

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 143 of 2005

NAKURU VETERINARY CENTRE LTD.....PLAINTIFF

VERSUS

MARY W. KARIUKI.....DEFENDANT

RULING

The plaintiff, Nakuru Veterinary Centre Ltd, has made an application under the provisions of Section 3A and 63(e) of the Civil Procedure Act and Order XXXIX rule 2 of the Civil Procedure rules seeking the orders of this court to compel the defendants, Mary Warukira Kariuki and Charles Muthui, by mandatory injunction to reopen the plaintiff's business premises and to allow the plaintiff to conduct its business without any harassment or threat of eviction from the suit premises. The grounds in support of the application as stated on the face of the application are that the defendants had instructed a firm of auctioneers, Mssrs Lifewood Auctioneers (K) Ltd who had closed the plaintiff's business premises. The plaintiff states that the closure of its business premises on the 9th of May 2005 had completely paralysed the plaintiff's business and thus caused the plaintiff to continue to suffer loss and damage. The plaintiff contends that he had paid the rent due in full in respect of the said premises to the defendants and therefore the defendants' action in closing the premises was irregular and unlawful. The plaintiff argues that it would be fair and just that the premises in dispute be reopened and the plaintiff be allowed to continue its business operations pending the hearing and determination of the suit. The plaintiff is apprehensive that unless the orders sought are granted the plaintiff would stand to suffer irreparable loss and the suit filed herein shall be rendered nugatory. The application is supported by the annexed affidavit of Paul Murigi Wamwea, a director of the plaintiff.

The application is opposed. The defendant has filed grounds in opposition to the application. Mary Warukira Kariuki, the 1st defendant has sworn a replying affidavit in further opposition to the plaintiff's application. The brief summary of the defendant's reply is that the plaintiff had not established a case as to entitle it to the orders of mandatory injunction sought. The defendants argue that the plaintiff has not established a prima facie case to persuade this court to issue a mandatory injunction to remove the possession of the suit premises from the defendants and give it to the plaintiff. In the replying affidavit filed, the 1st defendant has deponed that the plaintiff was evicted from the suit premises pursuant to the provisions of a registered lease agreement after the plaintiff had persistently fallen into arrears in paying the rent due. The 1st defendant further deponed that after the auctioneers distrained for rent, the defendants took possession of the suit premises and at the time the application was argued in court the same has already been leased to a third party. It is the defendant's case that the application filed by the plaintiff in the circumstances lacks merit and the same should be dismissed with costs.

During the hearing of the application, I heard the submission made by Mr Olola, Learned Counsel for the plaintiff and Mrs Ndeda, Learned Counsel for the defendants. Having carefully read the pleadings by the parties to this application and also considered the arguments made before by their respective counsel, the issue for determination by this court is whether or not the plaintiff has established a prima facie case to enable this court grant the orders of mandatory injunction sought. Both the plaintiff and the defendants are in agreement on the principles that ought to be considered by this court before the order of mandatory injunction is granted. These principles have variously been enunciated by the Court of Appeal in the

Despina Pontikos [1975]E.A. 38, and Kenya Breweries Ltd & Anor –vs- Washington Okeyo C. A. Civil Appeal No. 332 of 2000 (Nrb) (unreported). In the Kenya Breweries case (supra) the Court of Appeal quoted with approval the English decision of Locabail International Finance Ltd –vs- Agroexport & Anor [1986]1 All ER 701 at 901 where it was 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 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 degree of assurance that at the trial it would appear that an injunction had rightly been granted, that being a different and a higher standard than was required for a prohibitory injunction.”

