the 27th July 2005 put such arrears at kshs. 309,500/= which the plaintiff has not disputed, nor has the plaintiff deposited the same (or the arrears he admits) in to court pending the hearing and final determination of the suit. The plaintiff has also failed to show that the injunction orders granted in HCCC No. 422 of 1980 afore said are still subsisting and do affect the suit premises. The order of Simpson J (as his lordship then was) dated the 18th March 1980 was a temporary injunction pending the hearing and determination of the suit subject to the right of the defendant to terminate any tenancy agreement for non payment of rent subsequent to the date thereof..... The plaintiff being clearly in default of payment of rent, cannot benefit from this order even if he had established that the deceased was a party to this suit and a perpetual injunction was granted at the determination of the suit which the defendant was in any event failed to do”

On the basis of the above, the learned judge found no prima facie case established and proceeded to dismiss the application.

The case of RISHAD AMANA VERSUS CHARLES MUKIRI AND 2 OTHERS NAIROBI HCCC NO. 2937 OF 10096 decided by G.P. Mbiti J (as he then was) on 30th day of May 1997. The applicant sought an order of an injunction to restrain the respondents from attaching or selling his goods and that the goods attached on “4/11/96 be released on the grounds interalia that he does not owe any rents to the respondents. The respondent however contend that the applicants owes the sum of Kshs. 69,000/= as arrears of rent and service. The issue for determination was whether an injunction could be issued in the light of the conflicting affidavits evidence.

After due consideration, the court, ruled that: “If the goods which must be movable are sold, it is the view of the court, that the applicant could be adequately compensated by an award of damages if he is ultimately successful in his suit. Consequently as the respondents are merely exercising statutory right to distrain for arrears of rent, like in the case of a mortgagee, the landlord should only be restrained from doing so if the rents are tendered in full, otherwise the statutory right has to take its own course”

At page 1 of the said ruling line 6, from the bottom on the principles applicable to the granting of injunction, the learned judge made the following observations:-

“In dealing with injunctions one of the main principles on which the court, acts is that where damages can adequately compensate the injury which the applicant is likely to suffer, then an injunction should not normally be granted. The main practice is where a respondent is clearly acting contrary to the law”

The case of **KENYA BREWERIES LIMITED TEMBO CO-OPERATIVE SAVINMGS AND CREDIT SOCIETY LIMITED VERSUS WASHINGTON N.O. OKEYO NAIROBI CA 332 OF 2000** decided by the CA on the 31st day of May 2002. A reading of the facts reveals that it was an appeal from the superior courts' orders where by the superior court, had issued a mandatory injunction compelling the second appellants to release motor vehicle registration No KAE 284J (the vehicle) to the respondent, the plaintiff in the suit and an interlocutory injunction restraining the applicants from selling or in any way interfering with the same.

At page 3 of the judgement line 5 from the bottom the learned judges of the court of appeal made the following observations:-

“The test whether to grant a mandatory injunction or not is correctly stated in volume 1.24 Halsbury's laws of England 4th Edition paragraphs 1948 which reads:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the court, thinks it ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff A mandatory injunction will be granted on an interlocutory application”

At page 4 of the judgement the learned judges quoted with approval the decision in the case of **LOCABAIL INTERNATIONAL FINANCE LIMITED VERSUS AGRO EXPORT AND ANOTHER (1968) AER 901** at page 901 where it was stated:- *“ A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where that court thought that the matter ought to be decided at once or where the injunction was directed at simple and summary act which could only be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover before granting a mandatory interlocutory injunction, the court, had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”*

At page 5 line 3 from the top observation was made by the court, to the effect that *“counsel for the appellant had submitted that the learned judge of the superior court, ought not to have granted a mandatory injunction against the second appellant and thereby compelling him to release the vehicle at the interlocutory stage as no exceptional circumstances existed and moreover, the respondent was indebted to the second appellant, a fact not disputed by the respondent. The court, went on further to state that the respondent did not dispute his obligation to the second appellant and the fact that the loan owed to it is serviced and channeled through the first appellant. The obvious resultant effect therefore of the mandatory injunction granted by the superior court, is to relieve the respondent of his obligation to pay his just debt. He should not be allowed to steal a match by avoiding his just obligations. Moreover, it is and certainly be in equitable. It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of contract, by the other party”*

On the basis of that reasoning the CA held that *“there was nothing to justify the grant of a mandatory injunction on the interlocutory application.”*

Lastly there is the case of **GIELLA VERSUS CASSMAN BROWN (1973) EA 358** which is a celebrated land mark case laying down principles and or ingredients necessary for granting of an interlocutory injunctive relief. These are set out in holding IV-VI namely:

“IV An applicant must show a prima facie case with a probability of success.

