



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 82 OF 2020

TUSKER MATTRESSES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

JUJA CITY MALL LIMITED.....1ST DEFENDANT/RESPONDENT

BEN M.GATHURI T/A

AUCLAND AGENCIES AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

There are two Notices of Motion Applications for determination brought by the Plaintiff/Applicant herein. The 1st is dated **21st September 2020**, and the other one is dated **8th October 2020**.

The **21st September 2020**, application is premised to be brought under **Section 16** of the **Distress for Rent Act**, **Sections 1A, 1B, 3A** of the **Civil Procedure Act**, **Order 40 Rule 1 and 2** and **Order 51 Rule 1** of the **Civil Procedure Rules 2010** and has sought the following orders;

a) THAT pending the hearing and determination of this application, this Honorable Court be pleased to issue a temporary injunction restraining the Defendants either by themselves or through their agents, servants and/or employees or any person acting under their instructions from auctioning, selling, offering for sale and/or dealing with any manner whatsoever with the Plaintiff's property.

b) THAT pending the hearing and determination of this suit, this Honorable Court be pleased to issue a temporary injunction restraining the Defendants either by themselves or through their agents, servants and/or employees or any person acting under their instructions from auctioning, selling, offering for sale and/or dealing with any manner whatsoever with the Plaintiff's property.

c) THAT pending the hearing and determination of this application, this Honorable Court be pleased to grant a temporary injunction restraining the Defendants either by themselves or through their agents, servants and/or employees or any person acting under their instructions from evicting, harassing and/or locking out the Plaintiff from the premises known as Unit Number S1 situate on the ground floor of the Juja City Mall or in any other way interfering with the Plaintiff's quiet possession of the said premises.

d) THAT pending the hearing and determination of this suit, this Honorable Court be pleased to grant a temporary injunction restraining the Defendants either by themselves or through their agents, servants and/or employees or any person acting under their instructions from evicting, harassing and/or locking out the Plaintiff from the premises known as Unit Number S1 situate on the ground floor of the Juja City Mall or in any other way interfering with the Plaintiff's quiet possession of the said premises.

e) THAT pending the hearing and determination of this suit, the 1st Defendant be ordered to provide the Plaintiff with an accurate and complete statement of account relating to the Plaintiff's rental account with the 1st Defendant.

f) That costs of this application be borne by the Defendants.

Through the Law Firm of **O & M LAW LLP**, the Notice of Motion is supported by the Affidavit sworn by **ALAN BILLZ**, on the grounds that the Plaintiff/Applicant operates a Supermarket in the name and style of **Tuskys Supermarket**, on the ground floor and 1st floor of the **Juja City Mall**, as a lessee for the term of **10 years**. The Plaintiff/Applicant had seen a letter dated **27th August 2020**, through which the 1st

Defendant/Respondent had purported to instruct the 2nd Defendant/Respondent to distress for rent purportedly of **Kshs 40,339,536/=** and the Plaintiff/Applicant was never served with a **Proclamation Notice** requiring it to remedy any rental arrears due. He deponed that the 1st Defendant/Respondent has moved to unlawfully prevent the Plaintiff/Applicant from accessing its premises by locking and sealing off the entrance. He further deponed that 2nd Defendant/Respondent has issued the Plaintiff/Applicant with a notification of sale dated **11th September 2020**, which Notice purports to put up the Plaintiff's/Applicant's movable items for sale including shopping trolleys, computer equipment etc. and the said goods have not been subjected to valuation so as to ascertain their true value. That the amount of **Kshs.40,339,536/=** due to the 1st Defendant/Respondent as rental arrears is inordinate.

He further stated that the intended sale of the Plaintiff's/Applicant's property is premised on a **proclamation notice** dated **5th May 2020**, whose amount has been settled and hence the intended sale is illegal. He contended that the Plaintiff/Applicant is ready and willing to settle all subsequent rental arrears owed to the 1st Defendant /Respondent as may be ascertained by a reconciliation exercise between them. He further contended that the 1st Defendant/Respondent refused to collect cheques of **Kshs.3,000,000/=** upon receipt of the 2nd Defendant's/Respondent's Notice of sale in settlement of rent due for the month of June 2020.

