



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. E003 OF 2020**

**MOBITEL EXPRESS LIMITED.....PLAINTIFF**

**=VERSUS=**

**AMBASSADEUR INVESTMENT (K) LIMITED.....1<sup>ST</sup> DEFENDANT**

**LLOYD MASIKA LIMITED.....2<sup>ND</sup> DEFENDANT**

**JAYDIS INVESTMENTS LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

The 1<sup>st</sup> defendant is the registered proprietor of all that parcel of land known as L.R No. 209/8688 together with the developments thereon. The 1<sup>st</sup> defendant has constructed on the said parcel of land a hotel known as Ambassadeur Hotel which has several shops. The 2<sup>nd</sup> defendant is a court appointed manager of the 1<sup>st</sup> defendant's properties including Ambassadeur Hotel.

On 3<sup>rd</sup> November, 2016, the 2<sup>nd</sup> defendant as the manager of the said Ambassadeur Hotel offered to the plaintiff a lease in respect of one shop therein known as shop No. 3 (hereinafter referred to as "the suit property") on terms and conditions that were set out in the letter of offer dated 3<sup>rd</sup> November, 2016. The plaintiff accepted the offer on 6<sup>th</sup> November, 2016 and paid to the 2<sup>nd</sup> defendant security deposit in the sum of Kshs. 669,650/= and the 1<sup>st</sup> quarter rent in the sum of Kshs. 776,796.90. The lease that was offered to the plaintiff was for a term of 6 years with effect from 1<sup>st</sup> December, 2016. After accepting the offer and making the said payments, the plaintiff was given access to the suit property so that it could carry out renovation and partitioning of the same for commencement of business on 1<sup>st</sup> December, 2016. As soon as the plaintiff started renovation and partitioning works, the directors of the 1<sup>st</sup> defendant locked up the premises and denied it access to the suit property.

As a result of this development, the plaintiff filed a suit against the 2<sup>nd</sup> defendant herein, two directors of the 1<sup>st</sup> defendant who were accused of interfering with the plaintiff's possession of the suit property and the 3<sup>rd</sup> defendant herein at the Business Premises Rent Tribunal (BPRT) in BPRT Case No. 980 of 2016. The plaintiff obtained an interim order from the BPRT restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein from interfering with the plaintiff's quiet and lawful occupation of the suit property and the repairs and renovation that it was carrying out on the property pending the hearing of the suit before the BPRT.

The plaintiff's suit at the BPRT was ultimately heard and a judgment delivered on 29<sup>th</sup> May, 2020. In the judgment, the BPRT held that it had no jurisdiction to hear the plaintiff's suit on account of the fact that the tenancy between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants was not a controlled tenancy under section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya. The BPRT made further orders by consent of the parties that the suit property was to remain closed as it was until 30<sup>th</sup> June, 2020 to give time to the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein to sort out the dispute over the plaintiff's tenancy. The BPRT made a further order also by consent that with effect from 1<sup>st</sup> July, 2020 the 1<sup>st</sup> defendant herein was to be at liberty to deal with the suit property in any manner it deemed fit.

What is now before this court is the plaintiff's application brought by way of Notice of Motion dated 1<sup>st</sup> July, 2020 seeking the following orders;

1. A temporary injunction restraining the defendants from interfering, evicting, entering, intimidating, harassing, taking possession of, altering, renovating, leasing to a third party and/or in any other manner interfering with the plaintiff's quiet possession and enjoyment of the suit property pending the hearing and determination of the suit and resolution of the dispute between the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
2. An order for the Officer Commanding Central Police Station to assist in the enforcement of the orders if granted.

The application that was supported by the affidavit of the plaintiff's director, Ismail Ibrahim Durow sworn on 1<sup>st</sup> July, 2020 was brought on the grounds that; the 2<sup>nd</sup> defendant offered to the plaintiff a lease in respect of the suit property. The plaintiff accepted the offer and paid a total of Kshs. 1,389,300/= comprising of the security deposit and rent for the 1<sup>st</sup> quarter of the tenancy. The plaintiff took possession of the suit property and started renovating the same. The directors of the 1<sup>st</sup> defendant and other strangers invaded the suit property and stopped the plaintiff from continuing with the renovation works. The 2<sup>nd</sup> defendant which had offered to the plaintiff the lease confirmed that the plaintiff was the bona fide tenant on the property and that it had signed the offer letter and made the necessary payments. Since the 1<sup>st</sup> defendant's said directors had obstructed the plaintiff and denied it access to the suit property, the plaintiff lodged a complaint against the 2<sup>nd</sup> defendant and the 1<sup>st</sup> defendant's said directors at the BPRT seeking among others, an order for the opening of the suit property and access thereto which the BPRT granted on 14<sup>th</sup> December, 2016.

