REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(NAIROBI LAW COURTS)

CIVIL CASE NO. 399 of 2004

HIGHLANDS PLANTS LIMITED ……...…….…..PLAINTIFF

VERSUS

ALICE WAIRIMU MWANGI ……...……..…DEFENDANT

RULING

On 14.03.2005, this Court extended interim orders in terms of Prayer 2 of the plaintiff's application dated 16.07.2004 and filed in Court on 19.07.2004, restraining the Defendant whether by herself, her servants or agents from evicting or purporting to evict the Plaintiff from the leased premises pending the hearing and determination of this application inter partes. The following therefore is my ruling on the matter. The Plaintiff herein was represented by Mr. Gitonga, while the Defendant was represented by Mr. Gachichio. It was common ground among both Counsel that the Plaintiff and the Defendant entered into a Lease Agreement on or about 7.07.1999 in respect of the premises known as Title Number NYANDARUA/OL KALOU CENTRAL/2379. It was also common ground that the lease was duly registered at the appropriate Land Registry at Nyahururu. One Hendricus Anthonius Flaton, the Managing Director, in his Supporting Affidavit sworn on 16.07.2004 depones that while sharing a residence with the Defendant, he lost all his personal documents including a copy of the registered lease. As fate would have it, a search at the Nyahururu Lands District Registry failed to yield a copy of the registered lease. The matters of loss in the residence were reported to the Police, and the Police issued a Police Abstract Report showing the report of such loss. At any rate, the issue of loss of lease is not also disputed.

It is not also disputed that the lease took effect from 1.08.1999 and was for a period of five (5) years and therefore expired on or about 31.07.2004. It was also common ground that provided there was no breach on the part of the Plaintiff, as tenant or lessee, the Lease would upon written notice by the Plaintiff of intention to renew the lease be renewed for a further term of five years.

Gachichio learned Counsel for the Defendant told the Court that there was breach of the terms of the Lease, in that the Plaintiff company erected some structures onto the suit property without the consent of the Defendant, and that their breach disentitled the Plaintiff from the right to renewal of the Lease for a further term. Learned Counsel for the Defendant submitted that permission to the Plaintiff's Managing Director, Hendricus Anthonius Flaton, was not a consent to the Plaintiff. However, by the Supporting Affidavit sworn on 26.10.2004, sworn by Hendricus Anthonius Flaton, the said deponent attached a copy of a letter dated 22.06.1999 which generally allows the Defendant to farm the suit premises without the right by the said deponent to sell or lease the suit land to any other party. At the time of the said general authorisation, the deponent was Chief Executive Officer of the Plaintiff company, and was the personification of the Plaintiff. It is common and trite law that juristic persons like the Plaintiff only act by their known agents and more often than not, many parties see the human face rather than the juristic person they are supposed to be dealing with. The authorisation did not specify that the deponent would not farm the "shamba" through the agency of a juristic person. This however seems to be no more than a red herring from the real legal issue, whether the Plaintiff did abide by the terms of the Lease, namely that would pay rent promptly throughout the period of the lease. There is no claim on this score that the Plaintiff failed or is unwilling to pay rent for the farming on the Plaintiff's suit land. The relevant covenant for renewal is set out in clause 3 (f) of the draft lease which is common ground was on all fours with the Lease of 1st August 1999. It is in these terms –

(f) If at the expiry of the Term the Lessee wishes to obtain a further lease of the Premises and signifies such desire by notice in writing delivered to the Lessor three months at least before the expiry of the Term

and if there is at the date of the said notice no outstanding breach of the covenants and agreements herein contained and on the part of the lessee to be observed, then the lessor shall at or before the expiry of the Term at the request and cost of the lessee grant to the lessee a lease of the Premises for a further term of Five (5) years to commence at the expiry of the Term and with and subject to the like covenants agreements conditions restrictions stipulations and provisions as are herein contained or implied except this present provision for renewal, and at under such rent as is mutually agreed but so that if a revised rent cannot be agreed then the rent payable by the lessee during such further term shall be rental at the current market value of the Premises at that time as assessed by an independent valuer in the manner more particularly set out in the schedule hereto." For the implementation of this clause, all that the Plaintiff was bound to do was to indicate in writing its desire to renew the lease for a further term of five years, at least three (3) months before the expiry of the Term. By its letter of 8.03.2004 the Plaintiff give such notice to the Defendant of intention to renew the lease for a further term.

