



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. E061 OF 2020

WINDSOR DRYCLEANERS LTD.....PLAINTIFF

VERSUS

REGENT MANAGEMENT LTD.....1ST DEFENDANT

MUTHAIGA ROAD TRUST CO. LTD.....2ND DEFENDANT

RULING

What I have before me is an application that was brought by the plaintiff by way of a Notice of Motion dated 10th August, 2020 seeking a temporary injunction restraining the defendants from levying distress against the plaintiff and/or interfering with the plaintiff's possession of the premises known as Unit No.6, Ground Floor, Oilibya Plaza situated on L.R No. 214/250 (hereinafter referred to as "the suit property") pending the hearing and determination of the suit. The application was supported by the affidavit and further affidavit sworn by the plaintiff's director, Ngugi Mwaniki sworn on 10th August, 2020 and 29th September, 2020 respectively.

The plaintiff averred that it was a tenant of the 2nd defendant on the suit property and that the 1st defendant was managing the suit property on behalf of the 2nd defendant. The plaintiff averred that on 24th July, 2020, the defendants through Garam Auctioneers levied distress for rent against it for the recovery of an alleged rent arrears of Kshs. 5,549,218/=. The plaintiff averred that the distress levied against it was illegal in that no rent was due and payable by it to the 2nd defendant and that the goods that were distrained by the said auctioneer were its tools of trade. The plaintiff averred that it owed the 2nd defendant a sum of Kshs. 88,655/= only which it settled through a cheque dated 23rd July, 2020. The plaintiff averred that the rent that was claimed by the defendants included rent for store No. 3 that was to be let to it by the 2nd defendant together with the suit property but possession of which it never took due to defects that it communicated to the 2nd defendant. The plaintiff annexed to its affidavit in support of the application among others; a statement of its rent account in respect of the suit property, a copy of a cheque dated 23rd July, 2020 for Kshs. 88,655/=: a copy of a letter of offer of a lease in respect of the suit property and copies of correspondence exchanged with the 2nd defendant in respect of store No. 3 aforesaid.

The plaintiff's application was opposed by the defendants through a replying affidavit sworn by Bernice Ntiritu on 16th September, 2020. The defendants contended that the plaintiff owed the 2nd defendant a sum of Kshs. 5,549,218/- on account of rent for the suit property as at the time distress was levied against it. The defendants contended that the plaintiff was liable to pay rent not only for Unit No. 6 (the suit property) but also for store No. 3 that was also let to it. The defendants averred that they were not aware of any defect in store No. 3 and that they at no time undertook to carry out any repair or adjustment in respect thereof. The defendants averred that the plaintiff was using the said store all along and that it was not until 24th July, 2020 that the plaintiff returned the keys for the said store to the 2nd defendant. The defendants averred that the amount that was claimed from the plaintiff was not limited to rent but included also service charge. The defendants averred that the statement of account that was annexed to the plaintiff's affidavit in support of the application was in respect of rent due as at 25th February, 2020 and that even if it was assumed that the rent that was due from the plaintiff was Kshs. 88,655/= which was not correct, the said amount would have been due as at 25th February, 2020. The defendants averred that this suit was filed on 11th August, 2020 after the distress that was levied in July, 2020. The defendants averred that as at the time the plaintiff came to court and declared that it only owed Kshs. 88,655/=: the plaintiff had not paid rent for March, 2020 and two quarters covering April, 2020 to September, 2020. The defendants averred that on receipt of the plaintiff's statement of account, it pointed out to the plaintiff that a number of cheque payments reflected in the said statement were not received by the defendants. The defendants annexed to their replying affidavit among others, a statement of the plaintiff's rent account from 1st January, 2018 to 1st January, 2020 and correspondence exchanged with the plaintiff.

The application was argued by way of written submissions. The plaintiff filed its submissions on 16th November, 2020 while the defendants filed their submissions on 17th November, 2020. The plaintiff submitted that it had satisfied the conditions for granting the injunctive relief sought. The plaintiff submitted that the sum of Kshs. 5,549,218/= that was claimed by the defendants from the plaintiff as rent was unsubstantiated and that the defendants' replying affidavit consisted of hearsay. On their part, the defendants submitted that the plaintiff's application had no basis. The defendants submitted that the statement of the plaintiff's rent account that they had produced was not contested. The defendants submitted that it was not disputed that the plaintiff had not paid rent for the quarters covering April, 2020 to June, 2020 and July, 2020 to September, 2020. The defendants submitted further that the terms of the lease between the plaintiff and the 2nd defendant with

regard to the area that was let to the plaintiff was not disputed. The defendants submitted further that it was not disputed that store No. 3 was let to the plaintiff and that the plaintiff had not paid any rent in respect thereof since 2018. The defendants submitted further that the goods that were distrained by the auctioneers while levying distress against the plaintiff were not the plaintiff's tools of trade. The defendants submitted that the plaintiff had not established a prima facie case that would warrant the grant of the orders sought.

