



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 290 OF 2017

ZULFQAR ALIBHAI & SHAHINA ALIBHAI

Trading as SKY FRIES.....PLAINTIFF

-VS-

TECHNICAL UNIVERSITY OF MOMBASA.....DEFENDANT

RULING

1. By a Notice of Motion dated 3rd August 2017 brought under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 40 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules the Plaintiff seeks orders:

- 1. THAT this application be certified as extremely urgent and service be dispensed in the first instance.**
- 2. THAT the Plaintiff/Applicant be and is hereby authorized by this Honourable Court to break-in and enter the premises known as 5th floor, Engineering Block within the Defendant's Tudor, Mombasa Campus (Suit Premises) and collect its tools of trade and wares and subsequently cart them out of the Defendant/Respondent's premises.**
- 3. THAT the officer in charge of Makupa Police Station and/or any other officer under his command to provide security and supervise the carting away of the Plaintiff's/Applicant's tools of trade and wares from Defendant/Respondent's premises.**
- 4. THAT the Defendant/Respondent be at liberty to lease out the Suit Premises to another party after the Plaintiff has carted away its tools of trade and wares from the Suit Premises and subject to depositing in Court Kshs.600,000 being payment in lieu of notice.**
- 5. THAT the costs of this Application be provided for.**

2. The Application is supported by the Affidavit of Zulfiqar Alibhai sworn on 3rd August 2017 and a Further Affidavit sworn on 12th January 2018 and the grounds set out in the motion. Briefly, it is the Plaintiff's case that the Defendant and the Plaintiff on 14th November 2014 entered into a six year lease agreement in which the Plaintiff was to run a restaurant at the entire 5th floor of the premises known as Engineering Block within the Defendant's Tudor campus in Mombasa at a monthly rent of kshs.100,000. The Plaintiff avers that shortly after it began its operations the Defendant started breaching the terms of the lease agreement as well as renegeing its commitments to the Plaintiff. The Plaintiff contends that the Defendant renegeed in its commitments both on the lease agreement as well as oral representations made which include not attending to blocked sewerage systems, lighting and wiring, failure to provide water, stopped maintaining elevation, rejection of waiver of rent during vacations, outsourcing catering services and failure to close down other eateries outside the Administration Block.

According to the Plaintiff's, due to the Defendant's fault, they could no longer run the restaurant and thereafter decided to close it in December 2016, and locked the restaurant to secure the property inside, though they continued paying rent. The Plaintiff avers that sometime early 2017, one of their suppliers wanted back his refrigerator but that the Defendant instructed its security personnel not to allow them to take anything from the premises. This forced the Plaintiff to instruct their advocate to issue a demand notice but in response, the defendant asked the Plaintiff to vacate and instructed its agents and employees to detain the Plaintiff's wares and tools of trade. The Plaintiff states that they no longer want to operate the restaurant at the Defendant's premises.

3. The Application is opposed by the Defendant through a replying Affidavit sworn by Serah Okumu on 29th September 2017. It is the Defendant's contention that despite being granted various concessions, the Plaintiff continuously defaulted in rent payment thereby having

outstanding rent arrears of Kshs.600,000 as at December 2016 when the Plaintiff stopped operations and locked the premises on its own volition and left. The Defendant states that the premises have remained closed and it cannot have access and has never issued notice to terminate the tenancy, and denies breaching any terms of the Lease Agreement.

4. The Application was canvassed by way of written submissions which were duly filed and exchanged by the advocates for the parties. The plaintiff submitted that since the inception of the tenancy agreement the defendant has been in brazen breach of the agreement and has perpetually frustrated the Plaintiff's operations leading to the Plaintiff halting its operations sometime in December 2016 and has not been allowed to cart away its tools of trade from the Suit Premises. The Plaintiff submitted that whereas the pre-requisites for grant of an interlocutory injunction are enunciated in the case of **Giella –v- Cassman Brown & Co Ltd (1973) EA 358**, an interlocutory injunction will issue without wholly satisfying the tripartite test in the case where the applicant demonstrated that the Respondent has acted in a high handed and oppressive manner as held in the case of **Fadhili Zahrán Mohamed & Another – v- Aliya Ahrán Mohamed & Another (2017)eKLR**. The Plaintiff further admitted that the Defendant is in breach of Section 4(1) the Act by arbitrarily restricting the Plaintiff's access of the Suit Premises and that mere non-payment of rent does not deny a tenant his right to quiet possession of the premises. It is the plaintiff's submissions that the restaurant is its sole source of livelihood and if the defendant's acts continue it will suffer irreparable harm. The Plaintiff added that the balance of convenience lies in their favour.

