



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 10 OF 2020

KARI KINGORI.....PLAINTIFF

=VERSUS=

PANAFRIC HOTEL LIMITED.....DEFENDANT

RULING

1. The plaintiff initiated this suit in the High Court at Nairobi through a plaint dated 17/1/2020. Together with the plaint, the plaintiff filed a notice of motion dated 16/1/2020, seeking interlocutory orders restraining the defendant against disposing, diminishing, transferring, alienating or otherwise dealing in any manner whatsoever with his property detained at the defendant's premises.

2. On 20/1/2020, Odero J transferred the suit to the Environment and Land Court at Nairobi. Subsequent to the transfer of the suit, the plaintiff filed an amended notice of motion dated 26/2/2020. The amendments incorporated a prayer for a mandatory interlocutory injunctive order compelling the defendant to release certain items to the plaintiff. The said amended notice of motion was expressed as being supported by the "annexed affidavit of KARI KINGORI" but did not have any supporting affidavit annexed to it. The said application is the subject of this ruling.

3. The case of the plaintiff/applicant as set out in the plaint was that on 11/1/2017, he rented from the defendant **Flat No A25** at Panafric Hotel Serviced Apartments at an agreed monthly rent of Kshs 133,000 for the period from 1/1/2017 to 1/1/2018. He paid the agreed rent for the whole of 2017. On 11/3/2017, the defendant purported to unilaterally vary the terms of the agreement. Further, the defendant failed to refund to the plaintiff the security deposit of Kshs 133,000 which the plaintiff had paid.

4. It was the plaintiff's further case that on 1/1/2018, he entered into a three month tenancy agreement with the defendant at an agreed monthly rent of Kshs 153,267, which the plaintiff duly paid. The defendant subsequently conspired with unidentified people and caused him to be arraigned in court on 12/4/2018 on fabricated charges of non-payment of rent. From that day, the defendant denied the plaintiff access to the premises and to his property that had been illegally detained in the premises. On 7/1/2020, he received a notice from the defendant notifying him of the sale of his property within 14 days. He added that the defendant was frustrating his efforts to collect his property by falsely charging him sums which were not agreed upon by the parties to the agreement.

5. Consequently, the plaintiff sought the following orders in the main suit against the defendant:

a) Damages for breach of contract and conspiracy

b) A permanent injunction be and is hereby issued restraining and/or barring the defendant whether by themselves, their employees, servants, agents or nominees or any other person claiming through them from disposing assigning, diminishing, transferring alienating or otherwise dealing in any manner whatsoever with the plaintiff's property detained at the defendant's premises.

c) Orders directing that the defendant be compelled to release the plaintiff's property detained at the defendant's premises.

d) An order compelling the defendant to compensate and refund the plaintiff all the monies paid to him as deposit of Kenya Shillings One Hundred and Thirty Three Thousand (KE 133,000/-) together with interest at court rate from the date of termination of the contract to date.

e) Exemplary and punitive damages

f) Costs of this suit

g) Such further orders as the honourable court may deem fit and necessary to give effect to its directions and orders.

6. It is on the basis of the foregoing that the plaintiff sought the following verbatim orders in the amended notice of motion dated 26/2/2020:

3. Pending hearing and determination of this suit:

a) A temporary injunction be and is hereby issued restraining and/or barring the defendant whether by themselves, their employees, servants, agents or nominees or any other person claiming through them from disposing, assigning, diminishing, transferring alienating or otherwise dealing in any manner whatsoever with the plaintiff's property detained at the defendant's premises.

b) A conservatory order be and is hereby issued restraining and/or prohibiting the defendant whether by themselves, their employees, servants, agents, or nominees or any other person claiming through them from disposing assigning, diminishing, transferring, alienating or otherwise dealing in any manner whatsoever with the plaintiff's property detained at the defendant's premises

4. Pending hearing and determination of this suit; a mandatory injunction compelling the defendant whether by themselves, their employees, servants, agents or nominees or any other person claiming through them to release to the plaintiff; all the plaintiff's items of clothing and shoes, all the plaintiff's personal effects, the plaintiff's laptop, the plaintiff's United States of America Tax Returns and the plaintiff's Kenyan Passport, all in the defendant's premises.

