

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 193 OF 2020

FRUITS OF AFRICA RESTAURANT LIMITED & 2 OTHERS.....PLAINTIFFS

VERSUS

VAROO LIMITED.....DEFENDANT

RULING

(Plaintiffs claiming to have been tenants of the defendant and operating a restaurant business; plaintiffs stating that they had heavily invested and had furniture, equipment, and fittings; plaintiffs claiming that defendant illegally evicted them and took over their furniture, equipment and fittings; plaintiffs now seeking orders to preserve the said equipment and further orders for deposit of security by the defendant; application coming more than two years after the alleged take-over of the premises; plaintiffs also making an elaborate claim for damages; case not fit for grant of injunction as plaintiffs can be compensated by an award of damages; no basis for asking defendant to deposit security, because if successful, plaintiffs can proceed to execute; application dismissed)

1. This suit was commenced through a plaint which was filed on 26 October 2020. The 1st plaintiff is a limited liability company whereas the 2nd and 3rd plaintiffs are its directors and shareholders. It is averred that the 1st plaintiff was engaged in a hotel/restaurant business within Nyalii, Mombasa, in the Shop No. 30 and Annex, on the land parcel MN/3413 commonly known as “The Planet Gupta Complex”, as tenant of the defendant. The plaintiffs contend that the defendant consistently harassed the 1st plaintiff’s representatives and interfered with her daily operations despite not being in rent arrears and never was any formal demand for rent made. The plaintiffs aver that on 23 July 2018, the defendant removed all fixtures, fittings, furniture, equipment and stock items from the demised premises, and padlocked them, effectively evicting the plaintiffs. It is further pleaded that these items were subjected to poor storage conditions thus effectively destroying their worth. The plaintiffs plead that they were subjected to an illegal eviction and illegal distress. They further plead that the defendant has put a different tenant in the premises who is utilizing the plaintiffs’ fixtures, fittings, furniture and equipment. In this suit, the plaintiffs seek to be compensated in the sum of Kshs. 154,100/= for stock items; Kshs. 2,088,500/= for fixtures, fittings, furniture, equipment and inventory; Kshs. 5,000,000/= incidental expenses; Kshs. 580,000/= staff release cost; Kshs. 360,000/= to suppliers; Kshs. 15,400,000/= for loss of income; Kshs. 5,000,000/= for illegal/unlawful eviction; Kshs. 5,000,000/= for irreparable injury/damage to their business model; general damages for lost business/income; Kshs. 150,000/= and Kshs. 250,000/= respectively to the 2nd and 3rd plaintiffs; Kshs. 684,000/= and Kshs. 3,500,000/= as expected future medical expenses to the 2nd and 3rd defendants respectively; general damages for irreversible health damage to the 2nd and 3rd plaintiffs; mesne profits derived from the defendant’s use of the plaintiffs’ fixtures, fittings, furniture, equipment, inventory and stock items, calculated at the rate of Kshs. 350,000/= per month with effect from 23 July 2018 until hand over of the said items and/or full payment of their nominal value in lieu thereof; interest on all the above; costs of the suit and any other relief that the court may deem fit and just to grant.

2. Together with the plaint, the plaintiffs filed an application seeking orders to restrain the defendant from charging, disposing, transacting, or dealing in any way with the plaintiffs’ assets, pending the hearing and determination of this suit. The application also seeks orders to have the defendant deposit security or execute a bank guarantee securing the total amount of the plaintiffs’ claim. The grounds upon which the application is based, and the supporting affidavit, more or less reiterate the plaintiffs’ claim as pleaded in the plaint.

3. Despite being served, the defendant has not entered appearance and has not filed any response to this application.

4. What the application basically seeks are firstly, orders in the nature of injunction, and secondly, orders in the nature of deposit of security to the plaintiffs’ claim. On the injunction, for one to succeed, one needs to demonstrate a prima facie case with a probability of success; demonstrate that he stands to suffer loss that may not be compensable by an award of damages if the injunction is not granted; and where the court is in doubt, it will decide the application on a balance of convenience. The plaintiffs contend that they were illegally evicted, and without there being material from the defendant to counter this, I would conclude that they have demonstrated a prima facie case with a probability of success. However, it is apparent that the plaintiffs are already out of the suit premises and have been out for close to three years now. It is not prudent to now put them in the premises given the long lapse of time that they have been away. The plaintiffs wish to have preservatory orders on their furniture and fixtures, but they themselves, state that their fixtures are being used by the defendant or a tenant that the defendant has placed on the premises, and this again must have gone on for a considerable amount of time. I can see that the plaintiffs have made a very elaborate claim for damages, and given that position, their loss is compensable by an award of damages. This is therefore not a proper case for the grant of an injunction.

5. On the orders for deposit of security, I am afraid that I am not persuaded to grant such wide sweeping orders without first having heard the case. I see no prejudice to the plaintiffs, because if they succeed, they can proceed to execute for the judgment sum. In the application, the plaintiffs claimed that the defendant’s main director, one Premlal Ramnaph Gupta is deceased, but I see no issue here, because the defendant is a limited liability company with separate legal personality. It is also apparent that the defendant has assets, including the suit premises, and if the plaintiffs succeed in their claim, they can proceed to attach and execute. There is therefore really no basis to order the defendant deposit any security.

6. For the above reasons, I do not find this application merited and it is hereby dismissed. I make no orders as to costs since the defendant did not oppose it.

7. Orders accordingly.

DATED AND DELIVERED THIS 10TH DAY OF MAY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AN LAND COURT OF KENYA

AT MOMBASA