This court had the occasion to apply the above stated principles in the cases of Susan Wanjira Kimani –vs- Johnson Kuria Kihumba Nakuru HCCC No. 262 of 2004 (unreported) and Shell & BP (Malindi) Kenya Ltd –vs- Kings Motors Ltd Nakuru HCCC No. 265 of 2004 (unreported). The said principles for the grant of mandatory injunction may be summarized as thus; For the orders of mandatory injunction to be granted, the plaintiff must establish that he has a strong case that the defendant cannot possibly have a defence to. The plaintiff must also establish that the circumstances of the case is such that the grant of interlocutory mandatory injunction would remedy the situation that could not possibly be compensated by an award of damages. The conduct of the defendant has to be taken into consideration in deciding whether or not to grant the orders of interlocutory mandatory injunction. This list is not exhaustive and the facts of each case will ultimately determine whether or not an order of interlocutory mandatory injunction is issued. In the present case, the plaintiff was a tenant in the defendants premises. The lease agreement was reduced in writing. The plaintiff was granted a lease of one office on the ground floor of the building erected on parcel number Nakuru Municipality/Block 9/70 owned by the defendants. The lease was for a period of five years and one month with effect from the 1st of November 2003. The rent was agreed at Kshs 30,000/= per month. The said rent was to be paid semi-annually in advance (i.e. six months in advance). Of particular interest to these proceedings in clause 6(b) which provides that if the rent is not paid within the stipulated period, the landlord shall be at liberty to distrain for rent after issuing a notice of fourteen days. The tenant was also liable to forfeit the lease if he defaults in paying the rent due.

From the pleadings filed in this suit and also from the submissions made by counsels for the plaintiff and counsel for the defendants it is evident that the plaintiff persistently defaulted in paying the rent due in respect of the said premises to the extent that in March 2005, the defendants issued a notice for distress for rent to the plaintiff as provided by clause 6(b) of the Lease Agreement. The lease agreement was registered. The plaintiff failed to heed the notice upon which the defendants distrained for rent and subsequently thereafter issued a notice of repossession and took over the premises after terminating the lease agreement with the plaintiff. In response to the distress for rent, the plaintiff issued a cheque to the defendants which when upon presentation to the bank was returned unpaid. The plaintiff had issued “a rubber cheque”. The defendants have argued that pursuant to the lease agreement, the plaintiff forfeited the lease by his persistent failure to pay the rent when it was due. On his part, the plaintiff argues that it had never been in arrears in paying the rent due to the defendants. At the time the plaintiff filed this suit, it had made good the cheque which had been dishonoured upon presentation to the bank by paying the defendant in cash through their bank account. The defendants concedes that the said payment was made but submit that the same was made after the plaintiff had already forfeited the lease. The defendants argue that they received the money from the plaintiff without prejudice to their right to invoke the provisions of clause 6(b) of the Lease Agreement.

Having carefully considered the facts of this case, it is clear that it is the plaintiff, who by persistently defaulting in paying the rent due, that had forced the defendants into invoking the relevant clause forfeiting the lease. From the annexures to the 1st defendant’s replying affidavit it is clear that the plaintiff has been a pain in the neck of the defendants. The defendants took the decision to distrain for rent and to forfeit the lease as a last resort. The defendants have stated that they have leased the said premises to a third party. This fact has not been disputed by the plaintiff. In the circumstances of this

case, I do hold that the plaintiff has failed to establish a clear case to enable this court issue an order of mandatory injunction that it craves for. For all intents and purposes, it appears that the defendants properly invoked the provision of clause 6(b) of the Lease Agreement to re-enter the premises and take possession of the premises. It is the plaintiff who was at fault when he persistently failed to pay rent and thus forcing the defendant's hand.

The said premises have already been leased to a third party. If this court were to issue a mandatory injunction, it would amount to granting the plaintiff' a steal of a match as against the defendants. That cannot be. The law does not aid persons who want to steal a match on their opponents. If the plaintiff establishes in the main suit that it was wrongfully removed from the suit premises, it can be adequately compensated by an award of damages. From the material placed before me, I do not think the plaintiff has established a strong case that would enable this court to grant mandatory injunction without having any doubt in its mind.

For the reasons stated hereinabove it is evident that the application filed by the plaintiff must fail. The same is dismissed with costs to the defendants.

DATED at NAKURU this 3rd day of October 2005.

L. KIMARU

JUDGE