



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E079 OF 2021

VERUS PRAEDIUM REALTORS LTD.....PLAINTIFF

=VERSUS=

DELUXE HOMES LIMITED.....DEFENDANT

RULING

1. The plaintiff, Verus Praedium Realtors Limited, initiated this suit through a plaint dated 26/2/2021. They sought, among other reliefs, declaratory and injunctive orders barring the defendant against terminating the 5 years and 3 months lease between the two parties, relating to **Land Reference Number 1/1397**, situated in Nairobi [**the suit property**]. Together with the plaint, they brought a notice of motion dated 26/2/2021, seeking an interlocutory injunctive order restraining the defendant against terminating the lease, pending the hearing and determination of this suit. The said notice of motion is one of the two applications falling for determination in this ruling.

2. The second application falling for determination is the plaintiff's notice of motion dated 11/5/2021 seeking the following review order:

“ 2. That this honourable court be pleased to review the decision of the honourable court of 17th March 2021 directing the applicant to deposit the sum of Kshs 5,237,830 on or before the 31st May 2021”.

3. I will dispose the application dated 26/2/2021 first.

Application dated 26/2/2021

4. The application dated 26/2/2021 was supported by an affidavit sworn on 26/2/2021 by Shalom Gathara Njagi. In summary, he deposed that the defendant offered to lease the suit property to the plaintiff through a letter of offer dated 29/6/2019 and the plaintiff duly accepted the offer and paid to the defendant a sum of Kshs 9,000,000, covering deposit and six months' rent for the period running from September 2019 to February 2020. The defendant proceeded to give the plaintiff vacant possession of the suit property. The suit property did not have any development on it. Upon obtaining vacant possession, the plaintiff procured building approvals and proceeded to engage a contractor who erected developments on the suit property at a cost of Kshs 40,000,000. Further, the plaintiff executed a lease prepared by the defendant's Advocates, M/s Z N Gathara Advocates, and returned the executed lease to the defendant's advocates. The deponent added that arising from the restrictions imposed by the Government in response to the threat of the Covid-19 pandemic, they started experiencing difficulties in meeting their rent obligations. They engaged the defendant with a request for reduction of rent by 25%; rescheduling of rent payment; and waiver of interest. Their requests did not receive a response from the defendant. In total, they had paid the defendant a sum of Kshs 18,900,000 as at the time of bringing the application, notwithstanding the challenges posed by the Covid-19 pandemic.

5. He further deposed that on 6/1/2021, they received a letter from the defendant demanding immediate payment of the sum of Kshs 7,837,830. They managed to raise and remit Kshs 2,600,000, leaving a balance of Kshs 5,237,830 which they were proposing to settle in quarters concurrent with a further sum of Kshs 1,100,000 for each quarter. Notwithstanding their efforts, they received a letter dated 5/2/2021 from the defendant's advocates, M/s Kairu Mbuthia Law LLP, through which the defendant purported to terminate their lease. He contended that the plaintiff's only plea to the defendant was for them to consider their request for mitigation of the effects of the Covid-19 pandemic and that the defendant's action was insensitive and calculated to destroy their business. He urged the court to grant the interlocutory injunctive orders.

6. The defendant opposed the application through a replying affidavit sworn on 17/3/2021 by James Mwarangu Gathara. He deposed that parties to this suit entered into a lease dated 17/10/2019 pursuant to which the plaintiff was to pay quarterly rent of Kshs 3,000,000 plus VAT, payable quarterly on the 5th day of the first month of each quarter. The plaintiff breached the said term when rent for the last quarter of 2020 fell due. Despite demand, the plaintiff failed to pay the rent. Consequently, they issued a letter dated 5/2/2021, terminating the lease in

tandem with the terms of the instrument of lease. He urged the court to reject the application.

7. The application was canvassed through written submissions dated 31/5/2021. The defendant filed written submissions similarly dated 31/5/2021, opposing the application. I have considered the said submissions alongside the application and the rival affidavits.

8. The single question falling for determination in the application dated 26/2/2021 is whether the applicant (plaintiff) has satisfied the criteria upon which our courts exercise jurisdiction to grant interlocutory injunctive relief. The said criteria was outlined in **Giella v Cassman Brown (1973) EA 358**. In summary, the applicant is required to demonstrate a prima-facie case with a probability of success. Second, the applicant is required to demonstrate that unless an injunction is granted, he would stand to suffer injury that may not be adequately indemnified through an award of damages. Lastly, should there be doubt regarding both or either of the above two requirements, the court should determine the application based on the balance of convenience.