The application is opposed by **JAMES KINIYA GACHIRI**, the Managing Director of the 1st Defendant/Respondent who filed his Repling Affidavit dated **15th October 2020**, through the Law Firm of **GACHIE MWANZA & CO. ADVOCATES** and stated that it is true that the Plaintiff/Applicant is their tenant in the said **Juja City Mall**, a relationship that is regulated by the signed Head of Terms dated **4th February 2015**. He further stated that the Applicant has over the years defaulted in payment of the rent, which necessitated them through their lawyers to issue demands for payment of rents and annexed copies of two letters dated **24th May 2016**, and **5th September 2016**, as evidence.

He further stated that the Plaintiff/Applicant has taken pride in its market share of the supermarket customer base to frustrate Mall owners, despite being the anchor tenant. Its failure to pay rent on time which rent would have been used to offset loan repayment at the Co-operative Bank hence, the 1st Defendants is at risk of exercise of Statutory Power of sale by the said financier. He contended that it is not in dispute that the Plaintiff paid some amounts of rent after an earlier suit was withdrawn, but it did not clear the arrears which continued accumulating more and more and the arrears stood at **Kshs.40,339,536/=**. He further contended that the Plaintiff/Applicant cannot be allowed to pay rent at its own **will and desire**, and it is in breach of the Tenancy terms. He urged this Court not to protect the Applicant any longer as the Court cannot rewrite the contract on payment of rents and the Plaintiff/Applicant has at all times been bound to pay rent.

The Application was canvassed by way of written submissions.

Parties filed their respective Written Submissions and the Respondents' submissions with regard to the Applicant's application dated **21st September 2020** are dated **30th October 2020**, while the Applicant's submissions with regards to its application dated **21st September 2020**, are dated **4th December 2020**. The Court will give a ruling of both Applications concurrently.

With regards to the Applicant's application dated **21st September 2020**, the Court has now carefully considered and evaluated the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law. On the first fold of the orders sought, it is not in dispute that the Plaintiff/Applicant is the tenant of the 1st Defendant/Respondent. It is also not in dispute that the Plaintiff/Applicant is occupying premises owned by the 1st Defendant/Respondent and pays rent to the said 1st Defendant/Respondent.

For injunctive orders to be granted, the Applicant needed to establish the principles set out in the case of ***Giella...Vs...Cassman Brown Co. Ltd 1973 EA 358***. These are:-

- a) *The Applicant must establish that he has a **prima facie** case with probability of success.*
- b) *That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.*
- c) *When the Court is in doubt, to decide the case on a balance of convenience.*

A *prima-facie* case was described in the ***Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125***, to mean:-

“In civil cases, it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

It is evident that the Plaintiff/Applicant has brought this application under **Order 40 Rule 1** which provides that:-

Where in any suit it is proved by affidavit or otherwise—

- (a) *that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or*
- (b) *that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the*

purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”

Further the application is anchored under **Section 3A** of the **Civil Procedure Act** which grants the Court the power to issue any orders that are necessary for the end of justice to be met or to prevent abuse of the Court process.

Since the Applicant’s application is anchored under the above **Order 40** of the **Civil Procedure Rules**, it is incumbent upon the Plaintiff/Applicant to establish that his property is in danger of being **wasted, damaged** or **alienated** by the Defendants/Respondents. Upon such prove, then the Court would proceed to issue any necessary order to prevent such **wastage, damage, alienation, sale** or **disposal** for the end of justice to be met. See the case of **Noormohammed Jan Mohammed...Vs...Kassam Ali Virji (1953) 20 LRK 8**, where the Court held that:-

“To justify temporary injunction there must be evidence of immediate danger to property or sale or other disposition.”

In the instant suit, it is evidently clear that there is a dispute as to whether the rent arrears have been cleared or not. The Plaintiff/Applicant also gave the impression that the amount owed as rent arrears to the 1st Respondent is in dispute, but the Applicant has not tabled evidence to state the arrears owed neither have they provided documentary evidence to show the total amount of rent paid. That is not a ground for stopping distress for rent or sale of the distressed goods. This was stated long ago in **Lalyuna & others v Civil Servant Housing Co. Ltd (1995) LLR 336 (CAK)**, as quoted in **James Juma Muchemi & Partners Limited v Barclays Bank Ltd [2011] eKLR**, where Kwach, J. A. stated that:-

“A Court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.”

