REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

Civil Case 278 of 2005

UKWALA SUPERMARKET LIMITED……………...…………………..PLAINTIFF

VERSUS

CHINESE CENTRE FOR PROMOTION OF INVESTMENT

DEVELOPMENT AND TRADE IN KENYA LTD……..……….....1ST DEFENDANT

QIN MINXUE…………………………..…………………..……..2ND DEFENDANT

R U L I N G

The plaintiff by its chamber summons dated 23rd May 2005 brought under sections 3 and 3A and 63 (e) of the Civil Procedure Act and Order XXXIX Rules 1,2,3 and 9 of the civil Procedure Rules seeks the following orders: -

· That a prohibitory injunction do issue restraining the 1st and 2nd defendants from alienating or (sic) lease or selling or transferring however the whole or any part or portion of the premises known as the Chinese center situated on land reference No. 209/15380 pending the hearing and determination of this suit.

· That the 1st and 2nd defendants by themselves or their servants or agents or any other representatives be restrained and prohibited from any dealings with the suit premises pending the hearing and determination of this suit.

· That a mandatory injunction do issue directly to the 1st defendant to hand over possession of the aforesaid Chinese center situated on land Reference No. 209/15380 forthwith.

· That a mandatory injunction or an order for specific performance do issue compelling the defendants by themselves jointly or severally, servants, employees or assigns to execute a lease between it and the applicant/plaintiff for a term of 15 years in terms negociated and agreed and alternatively that the Registrar of Titles be empowered to sign on behalf of the defendants.

The parties accept the following fact as being the correct position of this matter. That on or about August 2004 there was a meeting between the plaintiff and the defendant to discuss the plaintiff's interest in leasing the 1st defendant's property L.R.. No. 209/15380 where there is a building thereon known as "**The Chinese center**."

The parties however did not accept that the parties agreed on the exact area the plaintiff was to lease. The plaintiff asserted that the aforesaid discussion was in regard to its leasing the whole of that building, but the defendant stated that the discussions related to a portion of the building. The defendant supports its said contention on the basis that even at the time of the said discussions, the building had been rented to many other tenants who are still in occupation thereof. The defendants in their replying affidavit accepts that there were initial discussions to rent that whole building to the plaintiff then the defendant stated: "…**..but this matter was never finalized, given the logistical impossibility of the plaintiff leasing the whole building which had by the time these negociations, (sic) already been leased bout by the first defendant to other parties."**

The defendant, thereafter the discussions, wrote to the plaintiff a letter dated 25th September 2004, whereby they made an offer to the plaintiff to lease its building. One paragraph of that letter provided:

"**We refer to 'premises' as the entire property of the CCPK EXCEPT the existing office building**."

Another paragraph in that letter, entitled "**TERM**" provided:

"**The period of lease should be 15 years (renewable**)".

The plaintiff replied that letter of offer by theirs dated 7th October 2004. That letter stated that all the points raised in the letter of offer were agreeable to the plaintiff except the ones dealing with, rent increment, rent deposit, existing supermarket in the defendant's premises, and the planned car park. The plaintiff then provided a schedule of the proposed rents that ought to be charged by the defendant.

The defendant in their replying affidavit submitted that in regard to their letter of offer dated 25th September 2004, the plaintiff had not counter signed it, and it therefore was not admissible in evidence and more importantly they submitted that there was no meeting of the mind by the parties hereof.

The plaintiff avers by its supporting affidavit that on or about October 2004 the defendant's advocates forwarded to the plaintiff a draft lease for the building.

The parties in the months of November and December entered into discussions which culminated with a letter of intent to enter in to a lease agreement which was written and signed by the plaintiff and the 1st defendant.

The letter of intent provided, amongst others, the following provisions;

- "**That the tenant has expressed its wish and intention to lease the property known as Land Reference Number 209/15380 Ngong Road on terms and conditions that will be out laid in the lease document to be executed by parties**"

- "**That the Tenant will pay to the land lord an initial amount of kshs 1, 734, 000/- on 23rd December 2004 which amount shall be termed as a commitment deposit and that thereafter the Tenant shall submit and endorse this letter a financial plan for further payment of kshs 13, 872, 000/- equivalent to eight month's rent to the landlord."**

- "**That the tenant proposes to sign the lease document, which shall be dully agreed and approved by the Advocates of the parties and the commencent date of the lease, shall be latest on or before 1st March 2005.**

- "**That the landlord has agreed with the Tenant that on or before 29th of December 2004 the Tenant shall submit the payment schedule of the eight months rent."**

The plaintiff averred that on signing that letter of intent it submitted payment to the defendants of kshs 1, 734, 000 and further on 7th day of January 2005 submitted a further payment of kshs 3, 468, 000/-.

