



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 215 of 2006

HORNBILL PUB LTD.....
PLAINTIFF

VERSUS

AMBASSADEUR INVESTMENT KENYA LTD.....DEFENDANT

RULING

By a plaint filed in this court on 24.4.2006 the plaintiff avers inter alia that by two leases dated 30.10.2000 the original director/proprietors of the defendant leased Shop No.7 and Shop No.3 for 6 years from 1.5.2000 and 1.9.2000 respectively. The plaintiff sought the landlord's consent to sublet a portion of their premises to a third party namely Simba Telecom. The sublease was for 1 year at the rate of KShs.90,000/- per month. The original director's then sold off their interest in the defendant company to third parties who without the plaintiff's consent and/or notice then negotiated a new lease directly with Simba Telecom. The plaintiff consequently commenced paying its rent less the said sum of KShs.90,000/- which was the position upto the filing of the plaint. In or about February 2003, an arbitrator was appointed by the defendant but no result or outcome of the arbitration has been divulged to the parties. In or about February 2004 the plaintiff initiated negotiations for the renewal of the lease which negotiations have being on giving. But despite the said negotiations the defendant served a notice seeking to evict the plaintiff which action unless the defendant is restrained will interrupt the plaintiff's business built over the last 5 years. In the premises the defendant is in breach of its obligations particulars whereof are given. The plaintiff will also suffer loss and damage particulars whereof are also given. The plaintiff in the premises prays for a prohibitory injunction restraining the defendant from interfering and/or evicting and/or interrupting the plaintiff's tenancy and/or further leasing and/or reassigning and/or sub letting of the premises and a declaration that the notice dated 31.3.2006 served on 5.4.2006 is null and void and therefore inoperable, unlawful and/or illegal.

Simultaneously with the filing of the plaint the plaintiff lodged the present Chamber Summons for the interlocutory relief of a prohibitory injunction. The injunction seeks to restrain the defendant whether by itself, its servants, and/or agents from interfering with and/or evicting and/or interrupting the plaintiff's tenancy and/or further leasing and/or reassigning and/or subletting of the premises pending inter partes hearing. The plaintiff further seeks an order that the notice dated 31.3.2006 and served on 5.4.2006 be declared null and void.

The application is expressed to be brought under Order XXX1X rules 1,2,3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law. It is based on the grounds that the said notice is a clear violation of the law having been dated 31.3.2006 and served on 5.4.2006 purporting to terminate the lease on 30.4.2006; that the defendant is in breach of its obligations under the lease; that negotiations have been in place since February, 2004 and all indications were that the economic viability of the Applicants Investment in the premises would be safeguarded and preserved; that the defendant seeks to impose a goodwill, precondition precedent to any further dealings with the

plaintiff; that if allowed the defendant seeks an unfair advantage and that no regard has been given to the potentially explosive economic hardship that will ensue to more than 50 workers and their dependants who will be adversely affected by the unlawful termination and/or illegal eviction of the applicants from the premises.

The application is supported by an affidavit sworn by one James Kimondo a director of the plaintiff. The affidavit essentially restates the averments in the plaint and the grounds for the application.

The respondent has filed a replying affidavit in opposition to the application. The replying affidavit is sworn by one John Maina Kaguma a director of the defendant. With regard to Shop No.7 which is really the subject of the present application it is deponed that the said shop was let to the plaintiff for a fixed term of 6 years from 1.5.2000 at a variable monthly rent of KShs.180,000/- and the said term expired on 30.4.2006 now past. It was a term of the said lease that the plaintiff would not sublet transfer or part with the possession of the premises or any part thereof without prior written consent of the defendant. It is further deponed that in the event of breach of that condition by the plaintiff the defendant had a lawful right to re-enter the premises without notice and thereupon determine the lease. It is also deponed that in July, 2001 the defendant discovered that the plaintiff had without the consent of the defendant sub-let part of the premises to Simba Telecom Ltd at a monthly rent of KShs.30,000/- payable quarterly in advance and to avoid creating a controlled tenancy the defendant regularized Simba's occupation by entering into a tenancy agreement with it at a variable monthly rent of KShs.40,000/- for the area occupied by it a fact that the plaintiff was made aware of. It is further deponed that the rent payable by the plaintiff was accordingly reduced pro rata. That notwithstanding the plaintiff has continued to deduct KShs.90,000/- from the rent payable to the defendant. According to the defendant, it is not equitable for the plaintiff to claim any benefit from the wrongful subletting of its premises. The defendant denies that it consented to the sublease and accuses the plaintiff of material non-disclosure. The defendant further denies that there have been negotiations with regard to renewal of the lease and states that the lease did not contain an option to renew the lease. Whereas the defendant admits that an arbitrator had been appointed to resolve the differences between the partes he was unable to do so because the plaintiff was not cooperative. The defendant has also deponed that the defendant is not deserving of the reliefs sought and has no right to demand renewal of the lease when there is no option to renew and when the plaintiff is in breach of the conditions of the lease.