On 29<sup>th</sup> May, 2020 the BPRT declared that it had no jurisdiction to entertain the complaint and ordered the suit property to remain closed until 30<sup>th</sup> June, 2020 to enable the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein to sort out the tenancy issue with the plaintiff. The plaintiff had engaged service providers and contractors who were in the process of carrying out renovation and partitioning of the suit property which had been paid deposit to commence work. The actions by the defendants aforesaid were malicious, unlawful and resulted in irreparable loss and damage to the plaintiff. The defendants had planned to evict the plaintiff from the suit property on the pretext that the property had been leased to a third party. The plaintiff stood to suffer irreparable financial loss and damage if the orders sought were not granted.

The plaintiff's application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 1<sup>st</sup> defendant opposed the plaintiff's application through a replying affidavit sworn by its director, John Kanguma Maina on 21<sup>st</sup> July, 2020. The 1<sup>st</sup> defendant contended that the BPRT upheld its preliminary objection to the plaintiff's complaint and ordered that the suit property remains closed up to 30<sup>th</sup> June, 2020 to enable the 1<sup>st</sup> and 2<sup>nd</sup> defendants to sort out the issue of the plaintiff's tenancy and gave the 1<sup>st</sup> defendant liberty to deal with the suit property as it deemed fit as from 1<sup>st</sup> July, 2020. The 1<sup>st</sup> defendant averred that pursuant to the said order by the BPRT, the 1<sup>st</sup> defendant informed the 2<sup>nd</sup> defendant and the plaintiff that it had not received any payment from the plaintiff and as such it was not in a position to refund any money to the plaintiff and that it was not going to consider the plaintiff for a tenancy on the suit property. The 1<sup>st</sup> defendant averred that it made it very clear that it was not willing to consider the plaintiff as a tenant. The 1<sup>st</sup> defendant averred that it had already entered into a lease with another tenant which had already finished renovating the suit property and was in possession. The 1<sup>st</sup> defendant averred that it had a right to lease the suit property to a tenant of its own choice in this case the 3<sup>rd</sup> defendant. The 1<sup>st</sup> defendant averred that the suit property had remained closed for over 2 years during which period it had lost significant amount of rent. The 1<sup>st</sup> defendant averred that it was a stranger to the 2<sup>nd</sup> defendant and that the 2<sup>nd</sup> defendant had no right to impose tenants on it.

The 2<sup>nd</sup> defendant opposed the application through a replying affidavit sworn by its director, David K. Machua on 15<sup>th</sup> September, 2020. The 2<sup>nd</sup> defendant admitted that it was a court appointed administrator of the suit property and that in that capacity it offered a lease in respect of the suit property to the plaintiff. The 2<sup>nd</sup> defendant admitted that the plaintiff accepted the offer and paid Kshs. 1,389,300/= being a deposit and rent for the 1<sup>st</sup> quarter of the lease. The 2<sup>nd</sup> defendant admitted that the plaintiff was granted possession of the suit property and that the plaintiff started to renovate and partition the property before two directors of the 1<sup>st</sup> defendant denied the plaintiff access to the property. The 2<sup>nd</sup> defendant admitted that it confirmed in writing that the plaintiff was the bona fide tenant of the suit property. The 2<sup>nd</sup> defendant averred that following the orders that were issued by the BPRT, it approached the 1<sup>st</sup> defendant to try to resolve the issue of the plaintiff's tenancy but the response that it got was that the 1<sup>st</sup> defendant did not want to have anything to do with the plaintiff and that it was not willing to consider it as a tenant. The 2<sup>nd</sup> defendant averred that it did not deny the plaintiff possession of the suit property. The 2<sup>nd</sup> defendant averred that it was ready and willing to refund to the plaintiff the monies that the plaintiff had paid to it on behalf of the 1<sup>st</sup> defendant since the suit property had already been leased out by the 1<sup>st</sup> defendant to the 3<sup>rd</sup> defendant.

The plaintiff's application was argued by way of written submissions. The plaintiff filed its submissions on 27<sup>th</sup> August, 2020 while the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their submissions on 30<sup>th</sup> September, 2020. In its submissions, the plaintiff submitted that the 2<sup>nd</sup> defendant was at all material times acting as an agent of the 1<sup>st</sup> defendant and as such it was vicariously liable for the acts of the 1<sup>st</sup> defendant complained of by the plaintiff. The plaintiff submitted further that it had established valid grounds for the grant of the injunctive reliefs sought against the defendants.

