



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 41 OF 2021

NAMO HARDWARE LTD.....PLAINTIFF

VERSUS

CHERANGANI INVESTMENT CO. LTD.....DEFENDANT

RULING

The Application

1. The application dated **8/7/2021** and filed in court on the same date has been brought under **Sections 1, 1A, 3A & 63(c)** of the **Civil Procedure Act, Order 40 Rule 2(1)** of the **Civil Procedure Rules**. The plaintiff/applicant seeks the following orders:-

a. ...spent

b. That this honourable court be pleased to issue an order of temporary injunction restraining the defendants by themselves anyone claiming through them from blocking the applicant's access to the suit premises by padlocking the same, letting the premises to anyone else or interfering with the plaintiff's quiet enjoyment of LR Kitale Municipality/2116/29/V pending the hearing and determination of the main suit.

c. That the costs of this application be provided for.

2. The application is supported by the affidavit sworn on **8/7/2021** by **Ronak Premchand Gulbchand Shah**, the plaintiff's director. The application is premised on the grounds that the applicant is a tenant on the suit property which belongs to the respondent; that the respondent without notice on **4th July 2021** proceeded to the premises and blocked the applicant from accessing it by welding the steel doors and applying additional padlocks; that the applicant's stock includes perishable items and the stock in the premises is worth more than **Ksh 15,000,000/=**. The applicant states that it would be unable to meet other obligations including to financiers if the premises remain inaccessible. The applicant states that all its rent obligations have been met save the rent for **July 2021** which was to be paid by **5th July 2021**. The acts of the respondent are alleged to have occurred on **4th July 2021**.

The Response

3. The defendant filed a replying affidavit to the application sworn on **12/7/2021** by one **Manasseh Njenga**, a director of the respondent. Its response is that no tenancy exists between the parties herein; that the defendant's tenant in the premises has been **Amar Hardware and Electronics Ltd** with whom a lease agreement of a period of **5 years** commencing **1/4/2016** and expiring on **30/6/2021** was executed on **25/2/2019**; that the lease never granted the applicant leave to sublet; that no consent to sublet was ever sought and the applicant is a stranger to the defendant; that upon expiry of the lease the tenant (**Amar Hardware & Electronics Ltd**) never sought an extension of the lease and it was supposed to deliver vacant possession until **30/6/2021**; that the deponent locked the suit premises on **4/7/2021** and gave notice to the tenant to remove its property therefrom so that it could secure vacant possession; that no response was obtained from the tenant; that the applicant seeks a mandatory injunction in contrast to an interim injunction which is improper and no *prima facie* case has been demonstrated.

Submissions

4. The plaintiff filed its written submissions on **19/7/2021**. The defendant filed its written submissions on **22/7/2021**.

Determination

5. I have perused the application together with the supporting affidavit, the replying affidavit and the submissions filed.

6. Since the respondent raised the issue in its replying affidavit, this court's first task is to determine whether the order sought is a mandatory injunction or a temporary injunction.

7. The applicant maintains that it seeks a temporary injunction to restrain the respondent from blocking access to the suit premises. It appears that whatever the means used to secure the suit premises, the applicant is in possession thereof and has been trading thereat. Its possession of the premises has therefore been a continuous state of affairs. The applicant has not been evicted from the premises. The order sought if granted would require the respondent to restrain itself from interfering with the applicant's use of the premises. I therefore find that it is an interim injunction that the applicant seeks.

8. The next mission of this court is to investigate whether the interim injunction order is deserved.

9. The conditions that govern the issuance of an interim injunction are that the applicant must demonstrate a *prima facie* case, that the applicant must demonstrate a likelihood of loss that can not be compensated for by way of damages and that if these first two cannot be established, then the court would rule on the application on a balance of convenience.

10. I find that the applicant is in possession as it states so and it is not in dispute. The main contention of the respondent is that there was no consent to the tenant to sublease the premises to the applicant. That issue brings into the picture of this dispute a third party, Amar Hardware and Electricals Ltd who has not been enjoined, and who may be presumed to have had a hand in the securing of the business premises by the applicant. This court is of the view that though the applicant has not exhibited a lease agreement it has demonstrated by its exhibited bank statement that it has been paying sums of money to the respondent without the respondent raising any demur. It is not a must that all tenancies be reduced into writing. Some remain though no written agreements exist. It would appear from the single business permit exhibited by the applicant that it has traded on the premises since the year **2019**. Secondly, the plaintiff claims damages for trespass and loss of business. There is reasonable foreseeability that some pecuniary loss may arise from closure though no determination can be made at present as to who is liable. Damages for trespass is a separate issue also. Therefore I am of the considered view that a relationship between the applicant and the respondent has been established to the extent that it can sustain a *prima facie* case requiring the court's investigation into some issues that now arise.

11. As to whether the applicant would suffer loss not remediable by damages, this court does not think that possibility has been established. The main claim of loss is that linked to perishable goods. The other claim is linked to inability to meet obligations to financiers. There may well be a possibility that some losses may occur. However, the presumption of the law that there should be no wrong without a remedy is embodied in the Latin maxim *ubi jus ibi remedium*. If there be any wrong committed by the respondent against the applicant by way of barring access to the premises without a court order as the applicant claims, then the loss can be particularized and claimed by the applicant. Nevertheless this court is of the view that even though no such likelihood of irremediable loss has been established, the circumstances of this dispute involve an ongoing trade, and though some loss is bound to occur by closure, or has indeed occurred, no final determination of the issues arising - including who is liable - can be arrived at at this interlocutory juncture. The only appropriate conclusion would be that the application before me must be determined on a balance of convenience. To this court the proper balance of convenience would lie in allowing the applicant to continue its operations in the suit premises as the hearing of the main suit is expedited in order to bring the dispute to an early determination.

12. The upshot of the foregoing is that the application dated **8/7/2021** has merit and the same is granted as prayed in **prayer no (b)** thereof to the extent that the injunction sought is granted pending the hearing and determination of the main suit herein. If by the date of this ruling the premises are still closed by the respondent, they shall be opened by the respondent and in default the applicant shall be at liberty to open them and they shall remain open and in possession of the applicant unless otherwise ordered by court pending the hearing and determination of this suit.

13. The costs of the application shall be in the cause. The parties shall ensure compliance with the **Civil Procedure Rules** and this suit shall be mentioned on **20/10/2021** for fixing of a hearing date.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 4TH DAY OF AUGUST, 2021

MWANGI NJOROGE

JUDGE, ELC, KITALE.