REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE 13 OF 2004

CULTIVATE TECHNOLOGIES LTD ..... PLAINTIFF

VERSUS

SIAYA DISTRICT COTTON FARMERS COOPERATIVE UNION ..... DEFENDANT

RULING

The plaintiff sought for an injunctive order to restrain the defendant from interfering with, disturbing, disrupting the plaintiff's business operations and or quiet possession of LR No Siaya/2339 pending the hearing and determination of this suit in a summons dated 1st March 2004 under order XXXIX rules 1 and 2 of the Civil Procedure Rules. The summons was supported by an affidavit sworn by Mary Toywa.

The defendant resisted the application by filing a replying affidavit sworn by Tom Odera Okinyi.

From the pleadings on record and the submission made by the learned counsels appearing for the combatants, it is clear that the plaintiff and the defendant went into an agreement via a lease executed on 30th October 2001 in which the plaintiff was allowed to occupy LR No Siaya/2339 plus the structures thereon for a period of 5 years with effect from 1.11.2001 by paying a monthly rent of Ksh 50,000/= payable quarterly (ie 150,000/ =). The lease contained the terms governing their relationship for that period which was renewable upon request.

The defendant purported to terminate the lease in a notice dated 26.1.2004 which it gave the plaintiff 14 days to vacate for failure to pay rent as per the lease agreement amounting to a sum of Ksh 634,909/=.

It would appear the defendant moved in and took over possession of the suit premises after the lapse of the 14 days of the notice. This prompted the plaintiff to institute this suit and of course the summons dated 1.3.2004 the subject matter of this ruling.

The principles applicable when granting or refusing to grant an order of injunction are well settled. The principles are contained in the case of *Giella vs Cassman Brown & Co* [1973] EA 358. The first principle is that a party must show that he has a *prima facie* case with a probability of success. In this instant case, the plaintiff avers that it has a *prima facie* case with a probability of success. The plaintiff has annexed a copy of the lease it duly executed with the defendant over LR No Siaya/2339. It has also shown that the notice issued by the defendant contravened clause 7(ii) of the lease. It is the plaintiff's submission that the defendant should have given it 3 months notice instead of the 14 days notice. The plaintiff therefore urged this Court to rule that it has shown that it has a *prima facie* case with high chances of success.

The defendant on the other hand resisted this ground stating that the plaintiff had not been incorporated

by the time it purported to execute the lease. It accused the plaintiff of concealing the fact that it was not in existence by then. A copy of a certificate of incorporation in respect of the plaintiff company was annexed to the affidavit of Tom Odera Okinyi to show that the plaintiff was incorporated on 12th September 2002. I was therefore urged to disregard the lease as the same was null and void *ab initio.* In a quick rejoinder the plaintiff filed a supplementary affidavit of Mary Toywa upon obtaining leave in which it sought to have the annexures attached to the affidavit of Tom Odera Okinyi struck out for being improperly on record.

I have considered the issues pleaded and raised on submissions herein. I think I will start with the later submission relating to the competency of the affidavit sworn by Tom Odera Okinyi. It has been stated by the plaintiff that the annexures therein are improperly on court record as they are not properly commissioned. What was done was that a plain paper attached to those documents was sealed and executed by the commissioner. This is obviously against the provisions of rule 9 of the Oaths and Statutory Declarations Rules which provides as follows:

"All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters identification."

I am of the humble view that the documents annexed to the affidavits of Tom Odera Okinyi as exhibits have not been properly sealed or commissioned, hence they are improperly on record and should be and are hereby ordered struck out and expunged from record.

Another aspect which has emerged also is that the deponent of the above affidavit has not disclosed the source of these documents so that even if the same were properly on record it cannot be acted upon by any court unless the sources of information are specified. It is not just enough for a deponent to state that he received and believed the information given by the advocate. The question is: How did the advocate obtain these documents?

What remains now of the affidavit of Tom Odera Okinyi cannot assail the averments contained in the affidavit of support of Mary Toywa. The basis of the plaintiff's complaint is the lease attached as an exhibit to that affidavit. I am convinced clause 7 (ii) of the lease was breached by the defendant by issuing a notice which was contrary to the one provided for under the lease. To this extent I say that the applicant has a *prima facie* case which it can probably prove when the matter goes to the substantive hearing stage.

The second principle which an applicant must prove is that it is likely to suffer irreparable loss which cannot be compensated by damages. It is the plaintiff's submission that it has been exposed to grave and irreparable loss and damage due to non-use of the premises. The defendant relied on the documents which have already been struck out and expunged from record to resist this ground. There being not much from the defendant's side over the issue I am enjoined to critically look at the pleadings and submissions relied by the plaintiff in support of its position. I have carefully combed through the lease document dated 30.10.2001. Which I have already stated that the same was annexed to the supporting affidavit of Mary Toywa sworn on 2nd March 2004 as an exhibit. Clause 7 (iv) of the aforesaid lease provides:

"If the lessor is in breach of clause 7 (ii) herein above, and or any other term of the lease agreement that shall render the operation and or running of the business of ginning cotton in the demised premises by the lessee impossible or cause by default or otherwise, the termination of this lease agreement, the lessor shall compensate the lessee by paying the equivalent value of three (3) months cotton lint yield estimated at 1200 bales (the equivalent of 192,000 kg) of lint which shall be valued at the ruling market price per kg of lint for purposes of compensation."

It is clear that the lease agreement relied upon provides for compensation in case of breach of any of its terms. Can it be said now that the plaintiff will suffer irreparable loss? The answer is no. Damage is capable of being ascertained. I will therefore refuse to grant the order for temporary injunction on this ground. I will not belabour to consider the third principle of injunction.

The upshot therefore is that the chamber summons dated 1st March 2004 is ordered dismissed with costs to the defendant.

Dated and Delivered at bungoma this 2nd day of July 2004.

J.K.SERGON

JUDGE