REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 90 of 2008

PROXY AUTO CONSULTANTS LTD…….....……...PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD….....….1ST DEFENDANT

NW REALITE LILMITED…….....…….2ND DEFENDANT

BENJAMIN KISOI SILA T/A LEGACY AUCTIONEERING SERVICES……..3RD DEFENDANT

RULING

The plaintiff is a tenant of the first defendant it the latter's premises situate in Nakuru and known as **Title No. Nakuru Municipality/ Block 4/ 262** (the premises) at an agreed monthly rent of Kshs. 10,279.50. He claims in the plaint that on or about 11th February, 2008, on instructions of the first defendant, the third defendant proclaimed his properties in distress for alleged rent arrears of Kshs. 539, 550.94. The plaintiff disputed that amount and the distress was suspended when the plaintiff admitted owing Kshs. 255, 649/= and gave the first defendant posted cheques in settlement of the same and it was agreed that a reconciliation meeting would be held between him and the first defendant on the disputed sum of Kshs. 283,901.94.

The plaintiff further claims that contrary to that agreement, on the 4th April 2008 the first and second defendants maliciously instructed the third defendant to proceed with the distress for the sum of Kshs. 539,550.64 ignoring the sum of Kshs. 255,649/= that he had paid to the first defendant. The third defendant negligently and in breach of the Auctioneers Act broke into the plaintiff's premises and spotted away his properties on the basis of the proclamation which had been cancelled. In the circumstances the plaintiff claims for a permanent injunction to restrain the defendants, their servants or agents from disposing of his attached properties or in any way interfering with his quiet occupation of the premises. He also claims for general damages for the unlawful distress for rent and any other relief that the court may deem fit to grant as well as the costs of this suit.

Contemporaneous with the filing of the suit the plaintiff filed an application under **Order 39 Rules 2** and **9** of the **Civil Procedure Rules** and prayed that pending the hearing and final determination of this suit a temporary injunction be granted in terms of prayer (a) in the plaint. In support of the application the plaintiff swore an affidavit in which he reiterated the averments in the plaint.

Upon being served the defendants filed defences and replying affidavits. For and on behalf of the first defendant its property manager, George Sirya Kenga, swore a replying affidavit in which he admitted that the first defendant indeed instructed the third defendant to distrain the plaintiff's properties for rent

arrears of Kshs. 599,168.90 due and owing to it from the plaintiff as at June 2008. When the plaintiff's properties were proclaimed he admitted owing the first defendant Kshs. 255,649/= in respect of which he issued the first defendant with posted cheques and the distress was suspended pending a reconciliation on the disputed sum. On presentation for payment, the plaintiff's first cheque for Kshs. 48,000/= was returned unpaid with remarks "payment stopped by the drawer." In the circumstances, he further deposed, the first defendant saw no point of presenting the other cheques and instead it instructed the third defendant to proceed with the distress.

Both in his defence and relying affidavit the third defendant denied acting unlawfully and deposed that he suspended and later proceeded with the distress for rent arrears on instructions of the second defendant.

Presenting the application on behalf of the plaintiff his counsel, Mr. Kisila, while admitting that the agreed monthly rent is Kshs. 10,279.50, submitted that, the tenancy between the first defendant and the plaintiff being a controlled one, the dispute on the arrears of rent has been caused by the first defendant's failure to maintain a rent book as required by **Section 3** of the **Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap 301** of the **Laws of Kenya** (the Act). He further submitted that the plaintiff stopped the payment of the cheques when the defendants proceeded with the distress contrary to the agreement suspending it pending a discussion on the disputed sum.

For the first and second defendants Mr. Murimi cited **Snell's Equity** and the case of **Kenya Breweries Ltd Vs Okeyo, Civil Appeal No. 332 2000** (unreported) and submitted that a party who fails to honour his contractual obligations is not entitled to an injunction. While disputing the allegation that the tenancy in this case is a controlled one, he further submitted that with or without a rent book the plaintiff has not paid even the undisputed sum of Kshs. 255,649/=. He said instructions were given to the third defendant to proceed with the distress when the first cheque was dishonoured.

Messrs Njuguna and Ndolo, for the second and third defendants respectively also opposed the application. Mr. Ndolo took the view that if this is controlled tenancy then this court has no jurisdiction to entertain this matter. He said that disputes on controlled tenancies are the preserve of the Business Rent Tribunal. He urged me to dismiss this application arguing that even if I find that this is not a controlled tenancy, the plaintiff has not made out a prima facie case to entitle him to an injunction.