5. In their opposing submissions, it was submitted on behalf of the Defendant that the Plaintiff has not demonstrated a prima facie case with a high probability of success as the Plaintiff was in rent arrears before filing this suit and has remained in rent arrears even after filing the suit. The Defendant further submitted that it did not terminate the tenancy of the Plaintiff. The defendant submitted that the Plaintiff stopped operations and locked the premises on its own volition and the Defendant has been denied access. The Defendant added that it strictly observed its obligation under the lease and accused the Plaintiff of breaching the terms of the lease. The Defendant further submitted that the Plaintiff has not shown that it stands to suffer irreparable loss that cannot be compensated by an award of damages and that it is the Plaintiff who is in rent arrears which continue to accrue. The Defendant submitted that it is illogical and absurd that the Plaintiff can claim that it is suffering loss and is seeking break in orders yet it is the Plaintiff itself that locked the premises. It is the Defendant's submission that the Application is a clever way by the Plaintiff to be released from the lease agreement without paying the substantial rent arrears that have accrued and urged the court to dismiss the application with costs.

6. I have considered the application as well as the affidavits in support and against. I have also considered the submissions filed and the authorities cited. Both parties agree that they entered into a lease agreement in which the Defendant leased out the 5th floor of the Engineering Block within the Defendant's premises at its Tudor campus, Mombasa. The lease is for a term of 6 years from 1st January 2015 to 31st December 2020 at a monthly rent of Kshs.100,000 with an annual increment of 15%. Although the lease agreement dated 14th November 2014 which was executed by both parties provided that the tenancy was to commence on 1st January 2015, the commencement date was mutually moved by the parties to 1st March 2015 when payment of rent would commence.

7. It is the Plaintiff's case that since the inception of the tenancy agreement, the defendant has been in brazen breach of the agreement and has perpetually frustrated the Plaintiff's operation leading to the plaintiff halting its operations in December 2016. The Plaintiff states that the Defendant reneged on its various commitments both on the written lease agreement as well as oral representations. The Plaintiff avers that in December 2016, they decided to stop operations and locked the premises and left. That the defendant has instructed its security guards not to allow the plaintiff to cart away its tools of trade from the premises and instead has demanded for rent.

8. In my view, the main issue for the Court's determination is whether the circumstances herein warrant the granting of the orders sought. I have carefully considered the pleadings, the affidavits and the documents presented before court and upon doing so it is manifestly clear to me that the underlying issue here is the locked premises. The Plaintiff concedes that it is the one which locked the Suit Premises and left. The Defendant contends that it has no access because the Plaintiff locked the Suit Premises and still has not issued notice to terminate the tenancy. All that the Defendant did is to demand for payment of rent arrears. The Plaintiff alleges that the defendant has been in brazen breach of the agreement for lease. At this stage, I do not need to go into the merits of who between the Plaintiff and the Defendant is in breach of the lease agreement. The issue of who is in breach cannot be determined in this application. It is an issue for determination on merit at the trial. I reserve the merits of such issue for the trial.

9. The Plaintiff has now moved this Court seeking an order to break-in and enter the suit premises. It also wants the defendant to be ordered to deposit in court the sum of Kshs.600,000 being payment in lieu of notice. In my view, on the basis that the Plaintiff is the one who itself locked the Suit Premises, the orders sought should not be granted. I say so because it is the Plaintiff who locked the Suit Premises not the defendant. The Court can only exercise its discretion in a situation where the Defendant had locked the premises. However, in this case, it is the Plaintiff itself who locked the premises and left. The plaintiff is the author of the act complained of. I agree with the Defendant's argument that it is illogical and absurd that the Plaintiff who itself locked the premises wants an order to break-in to the same premises locked by itself. The Plaintiff cannot have its cake and eat it. For the Plaintiff to stop operations, lock the premises and leave and then come to court for an order for the break-in is to me preposterous. Furthermore from the material placed before me, there is no evidence that the tenancy has been terminated by either party. And absent of the issue of termination of the tenancy by either party, it will be difficult for this court to make an order for rent to be deposited in lieu of notice as sought.

10. The overall impression out of the above analysis is that there is no reasonable cause why the court should exercise its discretion in favour of the Plaintiff and grant the orders sought. The upshot is that the Plaintiff's application is without merit and is dismissed with costs

Ruling dated, signed and delivered at Mombasa this 4th day of July 2018.

C. YANO

JUDGE