9. At the interlocutory stage, the court does not make conclusive pronouncements on the substantive issues before it. All it does is to interrogate the evidence presented at the interlocutory stage, with a view to establishing whether the requirements in **Giella v Cassman Brown (1973) EA 358** have been met.

10. This matter was initially slated for ruling on 8/7/2021. The court did not conduct sittings in that particular week because the **ELC Judges Annual Conference** was convened in Mombasa at a short notice. All the matters slated for that week were listed for directions the subsequent week. Consequently, on 12/7/2021, the court listed this matter for directions on 14/7/2021. Mr Onduso [counsel for the plaintiff] and Mr Kofuna [counsel for the defendant] subsequently attended court on 14/7/2021 with a view to taking a mutually convenient date for ruling. On that day, counsel for the plaintiff indicated to the court that all rent arrears covering the period up to 30/6/2021 had been cleared and the plaintiff was ready with the rent for the period running from 1/7/2021. Mr Kofuna, counsel for the defendant, confirmed that indeed the defendant had received the arrears. It is therefore within the above context that the court is invited to determine the single issue in the application dated 26/2/2021.

11. There is no dispute that the plaintiff fell in rent arrears and owed the defendant some rent arrears as at the time of bringing the present application. The plaintiff contends that the default was occasioned by the Covid-19 pandemic. The defendant's position is that the plaintiff was obligated to meet their contractual obligation to pay rent notwithstanding the measures put in place by the Government to contain the pandemic. Legal notices relating to lockdowns and closure of businesses and restriction of movements were first published by the Government of Kenya in March 2020 and continue to be extended to date. Whether the Covid-19 pandemic was an excusable explanation for the plaintiff's default is a question to be conclusively answered after trial. During trial, parties will be expected to lead appropriate evidence. At this stage, the court takes into account the fact that rent arrears which the plaintiff owed the defendant had been fully paid as at 14/7/2021. In the circumstances, the court has doubts on the validity of the rival positions taken by the parties to the lease and takes the view that this is an application that should be determined based on the balance of convenience.

12. The plaintiff was given the suit property in 2019. They have developed the suit property and have sublet the developments thereon. As at 14/7/2021, the plaintiff had cleared the arrears and was ready to remit rent for the then current quarter. In the circumstances, the balance of convenience favours preservation of the lease, pending the hearing and determination of this suit. This is subject to the plaintiff paying rent promptly as set out in the lease. Costs of the application shall be in the cause. I now turn to the application dated 11/5/2021.

Application dated 11/5/2021

13. The application dated 11/5/2021 sought a review of the order made by Okongo J on 17/3/2021. Paragraph 6 of the said order extended the previous order on condition that the plaintiff was to pay at least one half (½) of the rent arrears by 12/5/2021 and clear the whole arrears by 31/5/2021.

14. When counsel for the parties appeared before me on 14/7/2021, they confirmed that all the arrears which existed as at 17/3/2021 had been cleared. I do not therefore see the purpose which the review order as framed and sought by the plaintiff will serve at this stage. Put differently, the plea for a review order has been overtaken by events because the rent arrears which existed at the time of filing the application have since been paid. In the circumstances, the court will mark the application dated 11/5/2021 as spent. Costs of the application shall be in the cause.

Disposal Orders

15. In the end, I make the following disposal orders in relation to the plaintiff's applications dated 26/2/2021 and 11/5/2021 respectively:

a) In disposal of the plaintiff's application dated 26/2/2021, a status quo order is hereby issued preserving the lease between parties to this suit in relation to Land Reference Number 1/1397, pending the hearing and determination of this suit.

b) The above status quo order shall remain in force subject

to the terms of the lease and on condition that the plaintiff shall pay rent as stipulated in the lease.

c) The application dated 11/5/2021 is marked as spent.

d) Costs of the two applications shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF SEPTEMBER 2021

B M EBOSO

JUDGE

In the Presence of: -

Mr Onduso for the Plaintiff/Applicant

Mr Kofuna for the Defendant/Respondent

Court Assistant: Phyllis Mwangi

NOTE:

This application was heard and a ruling date fixed while I was serving at Nairobi (Milimani) Environment and Land Court Station. Due to the subsequent transfer, I have delivered the ruling virtually at Thika Environment and Land Court Station.

B M EBOSO

JUDGE