

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 100 of 2009

WESTVIEW INVESTMENTS LTD.....PLAINTIFF

VERSUS

KAWA COMMERCIAL ENTERPRISES LTD.....DEFENDANT

RULING

Before me is an application by the plaintiff made under provisions of Order XXXIX Rules 1, 2, 3, 7 & 9 of the Civil Procedure Rules and Sections 3A and 63(e) of the Civil Procedure Act seeking orders of this court to restrain the defendant by itself, its servants, employees or agents from interfering, developing, constructing structures, disposing off, evicting or entering into LR. No.1870/V/27 (*hereinafter referred to as the suit property*) to take possession pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Simon Matara Gichuhi, the managing director of the plaintiff. The application is opposed. Anastasia Wariara Wagichiengo, a director of the defendant swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard submissions made by Mr. Munge for the plaintiff and Mr. Ngugi for the defendant. I have carefully considered the said submissions. I have also considered the pleading filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a case to entitle this court grant him the interlocutory injunction sought. The principles to be considered by this court in deciding whether or not to grant an interlocutory injunction are well settled. The plaintiff must establish that he has a prima facie case with a probability of success. He must also establish that he would suffer irreparable injury that will not be compensated by an award of damages. Where the court is in doubt, it will determine the application on a balance of convenience. (See *Giella vs Cassman Brown* [1973] EA 358).

In the present application, the facts of this case as I understood it are as follows:

The defendant is the owner of a parcel of land known as LR. No.1870/V/27 (*the suit property*). On 6th May 2008, the defendant entered into a lease agreement with the plaintiff. The defendant agreed to lease the suit property for a period of ten (10) years with effect from 1st July 2008. The suit property was leased to the plaintiff for the purposes of undertaking a restaurant and bar business. For the first year, the rent that was required to be paid by the plaintiff was Kshs.200,000/=. The lease agreement was registered. The plaintiff states that it paid legal fees of Kshs.100,000/= to obtain the preparation and the registration of the lease. Under clause 1(b) of the lease agreement, the plaintiff paid the sum of Kshs.1,000,000/= as rent in advance. The plaintiff was further required to pay defendant a further sum of Kshs.3,000,000/= as compensation for works carried out by the defendant in refurbishing the premises on the suit property prior to the same being handed over to the plaintiff. According to clause 1(c) of the lease agreement, the plaintiff paid to the defendant a sum of Kshs.1,000,000/= on the signing of the lease.

From correspondence exchanged between the plaintiff and the defendant, it appeared that the plaintiff was unable to conduct business in the said premises due to the fact that it required planning permission from the City Council of Nairobi to undertake certain improvements and renovations on the property.

According to the plaintiff, it was the defendant who was required to secure planning permission from the City Council. On its part, the defendant is vehement in its denial that the agreement contemplated that planning permission was to be secured before the tenancy would commence. It appears that this was a sticking point between the plaintiff and the defendant. Other than correspondence exchanged between the plaintiff and the defendant, it is apparent that there was no agreement between the two regarding whether planning permission was to be secured or not.

From affidavit evidence on record, it is evident that the plaintiff applied for and secured planning permission from the City Council. To obtain the planning permission, the plaintiff was obliged to pay the land rents and other charges due to the City Council. According to the plaintiff, he paid a total sum of Kshs.420,100/= to secure the said planning permission. Upon being made aware of the planning permission that had been secured, the defendant was not amused. Indeed, the defendant wrote to the City Council disowning the application that had been made in its name that requested for the grant of planning permission. From the evidence on record, it is unclear whether the City Council responded to the letter of the defendant. According to the plaintiff, due to delay in obtaining planning permission from the City Council, it was unable to undertake renovations on the premises on the suit property so as to make it suitable for its business purpose. It was the plaintiff's case that it requested the defendant to defer the date of commencement of the lease from 1st July 2008 until the time when the City Council would have granted planning permission. Although the plaintiff annexed a copy of a letter dated 27th June 2008 which it allegedly wrote to the defendant requesting for the deferring of the date of commencement of the lease, the defendant on its part denies receiving such a letter. It is the defendant's case that upon executing the lease agreement, the plaintiff was required to take possession by 1st July 2008. It was from this date that the rent paid in advance would be applied. According to the defendant, the sum of Kshs.1,000,000/= was applied as rent for the months of July to November 2008. On its part, it was the plaintiff's case that the rent became payable when it secured planning permission to renovate the suit premises. The plaintiff states that it was required to commence paying rent with effect from 1st February 2009.

