



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Suit 317 of 2007

BRIDGE UP CONTAINER SERVICES LTD.....PLAINTIFF

VERSUS

JAMES MATHENGE MWAI.....1ST DEFENDANT

GRACE GACHEKE MWAI.....2ND DEFENDANT

CATHERINE WANGUI NGENGI MUIGAI.....3RD DEFENDANT

MWAI'S LIMITED.....4TH DEFENDANT

RULING

This is an application to restrain the defendants from interfering with the plaintiff's quiet and peaceful occupation of plot No. 911/VI/MN Mombasa hereinafter referred to as "the suit property". Although the order sought in the application is not expressed to be pending the hearing and determination of the suit, counsel for both sides had no doubt that the restraining order sought is on an interlocutory basis. The application is expressed to be brought under Order XXXIX Rules 1, 2, 3 and 4 of the Civil Procedure Rules and all other enabling provisions of the Law.

The application is supported by an affidavit sworn by one Pauline Wangui Mukomah a director of the plaintiff company on 5th December 2007. In opposition to the application, is a replying affidavit sworn by one Catherine Wangui Ngenji Muigai the third respondent on 8th January 2008. The background of this dispute is as follows. The defendants own the suit property which was leased to the plaintiff in 1991. The plaintiff has been on the suit premises since then. It would appear that the 4th defendant and the late Isaiah Mwai Mathenge instituted Mombasa HCCC No. 363 of 2002 against the plaintiff herein obtaining *inter alia* rent and rent arrears as well as possession of the property in that suit. It is not clear whether the said property is the same property that is the subject matter of this suit. However, the filing of that suit became the first documented evidence of the dispute between the plaintiff and the registered proprietors of the suit property. There is, in that suit, a pending application by the 1st, 2nd and 3rd defendants herein to be joined as plaintiffs on the ground that they are administrators of Late Mathenge's estate. During the pendency of that application the defendants issued to the plaintiff herein a Notice of Termination of Tenancy dated 16th October 2007. The notice gave the plaintiff 15 days to vacate and deliver up to the defendants possession of the suit property. That notice provoked the filing of this suit and the application. That is the genesis of this application.

The application is on its face expressed to be made on the grounds that the said notice of termination is illegal, null and void; that the plaintiff carries out business at a profit on the suit property and eviction

as threatened will totally ruin the plaintiff who will suffer irreparable losses and that on balance of convenience an injunction should issue. Those grounds are substantiated in the said supporting affidavit in which it is deponed, *inter alia*, that the plaintiff carries out the business of storing containers for hire for clients and has had an uninterrupted tenancy over the suit premises since 1st September 1991 to date. In the plaintiff's view that business is commercial in nature and is therefore controlled and cannot be terminated in the manner the defendants have set out to do. It is also deponed that should the termination take effect the plaintiff's business will be ruined and the plaintiff will further be exposed to many claims of substantial sums.

In the replying affidavit of Muigai aforesaid, it is deponed, *inter alia*, that the property is designated for residential use and is therefore outside the purview of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. It is also deponed that as the premises are not controlled, the notice of termination which was served upon the plaintiff was valid and should be complied with. It is further deponed that the plaintiff has failed and/or refused to pay rent for the premises and rent arrears for the suit property are in the millions. In the premises, the defendants contend that the plaintiff has not come to court with clean hands and is not entitled to the equitable relief of injunction. With respect to the said earlier suit, HCCC No. 363 of 2002, it is deponed that the same does not have any bearing to this matter and does not in any event restrict the defendants from exercising their legal right as landlords to terminate the tenancy.

The application was canvassed before me with vigour on 5th June 2008 by Mr. Gikandi, Learned counsel for the plaintiff and Mr. Ojiambo Learned counsel for the defendants. Counsel expounded upon the positions taken by their clients in their respective affidavits. Reliance was placed upon several decisions of the Court of Appeal and one decision of the Privy Council and for that I am grateful to counsel.

I have considered the application, the affidavits filed and the oral submissions made to me by counsel. I have also read the several cases relied upon by counsel. Having done so, I take the following view of the matter. The principles for the grant of an interlocutory injunction are now settled. They were set out in the case of **Giella – v – Cassman Brown & Co. Ltd. [1973] EA 358.** They are that first, the applicant must show a prima facie case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer an irreparable injury which could not adequately be compensated in damages; and thirdly that if the court is in doubt it should decide the application on a balance of convenience. As I consider this application, I bear in mind its interlocutory nature, and therefore, I should not make definitive findings of fact and Law as all I have are affidavits stating each party's side and submissions of counsel stressing aspects of the Law that support their side.

The plaintiff has shown that it has enjoyed a leasehold interest over the suit property since the year 1991. The period the plaintiff has been the defendants' tenant cannot be described as short, notwithstanding that the lease over the suit property does not seem to have been reduced into writing. The plaintiff contends that another suit i.e. Mombasa HCCC No. 363 of 2002 was instituted over the suit property and in it, there is an application by the defendants which has not been prosecuted. The claim against the plaintiff herein and who is the defendant in HCCC No. 363 of 2002 includes rent, rent arrears as well as possession of the suit premises.