5. That costs be in the cause

7. The plaintiff opposed the application through an affidavit sworn on 28/2/2020 by David Gichuru. Their case as set out in the affidavit was that in February 2018, the plaintiff rented a serviced apartment at the defendant's premises at Panafric Hotel at the rate of Kshs 133,000 per month. In 2017, Value Added Tax (VAT) was introduced on rent relating to serviced apartments by the Government of Kenya through The Finance Act, No 38 of 2016 published in Kenya Gazette Supplement No 159 of 20/9/2016. The applicant never disputed Value Added Tax until his account was long overdue.

8. The defendant added that in October 2017, the outstanding rent was Kshs 704,788/- whereupon the plaintiff paid Kshs 500,000 leaving a balance of Kshs 204, 788/-. This figure subsequently rose to Kshs 358,055 due to continued non-remittance of rent. At that point, the plaintiff disputed VAT. The matter was reported to the Police. As at March 2018, the plaintiff's rent arrears were Kshs 971,123. By April 2018, the rent arrears were Ksh 1,124,390. The plaintiff was subsequently arrested by Police for the offence of obtaining credit by false pretence. The plaintiff never returned to the premises until 5/5/2018 when he went there in the company of Police Officers and took an inventory of his goods and promised to go and collect them upon clearing the rent arrears. The defendant gave the plaintiff a rebate of the 18 days when he occupied the apartment in the month of April 2018, amounting to Kshs 91,960.24/=. The outstanding rent arrears demanded from the plaintiff was Kshs 322,419.55. The plaintiff as at the time of swearing the affidavit had failed to pay the arrears.

9. I have considered the amended notice of motion. I have also considered the parties' respective submissions together with the relevant legal frameworks and the prevailing jurisprudence on the key questions falling for determination in the application. The amended notice of motion under consideration is bare because there was no supporting affidavit annexed to it. The only evidential material before the court in relation to the motion is the defendant's replying affidavit. The two questions falling for determination in the motion are: (i) whether the plaintiff has satisfied the criteria upon which our courts exercise jurisdiction to grant an ordinary interlocutory injunctive order; and (ii) whether the plaintiff has satisfied the criteria upon which our courts exercise jurisdiction to grant a mandatory injunctive order at the interlocutory stage.

10. The criteria relating to grant of an ordinary injunction was spelt out in **Giella v Cassman Brown Co Ltd [1973] EA 358**. First, the applicant must demonstrate a *prima facie* case with a probability of success. Second, an interlocutory order will not be granted unless it is demonstrated that the applicant might suffer irreparable injury which would not be adequately compensated by an award of damages. Lastly, if the court is in doubt on the above two requirements, it will decide the application based on the balance of convenience.

11. The criteria for grant of a mandatory injunction was spelt out in the English case of **Locabi International Finance Limited v Agro-Export and Another (1986) All ER 901** as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had already been granted, that being a different and higher standard than was required for a prohibitory injunction.”

12. In the absence of a supporting affidavit, the plaintiff cannot be said to have placed before court evidence to satisfy both or either of the above two distinct criteria. Without saying much, in the absence of a supporting affidavit, the court has no evidential material upon which to evaluate the plaintiff's amended notice of motion. All that is before the court is the defendant's evidence which does not support the plaintiff's application.

13. The plaintiff urged the court to invoke Article 159 of the Constitution and grant the injunctive orders in the absence of a supporting affidavit. I cannot do that because jurisdiction to grant injunctive relief is exercised judiciously on the basis of evidence. Without supporting evidence, the amended notice of motion dated 26/2/2020 cannot succeed.

14. In the end, my finding on the two questions in the present application is that the applicant has not satisfied the two distinct criteria for grant of the respective injunctive reliefs. The result is that the amended notice of motion dated 26/2/2020 fails. The plaintiff shall bear costs of the application.

15. Lastly, I have looked at the plaint in this suit. This is a suit which should be in the Chief Magistrate Court at Milimani Commercial Courts. The pecuniary jurisdiction of that Court is Kshs 20,000,000. I accordingly hereby transfer this suit to the Chief Magistrate Court at Milimani Commercial Courts, for hearing and determination.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF FEBRUARY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Ms Mwangi for the Plaintiff

Mr S N Nganga for the Defendant

Court Assistant: June Nafula