It was the difference regarding the date when rent was required to be paid that caused the defendant to purport to terminate the lease. By its letter dated 9th February 2009, the defendant wrote to the plaintiff terminating the lease with effect from the same date i.e. 9th February 2009. The defendant informed the plaintiff that it had taken possession of the suit premises on account of the plaintiff's failure to pay the rent due. The defendant invoked the provisions of clause 3(b) of the lease agreement. The said clause provided that the defendant would be at liberty to repossess the suit premises if the plaintiff defaulted in paying rent for a period of seven (7) days from the date when the rent became due. There is however a proviso to the clause which states as follows:

“PROVIDED ALWAYS that in the event of any breach of any of the said covenants agreements conditions restrictions stipulations or provisions (save only that in respect of the payment of rent) the lessor shall not be entitled to exercise the said right of re-entry unless the lessor shall first give the lessee fourteen days' notice of the breach before the expiration of such notice.”

It was therefore clear that before the defendant could purport to exercise its right of re-entry, if indeed it established the fact that the plaintiff had defaulted in paying the rent due, it was required to give the plaintiff at least fourteen (14) days notice of default. The defendant could not purport to give hours notice before taking possession of the suit premises. It is therefore evident that the defendant acted unlawfully and contrary to the terms of the lease agreement. My evaluation of the facts of this case leads me to the conclusion that the defendant was determined to terminate the lease between itself and the plaintiff. To achieve its objective of completely frustrating the lease, the defendant demolished structures which had been erected on the suit property. That is the reason why the defendant can state with glee that there are no premises to which this court can order the plaintiff to return to.

Having assessed the facts of this case, and the applicable law, it was apparent to this court that the plaintiff and the defendant had not reached consensus ad idem in respect of two critical aspects of the lease; firstly, they had not agreed in writing on whether it was necessary for planning permission to be

secured before the lease could commence. Secondly, they had not agreed on the commencement date of the lease, especially in regard to the planning permission that was to be secured. The plaintiff and the defendant operated on two different planes in regard to the two issues. That is the reason why there was disagreement on whether it was the duty of the plaintiff or the defendant to obtain the planning permission from the City Council. My view of the matter is that it appeared that the plaintiff was prepared to lease the suit premises for the long haul and that is why it desired to renovate the premises to a standard which it could get returns on its investment. On the other hand, it is apparent that after the said lease agreement was entered into between the plaintiff and the defendant, the defendant changed its mind. It resorted to frustrating the plaintiff from renovating the premises to the standard that it desired.

It was apparent from the evidence on record that the defendant has already obtained, though unlawfully, possession of the suit premises. The defendant has gone ahead and demolished the premises that had been constructed on the suit premises. It is evident that the *status quo* on the ground is that the plaintiff is no longer in possession of the suit premises. The suit premises are no longer in the character that existed at the time the plaintiff and the defendant entered into the lease agreement. The plaintiff did not make an application for mandatory injunction to compel the defendant to allow it to return back to the suit premises. This court cannot give an order of interlocutory injunction to maintain a *status quo* that does not exist on the ground. I therefore hold that the plaintiff has failed to establish a prima facie case to entitle the court grant it the order sought of injunction. However, this court is of the view that the justice of this case demands, at least before the hearing and determination of the main suit, that the parties be put in a position they were prior to the commencement of the lease. As stated earlier in this ruling, it was apparent that there was no consensus ad idem in regard to the commencement date of the lease and further, in regard to whether planning permission from the City Council of Nairobi was necessary in order for the lease to be effective. I will therefore restore the *status quo ante*. Pending the hearing and determination of the suit, I hereby exercise my inherent jurisdiction and order the defendant to refund to the plaintiff the sum of Kshs.2,589,230/= that the plaintiff expended in pursuit of the frustrated lease. The said sum shall be paid within fourteen (14) days of today's date or in default the plaintiff shall be at liberty to execute. The costs of this application shall be in the cause. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF JULY 2009

L. KIMARU

JUDGE