In its submissions, the 1<sup>st</sup> defendant submitted that there was no lawful landlord and tenant relationship between the plaintiff and the 1<sup>st</sup> defendant which was capable of being protected by the court. The 1<sup>st</sup> defendant submitted further that the orders issued by the BPRT had allowed it to deal with the suit property in any manner deemed fit with effect from 1<sup>st</sup> July, 2020. The 1<sup>st</sup> defendant submitted further that the plaintiff had not established valid grounds for the grant of the injunction sought. The 1<sup>st</sup> defendant submitted that the plaintiff had not established that it had a prima facie case against the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant submitted that the plaintiff could not have a prima facie case without evidence of a valid lease agreement. The 1<sup>st</sup> defendant submitted that the letter of offer given to the plaintiff by the 2<sup>nd</sup> defendant was not binding in that the 2<sup>nd</sup> defendant made it clear that it was going to recommend to the 1<sup>st</sup> defendant to grant to the plaintiff a lease which was not done. The 1<sup>st</sup> defendant urged the court to dismiss the application with costs.

On its part, the 2<sup>nd</sup> defendant submitted that its position as a court appointed manager of the properties of the 1<sup>st</sup> defendant made it an agent of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant submitted that that the plaintiff's application had been overtaken by events since the 1<sup>st</sup> defendant had declined to grant it a lease and the suit property had been leased out to a third party.

I have considered the plaintiff's application together with the supporting affidavit. I have also considered the affidavits that were filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the various authorities filed in support thereof. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. As was stated in Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, an applicant for interlocutory

injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the court of Appeal adopted the definition of a prima facie case that was given in of Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

**“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”**

I am not satisfied that the plaintiff has established a prima facie case with a probability of success against the defendants. The letter of offer of a lease dated 3<sup>rd</sup> November, 2016 on which the plaintiff has based its claim is very clear in its terms. In the 1<sup>st</sup> paragraph of the letter the 2<sup>nd</sup> defendant stated as follows:

**“We write further to your wish to lease the above premises in Ambassadeur Hotel. We now set out below a summary of the principal terms on which we would recommend to the landlord to grant you a lease.” (emphasis added).**

The paragraph numbered 16 in the letter on possession states as follows:

**“Possession of the premises will not be granted prior to executing and returning the formal lease and compliance with the terms hereof and in the lease by you.....”**

In the last paragraph of the letter, the 2<sup>nd</sup> defendant stated that:

**“Notwithstanding that this matter remain subject to lease, the Landlord will be entitled to retain out of the deposit paid under this letter any costs and expenses incurred in preparing and negotiating the lease if you do not execute the lease within the period specified above. Any balances will be returned to you.” (emphasis added)**

I am not persuaded that the letter dated 3<sup>rd</sup> November, 2016 constituted a lease between the plaintiff and the 1<sup>st</sup> defendant. In my view, it was an offer of a lease that was subject to a formal lease being entered into by the parties. It is not disputed that a formal lease was not entered into between the plaintiff and the 1<sup>st</sup> defendant. I am not persuaded therefore that the plaintiff was entitled to take possession and to remain in possession of the suit property. The 2<sup>nd</sup> defendant was to recommend to 1<sup>st</sup> defendant to enter into a lease with the plaintiff. The recommendation seems to have been made but the same was not accepted by the 1<sup>st</sup> defendant. I am not persuaded that the court can compel the 1<sup>st</sup> defendant to enter into a lease with the plaintiff on the terms contained in the 2<sup>nd</sup> defendant’s letter of 3<sup>rd</sup> November, 2016. The offer in the letter was subject to contract and it is trite law that a court cannot make a contract for the parties. The 2<sup>nd</sup> defendant has not denied that it received Kshs. 1,389,300/= from the plaintiff. It has admitted receipt of the payment and its willingness to refund the same to the plaintiff. The 2<sup>nd</sup> defendant has averred that no demand was made before the filing of this suit and that it would have made the said refund if the plaintiff had asked for the same. Since the plaintiff has failed to establish a prima facie case, it is not necessary for me to consider whether the plaintiff will suffer irreparable harm which cannot be compensated in damages.

Due to the foregoing, the plaintiff’s application is not for granting. I wish to add that even if I had found that the plaintiff had established a prima facie case, I would still not have granted the orders sought. I am of the view that the application has been overtaken by events. The plaintiff has sought injunction to restrain among others, the taking of possession, altering, renovation or leasing of the suit property to a third party. The 1<sup>st</sup> defendant in its replying affidavit averred that it had already leased the suit property to a third party who had renovated the premises and was already conducting business therein. This averment was not rebutted by the plaintiff. The 1<sup>st</sup> defendant annexed a copy of a lease dated 1<sup>st</sup> July, 2020 between the 1<sup>st</sup> defendant and the said third party. The said third party is not a party to this suit and as such orders cannot be issued against him. The orders sought by the plaintiff have in the circumstances been overtaken by events.

The upshot of the foregoing is that the Notice of Motion dated 1<sup>st</sup> July, 2020 is without merit. The same is accordingly dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

**DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH 2021**

**S. OKONG’O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

N/A for the Plaintiff

N/A for the 1<sup>st</sup> Defendant

Ms. Lucheveleli for the 2<sup>nd</sup> Defendant

N/A for the 3<sup>rd</sup> Defendant

Ms. C. Nyokabi-Court Assistant