The application was debated before me on 14.6.2006 by Mr. Gatuguta Learned Counsel for the plaintiff and Mr. Mutua Learned counsel for the defendant. The Learned counsels recited the averments in their clients respective affidavits and sought orders as urged in the said affidavits.

I have carefully considered the application, the affidavits, the annexures, the submissions of Learned counsel and the cases cited. Having done so, I take the following view of this matter. The prerequisites for the grant of an interlocutory injunction were well stated in the precedent setting case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A. 358**. They are: First the applicant must establish a ***prima facie*** case with a probability of success at the trial. Secondly, an interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not be adequately compensated in damages. Thirdly if the court is in doubt, it will decide the application on the balance of convenience. So has the applicant established a prima facie case with a probability of success at the trial? The plaintiff has limited its arguments on the lease that commenced on 1st May, 2000. That was a term lease that was expressed to expire on 30.4.2006 now past. The plaintiff states that there were negotiations on the issue of renewal but there has been no agreement on the issue and as there were those negotiations the defendant was not entitled to terminate the tenancy as it purported to do by its notice dated 31/3/06. The plaintiff further contends that the said notice was in any event too short because although it is dated 31.3.06, it was served later and consequently gave the plaintiff less than a month to comply. Further it is the plaintiff's contention that its investment in the suit premises has not been taken into account and the defendant should be restrained as prayed in its application.

The defendant on its part is insisting on its pound of flesh. It maintains that the lease for the shop in question was for a fixed term which expired on 30.4.2006 and there was no option to renew. On the alleged negotiations the defendant contents that there were none as the plaintiff's request for the same

was not accepted by the defendant who is of the view that the plaintiff has been in breach of the former lease by subletting part of the suit premises without the defendant's consent and subsequently for failure to pay rent.

On the material availed to me, I am unpersuaded that the applicant has established a prima facie case with a probability of success at the trial. I have perused the lease in respect of the suit premises which lease is exhibited by the plaintiff as annexure "JK1". The lease was for a term – of six years from 1.5.2000. There is no option to renew. Indeed there is no requirement for a notice. Clause 3(4) of the said lease which is a covenant by the plaintiff is in the following terms:-

“ 4) At the expiration of the Term to yield up the premises in good repair and condition and in accordance with the terms of this lease and to give up all keys of the premises to the Landlord.”

By its letter dated 31.3.2006 exhibited by the plaintiff as annexure "JK4", the defendant intimated to the plaintiff its desire not to renew the lease on its expiry on 30/4/06. In my view, the defendant was not bound to accept the plaintiff's request for renewal of the lease. This is irrespective of whether or not the plaintiff was in breach of any term of the lease. On the expiry of the term, the plaintiff was bound under the lease to field up possession of the suit premises in good repair and condition.

The position in England is the same. As it is stated in Halsbury's Laws of England 4th Edition Reissue Vol.27 (1) at paragraph 209.

“A lease for a term generally requires no notice to quit at the end of the term, whether the term expires by effluxion of time or on the happening of an event on which it is expressed to determine.”

In the premises, I hold that the lease over the suit premises i.e. Shop No.7 was terminated on 30/4/06 by effluxion of time and as no fresh arrangements were made that remains the position to date. Faced with a similar situation M. Ole Keiwa J as he then was in **Hawkman Enterprises Ltd – vs – Rhoda Kiprono Biwott: HCCC No.772 of 1998 (UR)** concluded that a prima facie case had not been made out. Hewett J in **Ruth Wanjiku Kaguni & 2 Others –vs- Kobil Petroleum Ltd: HCCC No.1501 of 2000 (UR)** found that a licence agreement between the plaintiff and one of the defendants had been lawfully terminated and as no fresh arrangements were contemplated, the plaintiff had not established a prima facie case with a probability of success.

Having found that the lease over the suit premises was determined by effluxion of time, it is obvious that the plaintiff has not established a prima facie case with a probability of success at the trial. I need therefore not consider the second and third criteria for the grant of an interlocutory injunction. However, if it would have been necessary to consider the second criteria, I would have had no difficulty in holding that the injury to be suffered by the plaintiff is quite capable of being quantified and damages would be an adequate compensation. As I am not at all in any doubt as to the prima facie merits or otherwise of the plaintiff's application I do not have to consider the application on a balance of convenience. I will therefore express no view in that regard.

The upshot of this matter is that the plaintiff's application for injunctive relief dated 24.4.2006 is refused. The same is dismissed with costs.

I note in passing that the plaintiff sought the injunctive relief pending inter parties hearing of this application. There is no prayer for the same relief pending the hearing of the suit. My above findings however, show that even if such a relief had been sought, I would have dismissed it.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY, 2006.

F. AZANGALALA

JUDGE

5.7.2006

Read in the presence of:-

Gatuguta for the plaintiff and Muya for the defendant.

F. AZANGALALA

JUDGE

5.7.2006