



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. E052 OF 2020

INDAR SINGH LIMITED.....PLAINTIFF

VERSUS

STAR TIMES MEDIA CO. LIMITED.....DEFENDANT

RULING

What is before me is an application brought by the plaintiff by way of Notice of Motion dated 4th August, 2020 under Article 162(2)(b) of the Constitution of Kenya and Sections 13(1), (2)(d) and (e), (7) and 19(2) of the Environment and Land Court Act, 2011.

In the application, the plaintiff has sought the following orders;

1. That the defendant be restrained/prohibited from unilaterally terminating the lease agreement between the defendant and the plaintiff in respect of Shop No. G05 on Ground Floor, Gill House, Nairobi (hereinafter referred to only as “the suit property”), vacating the premises and returning the keys to the premises to the plaintiff pending the hearing and determination of the suit.
2. That the defendant be compelled to continue meeting its obligations under the lease agreement including but not limited to paying the rent for the premises as and when it falls due pending the hearing and determination of the suit.
3. That in the alternative to the above prayers, the defendant be compelled to deposit in court a sum of US\$436,956.48 and Kshs. 462,608.66 and/or furnish security in the form of a Bank Guarantee to pay to the plaintiff the said amounts as may be sufficient to satisfy the decree and/or judgement that may be passed against the defendant in this suit within 14 days of the order pending the hearing and determination of the suit.
4. The costs of the application.

The application that was supported by the affidavit of Mary Kimani sworn on 31st July, 2020 was brought on the following grounds: By a lease agreement dated 30th August, 2019, the plaintiff leased to the defendant the suit property for a term of 6 years commencing on 1st September, 2018 and terminating on 31st August, 2024. The lease had no termination clause. In breach of the said agreement, the defendant was attempting and/or purporting to unilaterally terminate the lease before the expiry of the term thereof while it had an outstanding rent arrears of Kshs. 462,608.66 and US\$38,451.48. The defendant had intimated to the plaintiff that it wished to terminate the lease due to bad business environment and the plaintiff had advised it that early termination of the lease was not acceptable. The plaintiff offered to the defendant several options but without considering the same, the defendant threatened to unilaterally terminate the lease. Unilateral termination of the lease was unlawful. In execution of that threat, the defendant vacated the suit property, removed most of its goods from the property and attempted to return the keys to the premises to the plaintiff through a third party. The plaintiff refused to take delivery of the keys. The allegation that the defendant was doing badly financially had no basis.

The plaintiff averred that the orders of injunction sought were intended to prevent the defendant from trashing the lease agreement and stealing a march on the plaintiff. The plaintiff averred that if the orders sought were not granted, the defendant was likely to vacate the suit property in breach of the lease and the plaintiff would suffer irreparable harm as it would not get another tenant in good time in light of the prevailing Covid-19 pandemic. The plaintiff averred that the defendant was a Chinese entity and that its directors were all foreigners. The plaintiff averred that it was apprehensive that the defendant intended to vacate the suit property with a view to relocating out of the jurisdiction of the court. The plaintiff averred that if the defendant moves out of the jurisdiction of the court, the plaintiff would have no means of enforcing any decree that may be made in its favour in the suit.

The plaintiff averred that it had a prima facie case against the defendant and that even if the court considered the balance of convenience, the same would tilt in favour of granting the orders sought. In the affidavit in support of the application, the plaintiff annexed a copy of the lease

between the parties, a copy of the defendant's rent statement and copies of correspondence exchanged between the parties.

The plaintiff's application was opposed by the defendant through a replying affidavit sworn by Anne Maluki on 14th October 2020. The defendant admitted that it entered into a 6-year term lease with the plaintiff with effect from 1st September 2018. The defendant denied that it had unilaterally attempted to terminate the said lease. The defendant averred that there was a meeting between the plaintiff's and the defendant's representatives on 27th February, 2020 at which the issue of termination of the lease was discussed. The defendant averred that following that meeting, the plaintiff wrote to the defendant on 4th March, 2020 giving the defendant several options to choose from in the event that the defendant had difficulty in raising rent for the suit property. The defendant averred that one of the options that the plaintiff gave it was to vacate the suit property. The defendant averred that it chose the option of vacating the suit property and issued a notice to that effect to the plaintiff. The defendant averred that it vacated the suit property on 29th June, 2020 and removed its properties therefrom. The defendant averred that following its surrender of the suit property to the plaintiff, a joint inspection of the suit property was done on 2nd July, 2020 by which time it had started renovating the suit property to return it to the condition in which it was when let to it. The defendant averred that the plaintiff acknowledged that the defendant had vacated the suit property in a letter dated 3rd June, 2020 in which it asked the defendant to undertake some more works/renovations that were left undone.

The defendant averred that it carried out the renovations to the standard that was required by the plaintiff and requested the plaintiff to undertake another round of inspection of the premises. The defendant averred that after it vacated the suit property, renovated the same and paid all the outstanding rent, the plaintiff refused to receive the keys for the premises in a bid to coerce the defendant to continue with the occupation of the premises that it had vacated. The defendant averred that the reason it had given for early termination of the lease was harsh economic times that demanded that it downsized its operations so as to remain a float. The defendant averred that it had no intention of closing its operations. The defendant averred that as at the time of vacating the suit property, it had settled all the rent and service charge due through the deposit that was held by the plaintiff and other payments that it made by cheques. The defendant averred that what it owed the plaintiff was service charge for the months of January, May and June 2020 in respect of which the plaintiff had not issued an invoice.