(v) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

(vi) Where the court is in doubt, it will decide the case on a balance of a convenience of both parties”.

This court, has given due consideration of the afore set out facts, and considered them in line with the principles of law set by case law cited to it emanating either from the superior courts, as well as the CA and in this courts’ opinion, the following facts do not appear to be in dispute namely:-

- That indeed the parties herein are contracting parties.
- That the subject of their contract is a landlord and tenancy relationship.
- That there are two contracting documents that have featured prominently in the papers presented by either side namely, the letter of offer on the one hand and the lease documents on the other hand.
- There is no dispute that the letter of offer is duly executed by both sides whereas the lease document remains un executed to date.
- There is a term in the letter of offer as explained herein above which states clearly that the lease terms are binding whether executed or not.
- It is on record that two properties have featured in the arguments of both sides namely the West lands Campus and the Muthaiga campus. It is on record that the West lands campus is not subject of the letter of offer and lease agreements that are subject of these proceedings. The agreements relate to the Muthaiga campus only. The West lands campus has featured prominently in the proceedings because it was the base from which the applicant operated before spreading wings to the Muthaiga campus in 2006.
- There is no dispute that the applicant indeed took possession of the Muthaiga campus and carried out its activities there on until early 2008 confirmed by the letter of offer and acceptance annexure EO1 as confirmed by deponement, skeleton arguments of both sides.
- It is common ground that the reasons given by the applicants as to the circumstances which led to the ceasing of the operations on the Muthaiga campus were the political chaos, and violence preceding the 2007 general elections as shown by the contents of annextures EO 5,6,7 and 8.
- It is common ground that as per the content of part of documents forming part of annexure EO4, the January 2008 exams which were to be undertaken at the Muthaiga campus among other campuses were cancelled as it was alleged that some of the students had left the country.
- It is common ground as per the contents of the exhibits referred to above that as soon as the applicant started experiencing financial problems he informed the respondents about this difficulty. At one time the respondent offered to accept half the rental value until the situation improved, but the applicant declined to accept that offer and decided to pull out instead.
- Following that turning down of the offer to keep the premises for half the rental value, the contents of exhibits EO7 and 8 show that they applicants wrote a letter dated 31st January 2008, annexure EO5 giving notice to terminate the tenancy, and at the same time the applicants requested to remove part of the furniture from the Muthaiga campus to the West lands campus.
- The move of pulling out was rejected by the respondents who said that the tenancy could not be terminated as the lease should run the full race and for this reason, they issued a letter dated 11th day of March 2008 EO9, demanding rent due and notice that the tenancy could not be terminated. It is this disagreement on the issue of tenancy and payment of rent arrears as well as future rent, which led the

respondents to distrain the applicant's property on West lands campus. The applicant objected to the levying of the distress on the West lands campus and this led to the applicant moving to declare the existence of an arbitration dispute.

The clause on reference of the dispute to arbitration, is not contained in the executed letter of offer of tenancy and acceptance, but in the unexecuted lease. It is also worth noting that the said letter of offer and acceptance did not contain a clause on termination of the tenancy but the parties on noticing the anomaly executed an addendum annexure EO2 which provided that the "*tenancy could be terminated by either party giving the other party 3 months notice in writing and sufficiently served if delivered by hand or sent by recorded delivery to the other party at their registered office*"

Apparently this is the clause that the applicant exercised, that was rejected by the respondents who insisted that as per the lease agreement the tenancy had to run the full contracted period, hence the accrual of rent arrears. The Respondent also took it that the applicant had defaulted or reneged on the said agreement, as such the security deposit stood forfeited and by reason of the said forfeiture the same was not available to cover the rental arrears. When the applicants failed to resolve the matter amicably is when they filed a referene for arbitration annexure EO11 as per the terms of the unexecuted lease. The unexecuted lease was given the breath of life because the executed letter of offer and acceptance stipulated that the terms of the lease would be binding on the parties whether the lease is executed or not.

