



**REPUBLIC OF KENYA**

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

**ELC CASE NO. E8 OF 2020**

**BENSON ODONGI T/A CLARIDON.....PLAINTIFF/APPLICANT**

**VERSUS**

**PROF. AYIECHO OLWENY.....DEFENDANT/RESPONDENT**

**RULING**

Benson Odongi T/A Claridon hereinafter referred to as the plaintiff/applicant has come to court against Prof Ayiecho Olweny hereinafter referred to the Defendant/Respondent seeking for orders of injunction that pending the hearing and determination of the suit, an interim order of temporary injunction do issue restraining the defendant whether by himself, his agents or servants from attaching, settling and/or otherwise interfering with the plaintiff quiet and peaceful enjoyment occupation and use of the rented premises situated on land parcel of no. Kisumu/Municipality/Block 10/774.

The application is based on grounds that **at all material times, the plaintiff herein has been the tenant of the defendant having entered into a lease agreement dated 11<sup>th</sup> December 2013, wherein the plaintiff was to rent the defendant's premises situated on land parcel no. Kisumu/Municipality/block 10/774 at a monthly rent of Kshs. 70,000/= payable on or before 5<sup>th</sup> of every month.**

**That the plaintiff, who has been running a hospitality/bar business, has been diligently paying the aforesaid rent, which was increased to Kshs. 140,000/= per month, until March 2020, when the whole country was locked down and restrictions issued on hospitality business due to the Covid -19 pandemic.**

**That based on the aforesaid pandemic, the defendant herein issued to the plaintiff a rent relief of Kshs. 40,000/= until the restriction placed on hospitality/bar business was lifted by the Government and as such, the plaintiff was to pay a monthly rent of Kshs. 100,000/=.**

**That the plaintiff did diligently pay to the defendant the rebated rent albeit in instalments due to lack of operations which operations finally resumed on 28<sup>th</sup> September 2020 when the President of the Republic of Kenya lifted the restrictions placed on the Hospitality/bar business was lifted.**

**That I did resume the plaintiff resumed normal operations of his business until 15<sup>th</sup> October 2020 when he was served by proclamation notice by Ikimwanya Auctioneers on instructions of the Defendant to distress for rent arrears amounting to Kshs. 729,000/=.**

**That the said action by the defendant is not only unlawful but made out without any justifiable reason as the said arrears does not include the Kshs. 40,000/= concession agreed to by both parties herein and guaranteed to run until the end of the imposed restriction by the government which ended on 28<sup>th</sup> September 2020.**

**The plaintiff has been ready and willing to pay the outstanding rent arrears but has only been hindered by the current economic situation brought about by the current covid 19 pandemics.**

**That unless the orders sought herein are issued in the interim, the plaintiff stands to suffer irreparable loss and damages as the instructed auctioneer is due to attach his property on 23<sup>rd</sup> day of October 2020 and as such, the plaintiff will lose on its business which is his only source of income the proceeds whereof the plaintiff uses for the maintenance of his family and payment rent. It is in the interest of justice that the orders sought are granted. This application meets the criteria for the grant of the orders sought.**

The Plaintiff further blames the Covid 19 Pandemic for a dip in his business.

The Plaintiff admits that he is in rent arrears but he blames the current economic situation.

In the replying affidavit the defendant states that the plaintiff is his tenant on parcel number Kisumu municipality/Bloc 10/774. The Plaintiff took possession in December 2013 and when the lease expired, it was reviewed from December 2018 for 6 years to February 2024. The plaintiff has ignored his tenancy obligation and has been paying rent in instalments. The monthly rent is Kshs. 140,000 but he does not pay the same. The defendant denies that he agreed to reduce rent by 40,000/= due to Covid 19.

The plaintiff business was open during covid-19 period. The defendant claims that he was suffering as he depends on the rent for his upkeep.

The plaintiff has failed to pay his monthly electricity and water Bills.

The plaintiff was in arrears of Kshs. 300,000 as at December 2019 and Kshs. 840,000 as at April 2020 before Covid 19 affected his business.

I have considered the application, affidavits on record and the rival submissions filed by parties and do find that the plaintiff is in arrears' of rent. There is no evidence that the defendant reduced rent payable by the plaintiff by Kshs. 40,000/=.

The plaintiff has not controverted the allegations that rent is owing and that he has not paid electricity Bills and water.

The evidence on record indicates that the plaintiff has been paying rent in instalments and not in full.

It is a trite law that there are those conditions to be met before an interlocutory injunction can be granted as expounded in **Giella v Cassman Brown Co. Ltd 1973 E.A. 358**.

**“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”**

On the issue as to whether the plaintiff has established a prima facie case with a likelihood of success, I do find that the plaintiff has admitted that he is in arrears. Moreover, there is no evidence that he was given a rebate of Kshs 40,000/=. I do find that the plaintiff is in arrears and therefore he has not established a prima facie case with a likelihood of success.

Moreover this court has no power to vary contracts In line with the dicta by the Court of Appeal in **Housing Finance Company of Kenya Ltd v Njuguna 1176 (CCCK)** where the court held: -

**“Courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they are at liberty to negotiate and even vary the terms as and when they choose. This they must do together with the meeting of the minds. If it appears to a court that one party varied the terms of a contract with another, whether the knowledge, consent or otherwise of the other and the other demonstrates that the contract did not permit such variation, this court will say no to the enforcement of such a contract.”**

On the issue of as to whether the plaintiff will suffer irreparable loss if injunction is granted given as he succeeds in the suit, I do find that the plaintiff can be compensated in damage. On the balance of convenience, I do find that the defendant will be more inconvenienced if rent arrears are not paid as he is a senior citizen surviving on pension and the rent that the plaintiff is withholding. I do dismiss the application with costs.

**DATED AT KISUMU THIS 21<sup>ST</sup> DAY OF MAY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**