The defendant averred that the plaintiff allowed it to terminate the lease. The defendant averred further that the orders sought by the plaintiff had been overtaken by events and that the same would be highly prejudicial to the defendant if granted. The defendant averred that since it had vacated the suit property, the plaintiff had a duty to look for another tenant and as such its refusal to accept the keys for the suit property was driven by malice. The defendant averred that it was well established in Kenya and had no intention of relocating its operations. The defendant averred that the plaintiff had not provided any basis for its apprehension that the defendant may relocate from Kenya. The defendant termed the plaintiff's application an abuse of the process of the court and urged the court to dismiss the same. The plaintiff filed a supplementary affidavit in response to the issues raised by the defendant in its replying affidavit.

The plaintiff's application was heard by way of written submissions. The plaintiff filed submissions and supplementary submissions dated 2nd December, 2020 and 15th December, 2020 respectively while the defendant filed its submissions dated 15th December, 2020. I have considered the application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the defendant in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the case law cited in support thereof. The following is my view on the matter. The plaintiff has sought temporary prohibitory and mandatory injunctions. The plaintiff has also sought what I would refer to as attachment before judgement. The principles upon which this court exercises its discretion in applications for interlocutory injunction are now well settled. In Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

For a temporary mandatory injunction, the applicant must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court applies in applications for interlocutory mandatory injunction were set out in Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901, where the court stated that:

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.

In Shepherd Homes Ltd. v Shandahu [1971] 1 Ch.304, Megary J. stated as follows:

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

From the material before me, I am not satisfied that the plaintiff has established that it has a prima facie case with a probability of success against the defendants and that it stands to suffer irreparable harm if the orders sought are not granted. From the evidence on record, I am in agreement with the defendant that the defendant had already terminated its lease with the plaintiff in respect of the suit property and had vacated the premises as at the time this suit was brought. Whether that termination was unilateral or by consensus can only be determined at the trial. By its letter dated 3rd July, 2020 that was annexed to the defendant's replying affidavit, the plaintiff acknowledged that the defendant had vacated the suit property. By the said letter, the plaintiff which had already received the keys for the suit property returned the same to the defendant to enable the defendant to carry out proper renovations in accordance with the terms of the lease. This means that as at

the time the plaintiff came to court on 4th August, 2020, the plaintiff was aware that the defendant had already terminated the lease between the parties and vacated the suit property. In the circumstances, the prayers in the plaintiff's plaint and in the present application seeking to restrain the defendant from terminating the lease and vacating the suit property have been overtaken by events. Since the defendant has already vacated the suit property, the court cannot also compel it to continue paying rent to the plaintiff since the landlord and tenant relationship between the plaintiff and the defendant has come to an end. If the defendant terminated the lease and vacated the suit property illegally, what the plaintiff would be entitled to in my view is damages for breach of contract and not rent. This prayer in my view has also been overtaken by events.

Even if the defendant had not terminated the lease and vacated the suit property as at the time this suit was brought, I would still not have granted the injunctive orders sought by the plaintiff. I am in agreement with the plaintiff that a tenant cannot unilaterally terminate a fixed term lease which has no termination clause. However, I have not come across any authority in support of the plaintiff's contention that a tenant in a fixed term lease who is unable to pay rent to a landlord can be forced by the court to continue in occupation of the leased premises if it has decided to vacate citing inability to pay rent. In my view, the court cannot compel a tenant to continue in occupation of leased premises even if the tenant has no valid reason for vacating the premises. The plaintiff's remedy in my view is in damages for breach of contract if it proves that the termination of the lease by the defendant was unlawful. Its remedy does not lie in compelling the defendant to continue in occupation of the suit property against its wishes. For the foregoing reasons, the plaintiff is not entitled to the injunctive reliefs sought in its application. With regard to the alternative prayer seeking an order to compel the defendant to deposit in court US \$436,956.48 and Kshs. 462,608.66 or furnish security as may be sufficient to satisfy the decree that may be passed against it in his suit, I am of the view that the relief is in the nature of an attachment before judgment in respect of which the court should have been moved under Order 39 of the Civil Procedure Rules.

Under Order 39 of the Civil Procedure Rules, the court can order a defendant to furnish security for the due performance of any decree that may be passed against him in a suit and in default for his property to be attached before judgment. That in my view is what the plaintiff is seeking in his alternative prayer. Under Order 39 rules 1 and 2 of the Civil Procedure Rules, such order can only be issued by the court upon being satisfied that either; the defendant with intent to delay the plaintiff or to avoid any process of the court or to obstruct or delay execution of any decree that may be passed against him, has left the jurisdiction of the court, is about to leave the jurisdiction of the court or has disposed of or removed his property or any part thereof out of the jurisdiction of the court or that, he is about to leave Kenya under circumstances a fording 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 burden was upon the plaintiff to satisfy these conditions. The plaintiff claimed that it was apprehensive that the defendant may leave the jurisdiction of the court since its directors are Chinese. The defendant denied this allegation. I have noted from the plaint that the defendant is a limited liability company incorporated in Kenya. The onus was upon the plaintiff to satisfy the court that its apprehension that the defendant may close its business operations in Kenya and relocate to another county was reasonable. The plaintiff did not place any evidence before the court as a basis for its apprehension. I am not satisfied therefore that a reasonable basis has been laid by the plaintiff to warrant an order for the defendant to deposit in court US \$436,956.48 and Kshs. 462,608.66 that the plaintiff has claimed in the plaint or to furnish security for the same amount.

In the final analysis and for the foregoing reasons, I find no merit in the Notice of Motion application dated 4th August, 2020. The same is dismissed with costs to be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 24TH DAY OF JUNE 2021.

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Kendi for the Plaintiff

Mr. Kamiru for the Defendant

Ms. C. Nyokabi - Court Assistant