



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AT NAIROBI

CIVIL SUIT NO. E253 OF 2021

BRITAM TOWERS LLP.....PLAINTIFF

VERSUS

ALONIAB GENERAL TRADING LIMITED.....DEFENDANT

RULING

1. The Plaintiff instituted a suit by a Plaint dated 9th July 2021 and contemporaneously filed a Notice of Motion application dated 9th July 2021 brought under Article 40 of the Constitution of Kenya 2010, Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. The Application was coupled with the sworn affidavit of Ambrose Dabani dated 9th July 2021 all brought under a Certificate of Urgency. The Application, which is the subject of this Ruling, prayed for the following Orders:

a. Spent.

b. Pending the hearing and determination of this Application, an Interlocutory injunction be and is hereby issued restraining the Defendant whether by itself, its servants and or agents from entering, using, occupying or in any other manner whatsoever trespassing on the premises known as Ground Floor compromising approximately 2,696 square feet – Main Restaurant and 1,381 square feet – Terrace area on the ground floor of the Building commonly known as The BRITAM Tower L.R. NO. 209/20622(I.R. NO. 146303) belonging to the Plaintiff.

c. Pending the hearing and determination of the suit herein, a permanent order of injunction be and is hereby issued restraining the Defendant whether by itself, it's servants and or agents from entering, using, occupying or in any other manner whatsoever whatsoever trespassing on the premises known as Ground Floor compromising approximately 2,696 square feet – Main Restaurant and 1,381 square feet – Terrace area on the ground floor of the Building commonly known as The BRITAM Tower L.R. NO. 209/20622(I.R. NO. 146303) belonging to the Plaintiff.

d. The costs of this application be awarded to the plaintiff.

2. The Respondent responded to the Applicants' motion by an affidavit in reply sworn by Filmon Bahta Weldemriam who is the director of the defendant dated 01/09/2021.

3. The Applicants then filed a further affidavit sworn by Jackson Kiboi on the 01/09/2021.

4. The matter was canvassed through written submissions with the Applicant filing theirs dated 13/10/2021 and the Respondent had not filed his submissions in court though he sought to highlight the same on 14/10/2021.

The Plaintiffs Case

5. Ms. Onyango for the Plaintiff identified one issue for determination being whether the prayers of temporary injunction sought by the Plaintiff are merited pending the hearing and determination of the application and the suit.

6. The plaintiff and the defendant had entered into a contract that was reduced into Head of Terms whose purpose was to lease the property to the defendant for term of six years.

7. The contract obligated the defendant to pay rent and service charge. The application was brought to court because the defendant failed to pay the monthly rent.

8. Clause 23 of the Head of Terms permitted the Plaintiff to reenter the property should the defendant be in default for more than 14 days

which is the case. The plaintiff exercised its right of re-entry on 8/07/2021.

9. Counsel for the plaintiff in her analysis relied on **Giella vs Cassman Brown Co. Ltd 1973 EA 358** where the principles of injunctions were clearly spelt out. The Counsel also referred to the case of **Mrao Versus First American Bank of Kenya Limited & 2 Others (2003) KLR 125**.

10. The plaintiff reiterated that it has shown a strong prima facie case with two key issues:

- a) The defendant has admitted being in default and all these is in writing and before the court
- b) The Head of Terms which is a contract between parties allow the plaintiff to reenter its premises upon default

10. Therefore, allowing the injunction the court will be enforcing the contract as drafted. Another case that the plaintiff relied on is **Eldos TT Ltd vs Corn Products & Another [2013] eKLR** where it was submitted that it was trite law that it is not up-to courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. The primary task of the court is to construe the contract and any terms implied in it.

11. The Heads of Terms are quite clear with respect to the Defendant's obligations in terms of payment of rent and service charge, and the Defendant had previously complied with the terms thereof until it begun to default in payment.

12. The Court in **Park Plaza Limited v Afro Asian Bank Limited [2016] eKLR** interpreted a similar provision of a contract in a Heads of Terms to mean that the parties to the agreement are bound to the terms of the same, as in any contract. The Court in **Park Plaza Limited, supra**, held as follows;

"The Defendant attempts to extricate itself from the Letter of Offer by pointing at Term 22 of the Heads of Terms and the Tenant's Acceptance Clause, The Term 22 reads:-

"Until such time as the standard Lease has been executed and registered, all covenants, conditions and the rent agreed, shall be deemed to have been incorporated in this offer ", My understanding of this Term is that once the parties have executed the Offer Letter, then all covenants; conditions and rent in the letter would constitute the contract between the two pending the execution and delivery of the standard lease. It would not matter that the that had not been executed and/or registered."

13. The Plaintiff submits that it has shown a strong prima facie case that and the fact that the Defendant was in default of payment of rent and service charge this necessitated the Plaintiff's reentry into the premises and is entitled to peaceful possession of the same. Therefore, it is in order for this court to issue an injunction to restrain the Defendant from interfering with the plaintiff's peaceful occupation of the suit property.

14. The Plaintiff contends that it will suffer irreparable harm should the Application not be granted. The Plaintiff avers that it has demonstrated to the court that the Defendant is already indebted to it in terms of Kshs. 19,736,166, which is a substantial amount. Allowing the Defendant to enter the premises, or interfere with the Plaintiffs peaceful possession of the same will only occasion the Plaintiff more damage and waste, which it may not be able to recover from the Defendant except through a lengthy and expensive Court process.