I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the defendants in opposition to the application. Finally, I have considered the submissions by the parties and the authorities cited in support thereof. The plaintiff has sought a temporary injunction against the defendants pending the hearing and determination of the suit herein. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in Giella v. Cassman Brown & Co. Ltd. [1973] EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not 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. In Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

The plaintiff has put forward two main grounds as a basis for its claim herein against the defendants. The plaintiff has contended that the sum of Kshs. 5,549,218/= claimed by the defendants as rent is not due. The plaintiff has contended that as at the time the distress was being levied against it on 24th July, 2020, it was not in rent arrears as the only rent due from it was Kshs. 88,655/= that it paid in full on 23rd July, 2020 a day before the distress. The plaintiff has contended further that the goods that were distrained for rent were its tools of trade that the same were not liable to attachment in distress for rent under the Distress for Rent Act, Chapter 293 Laws of Kenya.

I am not satisfied that the plaintiff has satisfied the conditions for granting a temporary injunction. From the letter of offer of a lease in respect of the suit property that was accepted by the plaintiff, the 2nd defendant let to the plaintiff both the suit property and store No. 3. There is no evidence that the terms of the said letter of offer were varied to exclude the said store or that the 2nd defendant had agreed that no rent would be paid for the said store until its door was widened. It follows from the foregoing that the plaintiff was liable to pay rent for the suit property and the said store. It is not disputed that it was not until 24th July, 2020 when distress was levied against it that the plaintiff returned the keys for the said store to the defendants. The plaintiff was liable to pay rent for the said store as at 24th July, 2020 when distress was levied against it. It was not disputed that the plaintiff had not paid any rent for the said store from 2018 as at the time the distress was being levied against the plaintiff. According to the statement of account that was placed before the court by the defendants, the plaintiff owed Kshs. 2,603,847.61 on account of rent, service charge and electricity for the suit property as at 19th March, 2020 and Kshs. 835, 207.91 on account of rent, service charge and electricity for store No. 3 aforesaid as at 1st January, 2020. The rent for the suit property and the store was payable quarterly in advance. The plaintiff did not dispute the fact that by the time distress was levied against it on 24th July, 2020, it had not paid quarterly rent for the periods, April to June, 2020 and July to September, 2020 for both the suit property and the store. The plaintiff was granted leave to file a further affidavit. In its further affidavit, the plaintiff did not at all challenge the statement of account that was presented to court by the defendants. The plaintiff did not also deny that it had not paid quarterly rents that were due on April, 2020 and July, 2020. I am in agreement with the defendants that the plaintiff's statement of account did not reflect a true picture of the rent and service charge that were due from the plaintiff as at the time that the distress was levied. The plaintiff's said statement of account leaves no doubt that it was for rent outstanding as at 25th February, 2020. The plaintiff has not said anything about the rent and service charge due from March, 2020 to July, 2020 when the distress was levied. The plaintiff did not also comment on the payments shown in the said statement to have been made by cheques which the defendants had informed the plaintiff that it had not received.

I am satisfied that as at the time distress for rent was levied against the plaintiff, there was rent and service charge due and payable by the plaintiff to the 2nd defendant. The quantum of that rent and service charge may be contested but in my view, that is not a valid ground on which to issue the injunction sought the defendants having established that there is a substantial amount of rent owed by the plaintiff. I am also not persuaded that the goods that were distrained by the auctioneer were the plaintiff's tools of trade.

Due to the foregoing, I am not satisfied that the plaintiff has established a prima facie case against the defendants with a probability of success. Since the plaintiff has not established a prima facie case, it is not necessary for me to consider whether or not the plaintiff would suffer irreparable harm if the orders sought are not granted. Before concluding, I wish to add that, injunction is an equitable remedy. It is a maxim of equity that he who comes to equity must come with clean hands. I am of the view that the plaintiff came to equity with unclean hands. As at the time the plaintiff came to court and obtained an ex-parte order for the maintenance of status quo on 12th August, 2020, the plaintiff had not paid rent from March, 2020. The plaintiff is therefore not entitled to an equitable relief of injunction.

The upshot of the foregoing is that the plaintiff's application dated 10th August, 2020 is not for granting. The application is dismissed with costs to the defendants. The interim order granted on 12th August, 2020 that was extended for the last time on 17th June, 2021 is discharged.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2021

S. OKONG'O

JUDGE

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

Mr. Mutiso for the Plaintiff

Ms. Obiero h/b for Mr. Ogembo for the Defendants

Ms. C.Nyokabi-Court Assistant