



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 56 OF 2018

LISA PAPER WORKS LTD.....PLAINTIFF/APPLICANT

VERSUS

FRANCIS MAJOR WATUNU (*Suing as the Administrator(s) of the Estate of WANGECI KIBITHE*

KAMWARA) MAMA MOMBASA GROUP LTD.....DEFENDANT/RESPONDENT

R U L I N G

1. By an application dated 25/5/2018 the plaintiff/applicant sought the following orders:-

(a) That this honourable court be pleased to certify this matter urgent and hear the same ex parte in the first instance.

(b) That this honourable court be pleased to issue an order of temporary injunction to restrain the respondent, his agents or those claiming through him from evicting the applicant from the commercial premises (tenancy premises, (sic) offering the said premises to anyone else for lease, alienating the premises or doing anything to interfere with the applicant's quiet occupation and enjoyment of the premises pending the hearing and determination of this application and pending the hearing and determination of this suit.

In the alternative and without prejudice the status quo obtaining at the lodging of this application be maintained pending the hearing and determination of this application and pending the determination of the substantive suit.

(c) That the applicant be granted leave to continue paying the proposed increased rent of Kshs.62,400/= plus 16% VAT per month for the renewed term of the lease pending hearing and determination of this application and determination of the substantive suit.

(d) That costs of this application be provided for.

2. The grounds on which the said application is made are as follows:-

(i) The applicant is a tenant of the respondent in a shop comprised in LR. 2116/234 situated in Kitale CBD (Central Business District) since 19th March, 2013 for a term of 5 years and 3 months which terminates on 30/5/2018.

(ii) The applicant has religiously met her obligation to the respondent in terms of rent payment and keeping the premises in tip top condition.

(iii) That it was a term of the lease agreement executed on 19th March, 2013 that if the landlord did not intend to renew the lease upon expiry he should give the applicant a written notice of 3 months before expiry of the lease.

(iv) That it is indeed an implied term of the lease that in default of giving notice as stipulated in clause 8 of the lease agreement the landlord is presumed to have renewed the lease for another term.

(v) That the applicant has stock of over 50 million on the tenancy premises and is likely to suffer irreparably if the respondent gets a free hand to evict her.

(vi) That the applicant has established and demonstrated a prima facie case against the respondent.

(vii) That if the court were in doubt the balance of convenience title in favour of the applicant as she is in possession.

(viii) The respondent/defendant will not be prejudiced in any manner as the applicant has paid the rent for this term, deposited Kshs.200,000/= advance rent for the 3 months of the new term and is willing to continue paying the monthly rent punctually on a monthly basis till this case is heard and determined.

(ix) That the respondent has purported to demand “good will” an extraneous and illegal demand not contained in clause 8 of the lease agreement which clearly stipulates that the lease can only be renewed for alike term on similar conditions and obligations.

3. The application is supported by the affidavit of **Alwin Sasia** the Managing Director of the applicant which reiterates what is contained in the grounds albeit in a greater detail.

4. In reply to the application the defendant/respondent filed a replying affidavit dated **13/6/2018**. He admits that a lease dated 19th March 2013 was entered into between the plaintiff and the administrators of Wangeci Kibithe over the suit property for a period of 5 years and three months and that the lease was to expire on 31st May 2018. However, he avers that the plaintiff was in January 2018 advised of the impending expiry of the lease and at a meeting held in February 2018, it was informed of the fact that it was dealing with a new lessor namely Mama Mombasa Group Ltd, that the new rent would be Ksh 62,500/=, that security deposit would be the equivalent of 6 months’ rent, that rent would be increased by 10% after the 2nd year, and that the lease would be subject to a goodwill, of Ksh 4,000,000/=. According to the defendant the plaintiff agreed to those terms however the plaintiff failed to comply with the goodwill amount asked for at first, but later paid the sum of Ksh 1000,000/= and undertook to pay the balance of Ksh 3,000,000/= before 23rd May 2018 which she subsequently failed to do. On the basis of the foregoing the defendant avers that the plaintiff has failed to disclose material facts and has come to this court with unclean hands. He has also alleged that the plaintiff has poor rent payment record in the past, the basis of his averment being the allegation that the plaintiff has been issuing bouncing cheques, some copies of which he exhibits in his replying affidavit. He avers that the property having changed hands the plaintiff can not assert his rights by relying on the 2013 lease.

5. The goodwill demanded by the defendant forms the main bone of contention between the parties herein. The plaintiff avers that the goodwill was never a term in the expired lease.

6. The conditions upon which an order of temporary injunction may issue were set out in the celebrated case of **Giella –vs- Cassman Brown 1973 EA 358**. First the applicant must demonstrate that he has a *prima facie* case with probability of success, and secondly that he stands to suffer injury that cannot be compensated by way of damages if an order of injunction does not issue.

7. I have examined the expired lease and in particular the **clause 8** cited by the plaintiff. I have also examined clause 9 and its contents. It has not been disputed that this is the lease that the parties entered into in the year 2013. However, a change of ownership has been alleged by the defendants. The circumstances under which the 2nd defendant obtained ownership of the suit premises, and the manner in which such transfer affects the lease already subsisting as at the time of acquisition of the premises has not been laid bare by the defendants. The 1st defendant appears to be also representing the 2nd defendant. More light needs be shed on the capacities in which the defendants are joined, or are responding to the suit. However, what matters in the present circumstances is that the 1st defendant seems to have recognized the former lease and allowed it to run to its end.

8. Having regard to the contents of the said lease and the affidavit evidence herein, I am of the view the plaintiff has established a *prima facie* case with probability of success. I do not wish to delve into the substance to any greater length in order avert any prejudice to the trial of the main suit.

9. As regards damages I am of the view that any abrupt eviction of the plaintiff at the present would occasion it irreparable harm.

10. The plaintiff has therefore fulfilled the conditions required for the grant of an order of injunction as set out in the celebrated case of **Giella –vs- Cassman Brown 1973 EA 358**.

11. I therefore issue an order restraining the respondents from evicting the applicant from the suit premises pending the hearing and determination of the suit and that the applicant shall continue paying the proposed increased rent of Ksh 62,400/= plus 16%VAT per month pending the hearing and determination of the substantive suit.

12. In addition the suit shall be set down for hearing expeditiously, and the plaintiff shall amend, file and serve an amended plaint reflecting the natural person and the company who are named as the defendants herein as distinct or separate defendants in the suit.

Dated, signed and delivered at Kitale on this day of 2018.

MWANGI NJOROGE

JUDGE

3/7/2018

Coram:

Before - Mwangi Njoroge Judge

Court Assistant - Picoty

No appearance for the parties

COURT

Ruling read in open court in the absence of the parties who had notice of the Ruling date but did not attend.

MWANGI NJOROGE

JUDGE

3/7/2018