



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT KAJIADO**

**ELC CASE NO. E034 OF 2021**

**HYDROMASTERS DRILLING COMPANY.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**NGONG BUTCHERS CO-OPERATIVE SOCIETY LTD.....DEFENDANT/RESPONDENT**

**RULING**

This ruling is on the Notice of Motion dated 11<sup>th</sup> May, 2021 which is by the plaintiff/applicant.

Originally, there were nine (9) prayers but now they have been whittled down to three (3) namely numbers 3, 7 and 9 which pray for;

(3) That the Honourable Court be pleased to issue a cease and desist order against the Respondent from entering, destroying, undertaking building works on, or in any way mutilating/modifying, the subject premises on LR. NO. 23124/3, L.R. NO. 5513/14, GRANT NO. I.R.N 5792 situated in Ongata Rongai Kajiado pending the hearing and determination of this application.

(7) That the Honourable Court be pleased to make an order of inhibition of the same title in (3) above, against the transfer by sale, leasing or conveyancing, pending the hearing and determination of the dispute by the Arbitral Tribunal.

(9) That the costs of this application be borne by the Respondent.

The notice of motion is supported by two (2) affidavits sworn by George Melonyie who is a director of the plaintiff. In summary he says that he leased the suit premises from the defendant in the year 2010.

He spent Ksh. 47 million in developing the suit premises into a shopping mall. He has never been compensated for this development by the defendant. They also owe him Kshs. 1, 350,000/- as rent deposit.

The Applicant has duly paid rent and maintained the premises in good condition in spite of the down turn in businesses brought about by the Covid -19 pandemic.

On the 16<sup>th</sup> April, 2021, the Respondent entered the suit premises by force and harassed the occupants all of whom had contracts with the Plaintiff. Further, the Respondent broke into the shops at the premises and carried away property that belonged to the sub-tenants.

The Applicant wrote to the chartered Institute of Arbitrators – Nairobi Chapter to have an arbitrator appointed to resolve the dispute as provided in the leases.

The Applicant fears that the Respondent may sell the premises without paying any compensation to the Applicant and it is for these reasons that he filed the current suit and application.

The application is opposed by the Defendant and Moses Muraya Sironik who is the Chairman of the Defendant has sworn a replying affidavit dated 24/5/2021. In the affidavit the deponent says that the Applicant has defaulted in paying rent as a result of which there has been litigation.

The Defendant terminated the leases for failure by the plaintiff to pay rent.

Secondly, the Plaintiff is accused of failure to maintain the common areas in the premises, failure to collect garbage and maintain the water and electric installations.

Thirdly, the Plaintiff's representative sub-let the premises contrary to the lease agreement and because of his failures, the sub tenants became hostile to him and could not let him in as they were baying for his blood.

This is the reason why the Defendant occupied the premises and signed new leases with the sub-tenants.

I have carefully considered the application dated 11<sup>th</sup> May, 2021 in its entirety including the affidavits and annexures and I find that two (2) issues arise namely;

(1) Has the Applicant established a prima facie case with a probability of success?

(2) Does the balance of convenience tilt in the applicant's favour?

On the first issue, I find that the Applicant has not established a prima facie case with a probability of success because no evidence has been adduced to show that rent has been paid for the relevant period as per the lease agreement.

Payment of rent is one of the fundamental requirements in a lease agreement. In the absence of such evidence, then a prima facie case is not made out.

Secondly, it would seem that currently, it is the Defendant who is in occupation of the suit premises. It would not be fair or reasonable to change the status quo especially when it is not proved that rent has been paid as expected.

Finally, the Plaintiff has nothing to lose because if it proves that it is entitled to the costs of the improvements said to have been expended in the suit premises, they can be quantified and awarded.

For the above stated reasons, I dismiss the application dated 11<sup>th</sup> May, 2021.

Costs in the cause.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24TH DAY OF NOVEMBER, 2021.**

**M.N. GICHERU**

**JUDGE**