15. In Conclusion, the Applicants submitted that the instant Application and the orders for injunction sought had merit. That they had satisfied the principles as laid out in **Giella vs Cassman** to be granted the equitable reliefs sought. That they had demonstrated that the Plaintiff/ Applicants had a prima facie case with a probability of success, the irreparable harm that shall be occasioned to them that cannot be compensated by an award of damages should they succeed in their case and the balance of convenience in this instance tilted in their favour. It was therefore prayed that the orders as sought in the Application be allowed as prayed.

Defendant's Case

16. In opposing the application when the defendant was served, he filed a replying affidavit and a defence and counter-claim dated 1/09/2021. The Counsel for the defendant Mr. Mutai in his submissions argued that the Head of Terms agreement that the Plaintiff alleges does not provide for a specific amount were to pay. Therefore, the alleged Kesh 19,736,166 is without basis.

17. The defendant avers that the arrangement was that of *sale turn over*. Where the defendant has been given exclusivity in the suit premises in order to provide for maximum monthly turn over.

18. In early 2021 the defendant submits that there was low foot traffic to the restaurant and the defendant tried to convince the plaintiff on a specific arrangement for payment of rent and service charge but the plaintiff declined and precipitated the proceedings.

19. It is the position of the defendant that the plaintiff is not entitled to the order sought. It beseeches the court to dismiss the application as the plaintiff stands to suffer no loss.

20. The defendant makes a counterclaim and repeats what it has averred in the defence. Further that the Plaintiff without any just cause whatsoever, seized the equipment and property belonging to the Defendant worth Kenya Shillings Thirty Million (Kshs. 30,000,0001-) causing financial stress, loss of income and irreparable damage. The Defendant further avers that he has been unable to run his business for gainful purposes at the premises.

21. The defendant relied on two cases in seeking the dismissal of the plaintiff's application. **Moses Njoroge Thara & another v Actae Development Limited & 11 others [2019] eKLR and Kenya Commercial Firm v Afraha Education Society Civil Appeal No. 142 OF 1999 (Nakuru) reported in [2001] EA.** Where the court noted that in establishing a prima facie case in any civil application any court should direct itself and must conclude that the matter at hand is arguable and the opposing party has to call for an explanation on the same.

22. In the later case the court held that establishing prima facie alone is not enough. If the damages are payable on the part of the defendant, then no interlocutory injunction should be issued however strong the claim is. The defendant referred the court to Order 2 Rule 15 (1b, 1c, and 1d) of the Civil Procedure.

The Law, Analysis and Determination

23. The Parties' presented their cases through their affidavit evidence as well as the submissions by the respective advocates, Ms. Onyango for the Applicant and Mr. Mutai for the Respondent. I in turn have had time to analyse the emerging issues therein. The instant Application relates to the grant of temporary injunctive relief pending the hearing and determination of this suit.

24. The substantive law on this matter is **Order 40 Rule 1(a) of the Civil Procedure Rules 2010** which provides:

"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

25. It was long established and continues to be good Law that temporary injunctions are granted upon the satisfaction of tripartite conditions to wit: whether the Applicants have established a prima facie case; whether upon examination of the prevailing circumstances it becomes clear that the Applicants stood to suffer irreparable loss that the Respondents would be hard pressed to assuage by an award of damages and finally, where there was still doubt, it would be in order to consider in who's favour the balance of convenience tilted. These principles were established in **Giella vs. Cassman Brown & Co. Ltd supra.**

26. In **The Siskina (Owners of the Cargo Lately On Board) vs Distos Compania Naviera SA: HL 1979 [1979] AC 210**, Lord Diplock said:

"A right to obtain an interlocutory judgment is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment of the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

27. While discussing the conditions precedent to obtaining an Order of injunctive relief, the Court of Appeal in **Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR** observed that:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

28. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society supra.** The court was clear that **"...the existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."**

29. Drawing positive inspiration from the **Nguruman v Jan Bonde Nielsen & 2 others [2019] eKLR**, the Court of Appeal in **Total Kenya Limited v David Njane t/a Argwings Twin Service Station & 2 others [2018] eKLR** restated the requirement that the three conditions for granting an injunction ought to be considered sequentially. In essence, the Court reasoned that the conditions for irreparable damage and balance of convenience ought not to be considered if a prima facie case had not been established.

30. Bearing the above in mind, the first stop of the journey towards my final determination is whether the Applicants have established a prima facie case. A prima facie case was defined in **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, where Bosire, JA stated as follows:

"So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

31. The Court of Appeal deliberating what amounted to a prima facie case in **Nguruman (Supra)** made the following comments:

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. 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 or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. 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.”

32. Having established the school of judicial thought I ought to abide, I shall now fix my gaze upon this instant application all the while cautioning myself not delve into the intricacies of the case as that is a preserve of the substantive suit.

33. In my considered view, it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting the interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales.

34. Having considered the facts that have emerged in this case and the evidence adduced by way of affidavits and written submissions it is the view of the court that the plaintiff has established a prima facie case with a probability of success against the Defendant. As regards irreparable damage, I take the view that should the injunction not be granted the substratum of this case will be destroyed and the plaintiff will suffer irreparable loss which may not be quantified in damages. The balance of convenience if I had doubt, would tilt in favor of the plaintiff in order to safeguard the current status quo of the subject matter of the suit pending hearing and determination.

35. Arising from all the above, I find merit in the application. Accordingly, I allow the Notice of Motion dated 9th July 2021 in terms of prayer 2. Considering the circumstances of this case, I order that each party shall bear their costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OCTOBER 2021.

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MOGENI J

JUDGE

IN THE PRESENCE OF:

Ms. Onyango for Plaintiff

Mr. Mutai for Defendant

Vincent Owuor Court Assistant