The plaintiff further contends that it carries out on the suit property, the business of storing containers for hire for its clients. In its view, the property is used for commercial purposes and is therefore subject to the provisions of the Land Lord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 302 of the Laws of Kenya. By dint of that Act, the defendants' notice of termination is illegal and unenforceable.

Whilst admitting that the plaintiff is a tenant on the suit property, the defendants contend that as proprietors, they are entitled to possession as sought in their notice of termination. That contention is made on the basis that the suit property is designated for residential use and does not fall within the ambit of the Land Lord and Tenant Act aforesaid and consequently the said notice of termination was valid and

should be complied with. The document relied upon by the defendants to support their contention on the user of the premises is titled “Invoice for Municipal Council Services.” In that document, usage is stated to be “residential.”

A related argument made by the defendants on the user of the premises is that, as the premises are designated for residential use the declared use by the plaintiff is illegal and the lease must on that basis be terminated. For that proposition the defendants’ counsel cited the cases of **Mistry Amor Singh – v – Serwano Wofunira Kulubya [1963] EA 408** and **Haptulla – v – Noormohamed [1984] KLR 380**.

On the material availed to the court, I am not able to determine with conclusiveness the purpose for which the suit property is designated. The title of the property has not been exhibited. The lease between the parties does not appear to have been in writing. Those are the documents that would have put the matter beyond dispute. The plaintiff has been on the suit premises for nearly 17 years carrying on what it thought was lawful business with the tacit approval of the defendants. To determine the lawful user of the suit property in my view would require more than the one invoice exhibited by the defendants. The decision in **Mistry Amar Singh – v – Serwano Wofunira Kulubya (supra)** is clearly distinguishable from the facts obtaining herein. In that case the appellant was found to be in possession contrary to the express provisions of the Law. That decision was infact made on an appeal lodged by the Land Lord to the then Court of Appeal which decision was upheld by the Privy Counsel. The facts in that case were therefore fully canvassed before being concluded by the Privy Counsel. The position of the present matter is vastly different. The title of the suit property is yet to be produced. The facts relied upon to establish user are to say the least scanty.

The decision in **Haptulla – v – Noormohamed** (supra) is also clearly distinguishable from this case. In that case, sufficient material was availed to the court to prove that the premises were authorized for use only as stores contrary to the use to which the tenant had put them, namely a dwelling. As I have already said above, the only document relied upon to show the user of the suit premises is one invoice. I have already found that that is not sufficient to establish even prima facie that the suit property is designated for residential purposes alone.

In the premises, I have come to the tentative conclusion at this interlocutory stage that the defendants cannot rely on the illegality of the user of the premises by the plaintiff as a basis for seeking to terminate the tenancy of the plaintiff over the suit premises. In other words the plaintiff has shown a prima facie case that he enjoys a valid tenancy over the suit premises.

The defendant has also argued that on the plaintiff’s own admission, it uses the premises as store and a store, according to the defendants, cannot be premises to which the provisions of the Land Lord and Tenant Act apply. In that regard therefore, the plaintiff did not require to be served with a statutory notice under the provisions of that Act. For that proposition reliance was placed upon the cases of **Panesar – v – Balbir [1972] EA 208** and **Gohil – v – Wamai [1983] KLR 489**. Having read those cases, I have no doubt that their exposition of the Law was sound. However, in those cases again the courts were availed sufficient material upon which definitive findings of facts were made. As I have already held, that is not the position here.

I bear in mind also the fact that the defendants herein have delivered their defence and set up a counter claim. In the counter claim, the defendants claim, *inter alia*, vacant possession of the suit property. There are also other suits i.e. HCCC Nos. 363 of 2002 and 38 of 2004 in which the 4th defendant and the late Isaiah Mwai Mathenge claim vacant possession of the suit property among others, rent, rent arrears and mesne profits.

In the premises, I find on a prima facie basis that unless the injunction sought is granted, the plaintiff faces a real threat of being evicted from the suit premises, even before the defendants’ claim in the counter claim is adjudicated upon. I find in the circumstances that if that event occurred the plaintiff would suffer irreparable injury which includes loss of goodwill built over a long period of time.

Having found that the plaintiff has satisfied the first two conditions for the grant of an interlocutory

injunction, strictly speaking, I need not consider the balance of convenience. However, even if I were to determine this application on the balance of convenience, I would have held that the same tilts in favour of granting the injunction to facilitate a determination of the dispute on evidence taking into account the fact that the plaintiff and the defendants have had a relation spanning nearly 17 years.

In the result I grant the applicant an order in terms of prayer 2 of the Chamber Summons dated 15th December 2007 pending the hearing and determination of this suit. The temporary injunction is granted on terms that the plaintiff shall file a written undertaking as to damages under its seal within five (5) days of today. The plaintiff's undertaking will be fortified by a personal undertaking to the same effect by Pauline Wangui Mukomah the plaintiff's director, which undertaking should be filed within the same period of five (5) days from the date hereof.

Costs shall be in the cause.

Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JUNE 2008.

F. AZANGALALA

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JUNE 2008.

L. NJAGI

JUDGE

Read in the presence of:

Mr. Gikandi for the Applicant

Mr. F. Ojiambo for the Respondent