In **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another, (1990) eKLR** the Court held as follows on what a party seeking an injunction must demonstrate:

“To succeed in an application for injunction, an Applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application, but must also show he has a right legal or equitable, which requires protection by injunction.”

The Applicant admits that it has rent arrears, but has not provided or tabled evidence in this Court to demonstrate how the same will be paid and neither has it provided a schedule of payment. In view of the foregoing, it is upon the Applicant to demonstrate full evidence of the outstanding amount, but not by piece meal evidence that the amount has been partially paid. Further, the Applicant has not provided evidence to show that they have been denied access to the suit premises nor evicted from the suit premises. To that extent that the Court finds that the Applicant has not proved its case on a *prima- facie* basis, and it is sitting comfortably on interim orders issued

by this Court, then the Court finds the applicant has failed on the first limb of ***Giella vs Cassman Brown (supra)***.

On whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, the Plaintiff/Applicant entered into an agreement with the 1st Defendant/Respondent to pay rent for the leased property. The loss herein may be quantified in a monetary manner as the said goods in the Supermarket are quantifiable in monetary value. The Applicant has therefore not established that it will suffer irreparable loss which cannot be compensated by an award of damages. **‘Irreparable loss’** was described in the case of **Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015**, as ***simply injury or harm that cannot be compensated by damages and would be continuous.***

On the 3rd limb, the Court is not in doubt and even if it was, the balance of convenience tilt in favour of the 1st Defendant/Respondent who has alleged that the Plaintiff/Applicant has defaulted in rent payment and the Plaintiff/Applicant has not demonstrated evidence of how it will offset the said rent arrears. No payment schedule was attached.

Having now carefully considered the available evidence, the Court finds that the Plaintiff/Applicant has not established the laid down principles for grant of injunctive orders. For the above reasons, the Court finds the Applicant’s **Notice of Motion** application dated **21st September 2020**, is not merited. For the said reasons, the said application is dismissed entirely with costs to the Defendant/Respondents. Let the disputed issues be determined on merit in a full trial.

APPLICANT’S/PLAINTIFF’S APPLICATION DATED 8TH OCTOBER 2020

The Court will now consider Applicant’s/Plaintiff’s application dated **8th September 2020**, which on the Applicant’s submission they date it as **8th October 2020**, premised to be bought under **Section 5** of the **Judicature Act**, **Section 29** of the **Environment and Land Court Act**, **Section 63 e**, **Section 1a, 1b, 3a** of the **Civil Procedure Act**, **Order 51 Rule 1** of the **Civil Procedure Rules** on an application for orders;

1) THAT this honorable Court be pleased to issue a Notice to Show Cause to the Respondents/Contemnors herein names JACKLINE MBAIRE, the Manager of Juja City Mall and Mr. Ben M Gathuri to Show Cause why they should not be cited for contempt of Court for disobedience of the Court orders decreed by this Court on 23rd September 2020 and extended on 6th October 2020.

2) THAT this Honorable Court be pleased to dispense with the requirement for personal service of the Court order, the same having been filed vide email addresses mbairejackline@gmail.com, auchlanagencies@yahoo.com which are known email

addresses for contemnors.

3) THAT in default to Show Cause, the Respondents/ Contemnors cited in prayer 2 above, then the Court to proceed and cite the Respondents for Contempt of Court and punish them accordingly.

4) THAT upon commencement of contempt of Court proceedings, a warrant of arrest be issued directing the Officer Commanding Thika Police Station to effect the arrest of the Respondents/Contemnors named above and if found to have disobeyed Court orders to suffer the sentence of imprisonment or a fine not exceeding 20 million or a term of imprisonment not exceeding two years.

5) THAT this Honorable Court be pleased to order all acts of the Respondent/Contemnor above of blocking the Plaintiff/Applicant from accessing its supermarket premises at the Juja City Mall in disobedience of Court orders is illegal, invalid and in contempt of a Court order and accordingly revoked and consequently access orders being issued accordingly.

