



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 122 OF 2020

(FORMERLY MILIMANI E069 OF 2020)

G A LIFE ASSURANCE LIMITED.....PLAINTIFF/APPLICANT

VERSUS

ANDREW KAMAU.....1ST DEFENDANT/ RESPONDENT

TELE FOODS LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

The Matter for determination is the Notice of Motion Application dated 10th August 2020, bought under Article 162 (2)(b) of the Constitution 2010, Sections 13(1), (2)(d), (e), (7) and 19 (2) of the Environment and Land Court Act 2012, by the Plaintiff/Applicant seeking for orders that;

- 1. This Honorable Court be pleased to issue an order compelling the 2nd Defendant/Respondent to sign the Lease Agreement, and have two guarantors (being its Directors and/or main shareholders) execute it and return it to the Plaintiff/Applicant in specific performance of the terms of the Agreement for Lease and/or letter of offer within 14 days of this order pending hearing and determination of this suit.***
- 2. pending hearing and determination of this suit, the 1st Defendant, its agents, servants and/or anybody claiming under them be and is hereby restrained from alienating, selling, disposing off, transferring, registering any agreements, transferring, charging, encumbering and/or entering dealings of any nature including advertising for sale or disposal or interfering in any way with motor vehicle Reg. Nos. KCM 321W and KCL 614C.***
- 3. This Honorable Court be pleased to issue an order that the 2nd Defendant/Respondent vacates its notice of its intention to vacate the premises and specifically perform its obligation under the agreement for lease and/or heads of terms agreement.***
- 4. That in the alternative to prayer 9, the Defendants/Respondents and the guarantors deposit in Court a sum of Kshs.25,733,533/= and or furnish security in form of bank guarantee to pay the Plaintiff/Applicant as may be sufficient to satisfy the Decree and/or Judgement that may be passed against the Defendants/Respondents in this suit within 14 days from the date of this Order pending hearing and determination of this Suit.***
- 5. That a temporary injunction do issue to restrain the Defendants and the guarantors, or by their servants, agents or otherwise howsoever from selling, transferring or in any manner dealing with any of their free property and/or bank accounts within the Jurisdiction of this Court and freeze any or all of such accounts held by the Defendant/Respondents and the guarantors pending hearing and determination of this Suit.***
- 6. Costs be provided for.***

The Application is supported by the Affidavit of **Sharon Mukania**, who averred that vide a letter of offer and/or heads of terms dated **31st October 2017**, the Plaintiff/Applicant offered to lease godowns **13** and **14** erected on **Land Title No. 1713/21**, to the 2nd Defendant/Respondent, for a period of **5 years** and **6 months**. That the 2nd Defendant/Respondent took possession and declined to sign the lease agreement, and further failed to pay rent arrears amounting to **Kshs.2,367,155/=**. That the 2nd Defendant/ Respondent had issued the Applicant with a Notice of intention to vacate, before the expiry of the terms of the lease.

That she has been advised by her Advocates that Courts are enjoined to give effect to the parties' contractual intentions, when required to interpret agreements and/or contracts entered into between the parties. She is further advised by her advocates that the letter of offer and/or

Agreement for Lease remains a contract between the parties irrespective of non-execution of the Lease Agreement. It was her contention that the 2nd Respondent has informed the Applicant that it has closed down its business and it is in the process of winding up.

The Application is opposed and the 1st Defendant/ Respondent filed a Replying Affidavit dated **9th November 2020**, by **Andrew Kamau Muhiu**, who deponed that he is the Managing Director of the 2nd Defendant/Respondent and that the 2nd Defendant/Respondent entered into a lease agreement for a term of **5 years and 6 months**, with the Lease Agreement providing a termination clause by either party giving Notice to the other party.

He averred that he executed the Lease Agreement on behalf of the 2nd Defendant/Respondent and on **28th May 2020**, he issued a Notice seeking to terminate the Lease Agreement as a result of **force majeure**, caused by the **Covid pandemic**, and requested the Applicant to utilize the deposit of **Kshs.1,528,046/=** that had earlier been paid to clear off the pending rent arrears. It was his contention that the 2nd Respondent is not in arrears as alleged by the Applicant and the Plaintiff/Applicant has not adduced sufficient grounds to warrant lifting of the veil of incorporation. He further contended that the 2nd Defendant/Respondent is a separate legal entity from the 1st Defendant/Respondent and has assets separate from the 1st Defendant/Respondent's ones. That the Plaintiff/Applicant's suit has no likelihood of success as it has invoked the provisions of the Lease Agreement and thus must fail.