I have considered these submissions. On the material placed before me I agree with Mr. Kisila that this is a controlled tenancy. I however, disagree with Mr. Ndolo that this court has no jurisdiction to entertain this matter. Section 12(4) of the Act only authorizes the Tribunal to deal with minor matters. The Tribunal has no jurisdiction to grant reliefs like injunctions. See the case of Heptulla Re Heptulla Properties Ltd [1979] KLR 96.

This being a controlled tenancy I agree with Mr. Kisila that the first defendant is obligated by Section 3 of the Act to maintain a rent book, which it admittedly has not done. That failure however, does not absolve the plaintiff from honouring his obligations under the tenancy like paying rent.

As I have already said this is an application for a temporary injunction pending the hearing and final determination of this suit. As was stated in the English case of America Cynamid –vs- Ethicon [1975] 1 ALL ER 504, (1975) AC 396 at PP 406 and 408 Quoted with approval in Mureithi –vs- City Coucil of Nairobi (above).

"The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial…. If damages in the measure recoverable at common law could be adequate remedy and the defendant would be in a financial position to pay them, interlocutory injunction should normally not be granted, however strong the Plaintiff's claim appeared to be at that stage".

Injunctions are, however, not granted as a matter of course –See 24 Halsbury's Laws of England 4th Ed. par. 953 and the Court of Appeal decision in Esso Kenya Ltd. –vs- Mark M. Okiya, Civil Appeal No. 69/91 (C.A). As is well known from the celebrated decision the Court of Appeal for Eastern Africa in

Giella Vs Cassman Brown Co. Ltd. [1973] EA 358 and numerous decisions following it, to be entitled to a temporary injunction pending the hearing of a case an applicant must first make out a prima facie case with a probability of success at the trial, secondly, he must satisfy the court that damages would not be an adequate and appropriate remedy should he succeed at the trial, and thirdly, if the court is in doubt about the prima facie existence of the right sought to be asserted and which is alleged to have been or is about to be violated or the appropriateness of damages as a remedy, the matter should be decided on a balance of convenience. In Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others, [2003] KLR 125 it was held that a prima facie case means more than an arguable case. Evidence must be placed before the court to show an infringement or likely infringement of a right and the probability of success of the applicant's case at the trial.

The Application for an interlocutory injunction in this case must fail for two reasons. First, I agree with counsel for the defendants that the plaintiff has not made out a prima facie case with any probability of success. He has not paid even the admitted arrears of rent of Kshs. 255,649/=. His counsel's contention that he stopped the payment of the posted cheques when the defendants breached the agreement suspending the distress is patently false. He stopped the first cheque on or about the 12th March 2008 when it was banked while the instructions to proceed with the distress, as is clear from the replying affidavits, were given on 4th April 2008. I entirely concur with the decision of the Court of Appeal in the Kenya Breweries Ltd Case (Supra) that a "party who fails to perform his part of the contract cannot obtain an injunction to restrain breach of covenant by the other party." This principle is reiterated in Snell's Equity 29th Edition at page 655 where it is stated that "an injunction will be refused to a contracting party who fails to perform his part of the contract."

The second reason why this application must fail is because the plaintiff is guilty of material non-dislosure. It is now settled that Courts take a dim view of non-closure of material and relevant facts. In Brinks Mt Ltd. Vs Elcombe (1988) 3 ALL ER 188, cited with approval by the Court of Appeal in The Owners of the Motor Vessel "Lilian 5" Vs Caltex Oil (Kenya) Ltd., Vivil Appeal No. 50 of 1989 (unreported). Balcombe LJ. Had this to say on the point at page 198 (par (L).

"The courts today are frequently asked to grant ex-parte injunctions, either because the matter is too urgent to await a hearing on notice or because the very fact of giving notice may precipitate the action which the application is designed to prevent. On any ex-parte application, the fact that the court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all facts known to him or which should have been known to him had he made all such inquiries as were reasonable and proper in the circumstances. The rule that an ex-parte injunction will be discharged if it was obtained without full disclosure has twofold purpose. It will deprive the wrongdoer of an advantage improperly obtained…. But it also serves as a deterrent to ensure that persons who make ex-parte applications realize that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless this judge – made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place notwithstanding that there may have been non-disclosure when the original ex-parte injunction was obtained."

While seeking an ex parte order of injunction the plaintiff did not disclose that he had not paid the admitted arrears of rent. At that stage, and even subsequently, he never said that he had stopped payment of the cheques he had issued to the first defendant. As a matter of fact he misled me to believe that he had paid the admitted arrears. As I have said it is his lawyer who falsely asserted from the bar that the plaintiff stopped payment of the cheques when the defendants breached the agreement to suspend the distress.

For these reasons I find no merit in this application and I accordingly dismiss it with costs.

DATED and delivered this 26th day of September, 2008.

D.K. MARAGA

JUDGE