The defendants in regards to that letter of intent, averred in the replying affidavit, that the letter of intent clearly stated that the terms of the proposed lease were to be contained in the lease; that the letter of intent was neither a lease or a letter of offer but was merely a commitment on the part of the plaintiff and the 1st defendant to enter into a lease in the future, if both parties agreed on its terms. Further the defendant's stated that the plaintiff failed to comply with the requirements of provision of a financial plan for payment of kshs 13, 872, 000.

The defendant further deponed that the letters dated 25th September 2004 and the letter of intent dated 23rd December 2004 did not concisely identify the portion being leased to the plaintiff, of the building.

The defendant, on quite a different limb deponed, that the 2nd defendant who is also the managing director of the 1st defendant does not speak or read English and consequently there was a misunderstanding between him and his then advocate regarding the instructions of the area to be lease. The 2nd defendant further deponed that even the other officials of the 1st defendant who were negociating with the plaintiff could not read or speak in English and that they all, together with 2nd defendant, are conversant and fluent in Chinese language. That this language barrier, consequently from the beginning of negociation, led to a mistake on the nature of the envisaged contract. That the plaintiff could not lease the entire premises of the 1st defendant building because almost the whole building was already rented to other people.

The parties engaged in various meeting and exchange of correspondence and finally at one meeting the defendant's informed the plaintiff that they were changing the previous agreement and were to lease to the plaintiff only the 1st floor of the center. This change of heart was followed by a letter dated 14th April 2005, being an offer to lease. This offer was rejected by the plaintiff. The plaintiff contends that the defendant had offered to lease the entire center and the defendant contends that cannot be because it was bound by the leases, with the other tenants, which leases it had entered into.

The plaintiff alleges it incurred expenses of professional advisers, to the tune of kshs 3.2 million, and had anticipated starting its business at that center, which it described as unique and strategically situated; and was therefore expecting a turn over of kshs 80, 000, 000 per month.

I have taken into consideration the arguments presented before me, the application and it supporting affidavit and the replying affidavit.

If indeed there was a contract by virtue of the letter dated 25th September 2004 that I believe can be considered to have been abandoned when the parties entered into the subsequent agreement by the letter of intent dated 23rd December 2004.

In considering whether the plaintiff is entitled to an injunction it is important to determine whether the principles enunciated in the case of **GIELA V CASSMAN BROWN AND CO. LTD [1973] EA 358** are satisfied. The first is whether the applicant has laid out a prima case. I have looked at the letter of intent dated 23rd December 2004. That letter was quite succinctly stated by the defence counsel to be an agreement to enter a lease. The letter stated that the parties were to enter into a lease, "**on terms and conditions that will be out laid in the lease document to be executed by parties**." On a prima facie basis considering the meetings and the correspondence exchange after the signing of the letter of intent I find and I hold that there is no prima facie case with probability of success shown.

The second principle is whether the applicant might suffer irreparable injury if the injunction is not granted. The plaintiff stated that it incurred certain expenses related to professional advise given to it relating to the lease, that it expected to have a turn over of kshs 80 million per month and also other additional costs. What that means is that the plaintiff's claim is capable of being ascertained by mere calculation. That therefore means that the loss the plaintiff will suffer, if the injunction is not given, is not irreparable.

The plaintiff sought interlocutory mandatory injunction. In the case of KENYA BREWERIES V OKEYO [2002] I EA 109 held that: -

"**A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff."**

As stated before I find that the plaintiff has not shown a prima facie case with probability of success and the loss to be suffered by the plaintiff is discernable. Additional is it is quite clear from the evidence of both parties that the suit property has been rented, some of the spaces, to other third parties who are not parties to this suit. It would be unjust in those circumstances to issue an injunction, which obviously affect them, and yet not afford them a hearing. I accordingly find that there are no special circumstances that warrant the court granting an interlocutory mandatory injunction.

In the end I find that the plaintiff's application must fail.

I therefore order as follows: -

· **That the plaintiffs application dated 23rd May 2005 be and is hereby dismissed with costs to the defendant.**

Dated and delivered this 22nd day of September 2005.

MARY KASANGO

JUDGE