Parties were directed to file written submissions and the Plaintiff/Applicant filed its submissions dated **16th April 2021**, through the Law Firm of **CM Advocates LLP**. The 1st and 2nd Defendant/Respondents did not file their respective submissions.

The Court having laid down the background of this case and having considered the Application, the Replying Affidavit and the rival written Submissions and authorities cited, finds the main issues for determination are;

- 1. Whether there was a valid Agreement for Lease between the parties capable of enforcement.**
- 2. Whether the Court has Jurisdiction to deal with the matter at hand.**
- 3. Whether the Plaintiff/Applicant is entitled to the orders sought.**

1. Whether there was a valid Agreement for Lease between the parties capable of enforcement.

The Court rightly notes that the **Heads of Terms** subject to Lease dated **31st October 2017**, provided on clause 18 under "Acceptance" head that "by accepting the terms of this letter of offer, you are deemed to approve the standard form of Lease...." The same was signed by the parties herein.

Counsel for Plaintiff/Applicant argued that there was a valid contract in force as proved by the existence of the **Heads of Terms**, which was voluntarily executed by the parties. That there was then part performance by the 2nd Defendant/Respondent, when it made a payment of the deposit of **Kshs.1,528,046/=**. Even if a tenancy was not created because there was no binding contract in writing, it would still be created by dint of Statute. **Section 57(2) and (3) of The Land Act 2012**, on periodic leases provides as follows:-

- 2) If the owner of land permits the exclusive occupation of land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.**
- 3) The periodic tenancy contemplated in subsection (1)a shall be the period by reference to which the rent is payable.**

Therefore, it is this Court's considered view that the **Heads of terms** subject to Lease dated **31st October 2017**, and the Lease attached is a tenancy agreement between the parties' subject of full enforcement.

2. Whether the Court has Jurisdiction to deal with the matter at hand.

Having held that parties are bound by the terms of the Lease Agreement, it is incumbent upon this Court to interpret its terms, but not to rewrite the Agreement on behalf of the parties. The Court further notes that the Lease Agreement **Clause 8** on Dispute Resolution provides that

8.1 " should any dispute arise between the parties hereto with regard to the interpretation, rights, obligations and/or interpretation of any one or more of the provisions of the Lease, the parties shall in the first instance attempt to resolve such dispute by amicable negotiation.

8.2 should such negotiations fail to achieve a resolution within 15 days, either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to Arbitration under the following terms;

(a) such arbitration shall be resolved under the provisions of the Kenya Arbitration Act 1995.

From the Lease agreement, the Arbitration clause provides that all claims and disputes whatsoever ought to be referred to **Negotiation** first, then to **Arbitration**. The basis of this suit is the alleged breach by the Defendants/Respondents, thus breaching the terms of the lease. Therefore, the instant dispute falls under the realm of **Clause 8** on **Dispute Resolution** of the said Agreement.

The Plaintiff /Applicant has not placed any evidence to show that parties entered into negotiations and the outcome of such negotiations.

In the case of County Government of Kirinyaga ...Vs... African Banking Corporation Ltd [2020] eKLR, the Court held that;

“The clear intentions of the parties was that if any dispute arises they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration. This in line with Judicial Authority, under Article 159(2)(c) of the Constitution, which states.

“In exercising Judicial authority, Courts and Tribunals shall be guided by the following principles –

“alternative forms of dispute resolution including reconciliation, mediation, arbitration ----- shall be promoted.”

The Dispute Resolution clause did oust the jurisdiction of the Court but gave an option for the parties to solve their dispute before coming to court. If the Plaintiff/Applicant was serious on having this dispute dealt with at the arbitration level, when negotiation had reached an impasse, then it would have under **Section 6** of the **Arbitration Act**, made an application to stay the courts proceedings. The court in Corporate Insurance Co. -Vs- Wachira (1995-1998) 1EA 20 held that,

“In the present Case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause.”

The court will therefore not interfere with the parties contract and it ought to down its tools for lack of jurisdiction.

3. Whether the Plaintiff/Applicant is entitled to the orders sought

Having found that the Court lacks jurisdiction to deal with the instant matter, then this Court finds no reason to issue the orders sought herein by the Plaintiff/Applicant.

The Upshot of the foregoing is that the **Notice of Motion Application** dated **10th August 2020**, by Plaintiff/Applicant is found **not merited**, and the same is dismissed entirely with costs to the Defendants/Respondents. This Court lacks jurisdiction and consequently downs its tool and the suit herein **is struck out entirely** as the Court lacks requisite Jurisdiction.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 30TH DAY OF SEPTEMBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Kuiyaki