



Bilbao Restaurant & Lounge Ltd v Morgana Traders Ltd (Environment & Land Case E088 of 2022) [2022] KEELC 15640 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E088 OF 2022
LN MBUGUA, J
DECEMBER 20, 2022**

BETWEEN

BILBAO RESTAURANT & LOUNGE LTD APPLICANT

AND

MORGANA TRADERS LTD RESPONDENT

RULING

1. Before me is an application dated March 8, 2022 where the plaintiff applicant seeks the following orders:
 - a. That a declaration be issued that the action of the defendant/respondent are unlawful, illegal and against the requisite law.
 - b. That pending the hearing and determination of this application interparties, the honourable court be pleased to order that the plaintiff/applicant herein be reinstated to its tenancy unconditionally.
 - c. That pending the hearing and determination of this suit, the honourable court be pleased to order that the plaintiff/applicant herein be reinstated to its tenancy unconditionally.
 - d. That pending the hearing and determination of this application interparties an order be issued suspending and/or restraining the defendant/respondent from further interfering with the business of Bilbao restaurant and lounge.
 - e. That pending the hearing and determination of this suit an order be issued suspending and/or restraining the defendant/respondent from further interfering with the business of Bilbao restaurant and lounge.
 - f. That the defendant/respondent be ordered to reinstate the status of the business as it was before the time of eviction.



- g. That the defendant/respondent be ordered to compensate the plaintiff/applicant with both aggravated and general damages.
- h. That the OCS Kileleshwa police to enforce compliance of these orders.
2. The application is premised on the grounds set out on its face and on the affidavit of one Segbo Tundura Gagi, the director of the plaintiff.
 3. The case of the applicant is that vide an agreement of April 2021, the applicant occupied the suit premises known as LR No 1870 /VI/163 thereby establishing the Bilbao restaurant and lounge in Westlands. They heavily invested in the business where there was a restaurant, lounge and a swimming pool. They were however evicted in February 2022 despite faithfully paying the monthly rent.
 4. The applicant filed a suit before the tribunal but *vide* orders given on February 21, 2022, the tribunal declined to handle the dispute on account of jurisdiction. The applicant desires that they be reinstated back into the suit premises.
 5. The respondents have opposed the application via the replying affidavit of one Johnson Kebwaro who is its legal manager. The same is dated June 2, 2022. He admits that indeed there was a tenancy agreement but the plaintiff defaulted in payment of the same leading to arrears of kshs 3,834,697 as at January 31, 2022. The respondents then instructed the auctioneers to recover the said rent prompting the filing of the case Milimani CMCC miscellaneous application No E072 of 2022 for levying of distress.
 6. That the plaintiff had then moved to the tribunal via cases No's E090 and E135 of 2022 but the tribunal indicated that it had no jurisdiction to handle the matter.
 7. I have considered all the issues raised herein including the rival submissions. It is the plaintiff's claim that they stand to suffer irreparable harm if the orders are not granted averring that their eviction was unlawful as the allegations that they were in rent arrears was unfounded.
 8. The respondents on the other hand contend that the applicants were in breach of the agreement and their managing director had even admitted under oath that they had arrears amounting to ksh 3,834,697.
 9. It is not in dispute that the rival parties had entered into an agreement in April 2021 for the applicant to operate an establishment in the suit premises. It is also common ground that the applicant was evicted in February 2022. It is also not in contention that the dispute was taken before the tribunal in the references 132 of 2022 and 090 of 2022 but via an order of February 21, 2022 the tribunal declined to handle the dispute on account of jurisdiction.
 10. I have keenly perused the orders sought in the plaint where in prayer number (a)& (d) thereof the plaintiff seeks orders that:

“A declaration that the eviction was illegal, irregular, unprocedural and contrary to the requisite law.

An order compelling the defendant to reinstate the status of the business as at the date of eviction including the swimming pool and all stocks that were spoiled/destroyed by the defendant”.
 11. If this court was to grant injunctive orders sought for by the applicant at this interlocutory stage, it would be tantamount to granting major reliefs sought in the main suit. In the case of *Daniel Atibu*



Jasimba v Ainea Sandanyi Magana [2013] eKLR, the court had this to say in respect of a prayer relating to a major relief;

“Since the plaintiff’s suit is for eviction of the defendant from the said residence, such an injunction will amount to granting a major relief in the suit without the benefit of a hearing”.

12. It is not lost to this court that the crux of the dispute is whether there was breach of the agreement of April 2021. Despite availing a 20 paragraph affidavit, the applicant has not given a concise statement of account and only makes a general averment at paragraph 3 of the supporting affidavit that they were paying rent.
13. Further, most of the documents availed by the applicant including the lease of April 1, 2021 are illegible and don’t speak systematically on the issue of rent payment.
14. It is further noted that the respondent has availed an affidavit filed before the tribunal where the applicants were apparently admitting that they were in rent arrears.
15. In the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR , the court stated that;

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected”.
16. In the instant case, the applicant has not demonstrated an unmistakable right to be protected. The upshot of these findings is that the application is unmerited. The same is dismissed with costs to respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Makori holding brief for Okumu for Plaintiff Applicant

Court assistant: Eddel