With the reference of arbitration being in place, the question that the court, needs to determine is whether on the facts presented in the assessment ,the applicant has earned the granting of the interim reliefs sought herein.

The first interim relief is that which has been set out in prayer 2 and 3 namely "*restraining of the defendant/respondent by itself, its agents servants or assigns to be restrained from levying distress, or trespassing, harassing causing disturbance or in any way being a nuisance to the plaintiff at the plaintiffs West lands campus.*" In order to earn this relief, all that the applicant needs to do is to bring itself within the ambit of the three ingredients that are required to be established in order for one to qualify for an injunctive relief as set out in the case of **CASSMAN VERSUS BROWN (SUPRA)**. The first ingredient is the establishment of the existence of a prima facie case with a probability of success. When this ingredient is applied to the rival arguments herein, it is this courts' opinion that the same has been established for the following reasons:-

(a) The injunctive relief is sought pending arbitration. It is therefore necessary to demonstrate that, that right exists and is within in reach of the applicant and that the said applicant has rightly availed itself of it vide annexure EO11.

From the deponement, written skeleton arguments, and oral high lights, the right to arbitration arises by reason of the content of clause 5 of the lease agreement over the suit property which stipulates that "*in the event of any dispute arising from the tenancy relationship, the same to be referred to arbitration in the manner provided for in the said lease.*" Clause 8 of the offer and acceptance letter stipulates that "*upon signing of the letter of offer and acceptance, the terms of the lease become binding on the parties whether the lease is executed or not.*" It therefore follows that the applicant was entitled to invoke the arbitration proceeding.

The next to be considered is whether by the said invocation of the arbitration procedures, the applicant is within the applicable law namely the Arbitration Act No. 4 of 1995 which the Act was specifically mentioned in the lease agreement that its provision would govern the arbitration proceedings so long as they are not contrary to the lease terms. The relevant section to this ruling are section 3 and 4 thereof. Section 3 (1) defines an Arbitration agreement as:- means "*agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.*"

Section 4 of the same Act on the other hand provides as follows:-

“ 4(1) Arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement shall be in writing.

(2) An arbitration agreement.

(3) An arbitration agreement is in writing if it is contained in-

(a) A document signed by the parties

(b) An exchange of letters, telex, telegrams or other means of telecommunication.

(c) An exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.

(4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

When these ingredients are applied to the facts herein, it is clear that the applicant has an arguable case with a probability of success in so far as their right to access arbitration procedures is concerned. The reason for finding so is because the executed letter of offer and acceptance validates the terms and conditions of the lease whether executed or not, which lease is not disputed that it contains an arbitration clause. 2ndly the plaintiff has pleaded in its statement of claim the existence of an arbitration clause. The defendant/respondent has not denied this. Thus bringing the matter into the operation of the provisions of section 4 of the same Act.

Having established the existence of a right to invoke the arbitration procedures, the applicant is obligated to establish that he has an arguable case with a probability of success to be presented to the arbitration. The applicant seems to be complaining of the following:

(a). They were entitled to terminate the tenancy in the manner done relying on the clause of termination in the addendum to the letter of offer and acceptance which addendum was also executed by both sides. This will have to be contrasted with the terms of the lease, which stipulate that the lease had to run the full length. It will be necessary for the arbitrator to determine which of the two clauses is onforceable.

(b). There was the issue of forfeiture of the security deposit which could only be forfeited upon default by the tenant. The applicant says they have not defaulted, where as the respondent says that there is default. The circumstances which led to the inability to continue with the operations at the Muthaiga campus, were the chaos that followed the 2007 elections which fact appears to have been accepted by the respondents when they offered to accept half the rental value. Issue will therefore arise as to whether the applicant can be held to be in default in view of the apparent unavoidable circumstances which can clearly be said to be beyond their control.

(c). Issue was also raised about distress for rent on a premises belonging to another landlord and also whether the distress was levied beyond the accepted period provided for by the relevant law. This is also arguable.

Having satisfied both aspects of ingredients, the court has to determine whether the applicants is disentitled to the injunctive relief because the loss they are bound to suffer can be compensated for by way of damages. Indeed the value of the distrained goods as well as any rentals that the applicant will be called upon to pay during the pendency of the arbitration proceedings can be computed and paid for by way of damages. However this court, has judicial notice of the fact that there are now judicial decisions emanating both from the superior courts, and the CA that there are exceptions to this general rule. These are:

(a). A principle that a party cannot be allowed to trample on another’s rights simply because he/she/it, is

in a position to pay monetary compensation.