6) THAT this Honorable Court be pleased to issue an order directing the OCS Thika Police Station to supervise access to the supermarket premises of the Applicant at the Juja City Mall.

7) THAT Contemnors to pay costs of this application.

The 2nd Defendant swore a Replying Affidavit on behalf of JACKLINE MBAIRE on 24th October 2020, in opposing the said Application wherein he denied that they were disobeying the said Court Orders and deponed that the Court Order directed him not to sell the attached goods which he has not sold. He further deponed that the Court order required that they do not evict the Plaintiff from the suit premises and according to him no one has been evicted and finally prays that the application be dismissed as the Plaintiff/Applicant is simply agitated.

The Court directed the parties to file written submissions. The Defendants'/Respondents filed theirs on 3rd December 2020, while the Applicant's submissions are dated 4th December 2020.

The Court renders itself as follows; *Contempt of Court* is defined by Black Law dictionary as:-

“Conduct that defies the authority or dignity of a Court. Because such conduct interfere with the administration of justice, it is punishable usually by a fine or imprisonment.”

Therefore, from the above description, it is clear that Contempt of Court is a serious conduct as it undermines the authority of the Court. Indeed Courts do frown on cases of Contempt of Court because such actions do undermine the authority and dignity of the Court. In the case of Teachers Service Commission...Vs...Kenya National Union of Teachers & 2 Others (2013) eKLR, the Court held that:-

“A Court Order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of any person that this remains the case. To see it in any other way is to open the door to chaos and anarchy”

Indeed, Courts do not take it lightly when a party fails to comply with a Court Order. In the case of Hadkinson...Vs...Hadkinson, (1952) ALL ER 567, the Court held that:-

“It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C. said in Chuch..Vs..Cremer (1) (1 Coop, temp,Cott 342):-

“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and valid- whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it exists it must not be disobeyed.”

Further, this Court in Refrigeration and Kitchen Utensils Ltd ...Vs..Gulabchand Popatlal Shal & Another, Civil Application No.39 of 1990 held:

“It is essential for the maintenance of the rule of law and good order that the authority and dignity of our Courts is upheld at all times.”

From the above findings of the Court, it is clear that for a person to be held in Contempt of a Court Order, he/she must be aware of the existence of the Court Order.

It is noteworthy, that the contempt application is brought on the basis of an order of the Court obtained ex-parte before the Court took consideration of the Defendants'/ Respondents' side of the story. The Plaintiff/Applicant has not proved that they were evicted, neither denied access to its premises on **Juja City Mall**. It is therefore uncertain to this Court without any evidence placed before it that there was

eviction and denial of access. There is no evidence that the said alleged contemnors were served personally with the Court Order given that they are cited personally. In the case of *Kiwi Ltd. Vs...Reef Hotels Ltd, Mombasa HCMA No.616 of 2006*, the Court held that:-

“As a general rule, no order of Court requiring a person to do or abstain from doing any act maybe enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.”

It is evident that the proof of Contempt of Court allegation is on a higher standard. The Court finds that the Plaintiffs/Applicants herein have failed to establish or proof that the cited contemnors were in contempt of the Court Order issued on **23rd September 2020**, and extended on **6th October 2020**.

Consequently, the Court finds that the ***Plaintiff's/Applicant's Notice of Motion*** application dated **8th October 2020**, is ***not merited***. The said application is hereby ***dismissed entirely with costs to the alleged contemnor***.

Having carefully considered the Plaintiff's/Applicant's two Notices of

Motion applications, dated **21st September, 2020** and **8th October 2020**, and the annexures thereto together with the rival Written Submissions, the Court finds the two applications are **not merited** and are hereby dismissed entirely with costs to the Defendants/Respondents.

For the avoidance of doubt, any interim orders in place are hereby vacated forthwith.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 22ND DAY OF APRIL 2021.

L. GACHERU

JUDGE

22/4/2021

Court Assistant - Phyllis

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff/Applicant

Mr. Omondi holding brief for Mr. Gachie the 1st and 2nd Defendant/Respondent

L. GACHERU

JUDGE

22/4/2021