By a letter dated 15.04.2004, by her Advocate C. Mwangi Gachichio, the Defendant told the Plaintiff's Advocates M/s Hamilton Harrison & Mathews, that his client, the Defendant "did not intend to lease her land to our client as is suggested by your letter or at all." In response to the Plaintiff's Advocates letter of 24.05.2004, that the Plaintiff had vested rights in the lease, and the offer to renew the same, and threat of filing suit, learned Counsel for the Defendant/Respondent that he had authority to accept Court process on behalf of the Defendant, and hence these proceedings.

I have carefully considered the application herein, including the grounds, the Supporting and Supplementary Affidavit of Hendricus Anthonius Flaton, the Grounds of Opposition dated and filed on 23.07.2004, and in particular the Defendant's Further Replying Affidavit sworn and filed on 29.10.2004, in relation to the conditions for grant of an interlocutory injunction. The condition for grant of the interlocutory injunction were laid done by SAPRY, V. A. in GIELLA –VS- CASMAN BROWN & Co. LTD. [1973] EA 358, at p360 as follows –

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience."

These principles have been consistently applied and followed by this Court in many similar cases. The issue therefore is whether the Plaintiff has established a prima facie case with a high probability of success, whether the applicant will suffer irreparable loss unless the injunction is granted. From the pleadings, I have referred to, it seems to me that there was a binding lease between the parties. The lease gave the Plaintiff the option to renew the lease upon 3 months notice before the expiry of the term. The Plaintiff in the event gave such notice, in fact four months before the expiry of the term. Once that option was exercised, it vested a right upon the Plaintiff for a further term of five years. That right could only be vitiated, by a breach by the Plaintiff which the Defendant alleged the Plaintiff had committed. Can such contention stand? I think not, and this is why. The very concept of farming or as in this case, growing flowers for export necessitates the construction of not just sheds but stores for sorting out and packaging the flowers for export. It is patently unreasonable to suggest that the construction of such sheds and stores is a breach of the Lease Agreement. I reject the argument that the Plaintiff was in breach of the Lease of 1st August 1999. In my view therefore, once the Plaintiff had given notice in exercise of its option, the Defendant was bound to grant the Plaintiff a lease for a further term of five (5) years. The Plaintiff has established a prima facie case with a high probability of success. Having made this finding, it is not absolutely necessary to consider other legs of the Giella trilogy. I think the Plaintiff would suffer irreparable loss which the Defendant cannot adequately compensate in damages. Both Counsel agreed that the Plaintiff is the largest single employer in the District. It would be nigh impossible to establish the extent of loss to employees and their families, let alone to the Plaintiff, both directly and indirectly. The loss to the Plaintiff would be incalculable at this stage. Being of this view on this leg as well, there would be no doubt, the balance of convenience would at this stage be for the Plaintiff.

The application herein is to restrain the Defendant from breaching her contract, the Lease with the Plaintiff pursuant to Order XXXIX rule 2 of the Civil Procedure Rules. Rule 2A of the said order donates

to the Court power to grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving of security or otherwise, as the Court thinks fit. The Plaintiff has given written undertaking as to damages in the event it were eventually unsuccessful in this suit. It is sealed with the Plaintiff's seal and dated 16.07.2004. The Defendant is therefore secured in the event of her success at the end of the trial of this suit if the parties were to go through the rigour of full trial and cross-examination in this matter.

For those reasons, the Plaintiff's application dated 16.07.2004, succeeds, there shall accordingly be orders in favour of the Plaintiff in terms of prayers Number 3 and 5 thereof.

Dated and delivered at Nairobi this 25th day of May 2005.

ANYARA EMUKULE

JUDGE