(b). An injunctive relief is an equitable relief and it will not be granted or denied where it is going to shield either party from willful breach and or disobedience of law.

(c). The court, will not hesitate to grant the same where the offending party has acted in a high handed and highly oppressive manner with impunity of bordering impunity.

Applying these exceptions to the scenario herein, it is the opinion of this court, that a situation where one contracting party is being told by the other that it cannot bring that contract to an end, giving rise to a situation where the objecting party is likely to have an unfair advantage and profit against the other, it can safely be said that the party in an advantageous position is acting in a high handed, and oppressive manner to the other. Herein it will be highly oppressive to force the applicant to be tied up to the lease contract and order them to continue paying rent even when they themselves are not earning any profits from the premises. This will be highly oppressive if not punitive. It is therefore the finding of this court, that ingredient number 2 in the Giela case is not applicable to this case.

As for the 3rd ingredient of deciding the case according to the balance of convenience to both parties, it is this courts, finding that by reason of what has been stated above, the balance of convenience tilts in favour of the restraint orders being granted.

Having made findings on the interim restraint orders, the court, moves to make findings on the mandatory injunction namely to compel the defendant to release the distrained goods. Case law on the subject is clear as regards to the circumstances in which this relief is available to a litigant namely, clear and an obvious case or where the offending party intends or is likely to steal a march on the other side. This court, has applied those ingredients to the scenario herein, the court, makes a finding that the relief is available to the applicant because:-

(i) The applicant was entitled to rely on the addendum clause, executed by both sides on termination.

(ii) It has not been blamed for the circumstances which led to the closure of the Muthaiga campus.

(iii) It will be highly un reasonable, oppressive and punitive to tie the applicant to a lease over premises, force them to continue paying rent even through they will not be making use of and profiting from the said premises.

(iv) The issue of undeterminability of the lease till full period of lease term is exhausted contained in the lease document is yet to be confirmed by the arbitration proceedings.

(v) The respondent has the security deposit and if the termination was to take effect after 3 months during which rent was payable then it would mean that the Respondent would have retained the security deposited and the applicant would applicant would only have been called upon rent for one month.

(vi) It is doubtful whether the plaintiff/applicant can be blamed solely for the political chaos that ensued after the 2007 elections leading to the departure of students from the Muthaiga campus.

For the reasons given in the assessment, the court, makes the following orders:-

1. An order be and is hereby made that pending the hearing and determination of the intended arbitration, the defendant by itself, or through its agents, servants or assigns, be restrained from levying distress or trespassing upon, harassing, causing disturbance or in any way being a nuisance to the plaintiff at the plaintiffs' West lands campus situate on L.R. No. 209/2058 Muthithi Road West lands Nairobi.

2. An order be and is hereby made and ordered that pending the determination of the intended arbitration, a mandatory injunction do issue compelling the defendant to forthwith release to the plaintiff,

the plaintiffs goods namely:- office furniture, classroom furniture, school library furniture e.g. lock shelves, library books, laboratory equipment and chemicals, computer lab furniture, examination room safes, plaintiff fixtures, sports gear and equipment (foot balls), table tennis rackets, netball goals posts etc) held by the defendant at the defendants premises on L.R NO. 2009/9295. new Muthaiga Nairobi.

3. That an order be and is hereby made to the effect that the defendant herein be and is hereby ordered to continue holding the security deposit that had been paid to the defendant.

4. That an order be and is hereby made and ordered that in addition to the security deposit mentioned in number 3, above the applicant do deposit a sum of Kshs. 500,000.00 into court within 60 days from the date of the reading of this ruling to cover any excess rent up to the maturity of the notice of termination as well as other incidentals payable upon termination as per the letter of offer and acceptance.

5. Upon complying with number 4 above, the applicant will have 90 days from the date of such compliance to process the arbitration proceedings.

6. In default of number 4 above the orders granted in respect of the restraint order herein shall stand lifted.

7. Also if number 4 above is complied with but the arbitration proceedings are not commenced within 90 days from the date of compliance, the restraint orders granted herein shall stand lifted.

8. The plaintiff/applicant will have costs of the application.

9. There will be liberty to apply to either party.

DATED, READ AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2009

R.N. NAMBUYE

JUDGE