



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 75 OF 2020**

**KYELENI VALLEY VENTURES LIMITED.....PLAINTIFF**

**VERSUS**

**MUKA MUKUU FARMERS COOPERATIVE SOCIETY LTD...DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 14<sup>th</sup> December, 2020 brought pursuant to Order 51 Rule 1 and Order 40 Rules 1& 2 of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act. The Plaintiff seeks orders of temporary injunction against the Defendant including its agents restraining it from interfering with land parcel numbers Donyo Sabuk/Donyo Sabuk West Block 1/3332, 3335, 3336, 3342, 3341, 3344, 3345, and 3375 hereinafter referred to as the 'suit lands', pending the outcome of this suit.

The application is premised on the grounds on the face of it and the supporting affidavit of ANTHONY MATHI its director where he deposes that on 17<sup>th</sup> July, 2019, the Plaintiff and Defendant entered into a Lease Agreement in which the Plaintiff was to lease 500 acres from the Defendant for quarrying purposes. Further, as per the terms of the Lease, the Plaintiff was to pay to the Defendant a sum of Kshs. 600,000, as commitment fees upon which it would have possession of two (2) acres for purposes of geomining and testing. He avers that it was also a term of the Lease that the Plaintiff would pay a further rent advance deposit of Kshs. 25,400,000 on or before 1<sup>st</sup> December, 2019 and the balance of Kshs. 39,000,000 being the balance of the first year annual rent, was to be paid on or before 1<sup>st</sup> October, 2020. Further, as per the terms of the Lease Agreement, the Plaintiff paid to the Defendant the sum of Kshs. 6,000,000 in two equal instalments on 4<sup>th</sup> October, 2019 and 11<sup>th</sup> October, 2010 respectively. He avers that after the Plaintiff procured the NEMA license as well as other requisite licenses, they took possession of suit land, placed equipment thereon and commenced quarrying. Further, the Plaintiff also licensed other third parties to commence quarrying. He claims on 21<sup>st</sup> January, 2020, the Defendant wrote to the Plaintiff to cease quarrying immediately which it heeded to. He insists the said letter was in breach of the aforementioned Lease as no notice was issued under clause 4(a) of the Lease Agreement. He reiterates that on 24<sup>th</sup> February, 2020, the Plaintiff wrote a letter to the Defendant putting it on notice that the closure of the quarry was in clear breach of the terms of the Lease and urged the Defendant to immediately reopen it. Further, on 5<sup>th</sup> and 7<sup>th</sup> March, 2020 respectively, the Plaintiff wrote to the Defendant confirming that the balance of the rent amount due was ready and the same would be released to the Defendant upon confirmation. Further, despite confirming the entire Lease amount is ready, the Defendant insists the Lease has been determined. He states that the Defendant is in the process of inviting fresh tenders for the leasing of the subject parcel of land to third parties. Further, the Plaintiff has suffered immense losses due to closure of its operations.

The Defendant opposed the application by filing a replying affidavit sworn by DOMINIC MUTUKU NTHWAO its Chairman who deposes that this suit is fatally defective since there is no resolution authorizing its institution by the company and other interested parties. He confirms they entered into an unregistered Lease Agreement with the Plaintiff and continued to explain that the Plaintiff was to pay Kshs. 65,000,000 as annual rent for the first year and Kshs. 26,000,000 as part payment of rent that had been agreed upon for the first year. He insists the Plaintiff breached the terms and failed to pay rent. He denied that the Plaintiff paid the sum of Kshs. 60,000,000 in two equal instalments. He averred that the Plaintiff paid Kshs. 600,000 on 8<sup>th</sup> August, 2019 and Kshs. 2,400,000 on 14<sup>th</sup> October, 2019. Further, the Defendant sent demands for the Plaintiff to regularize the Lease by paying the accrued rent and on 27<sup>th</sup> January, 2020 they instructed their Advocates to issue a 30 days Notice of termination of the Lease, which they did on 27<sup>th</sup> January, 2020. He claims the Plaintiff in total disregard of the notice continued to be in occupation of the suit land until sometimes in March 2020 when they moved away the machinery without notice to the Defendant and not paying the accrued rent. He reiterates that the Plaintiff has brought this suit after inordinate delay. Further, between August, 2019 and March, 2020, the Plaintiff occupied suit lands and engaged in subletting it to other entities including persons that excavated machine cut building stones worth over Kshs. 15,000,000. He disputes the Plaintiff's claim that it suffered harm and contends that the Plaintiff engaged individual members of the Defendant society, leased out the land to them and they are currently carrying on quarrying activities.

The Plaintiff filed a further affidavit reiterating its claim and disputing averments in the replying affidavit. It insisted it paid certain monies personally, to the Defendant's officials and its machines were vandalized.

The application was canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the Plaintiffs Notice of Motion application dated the 14<sup>th</sup> December, 2020 including the parties' affidavits and rivalling submissions, the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction restraining the Defendant from dealing with the suit lands pending the outcome of the suit.

The Plaintiff in its submissions averred that it had established a prima facie case as against the Defendant as the Defendant's action of terminating the Lease culminated in its suffering loss. Further, it suffered irreparable loss which cannot be compensated by an award of damages and balance of convenience tilted in favour of granting an injunction. It relied on the following decisions: **Giella V Cassman Brown & Co. Ltd (1973) EA 358; Ace Engineering & Building Contractors Ltd V National Bank of Kenya Limited (2019) eKLR which favourably cited the case of Mrao Ltd V First American Bank of Kenya Ltd & 2 others, Civil Appeal No. 39 of 2002 and Pius Kipchirchir Kogo V Frank Kimeli Tenai (2018) eKLR** to support its averments.

The Defendant in its submissions insisted that the Plaintiffs has not established a prima facie case with a probability of success at the trial as it failed to pay the due rent and vacated the suit land before filing this suit. Further, that the said Lease was terminated by provisions of Clause 4 of the Lease Agreement. It avers that the Plaintiff has not suffered any irreparable loss. To support its arguments, it relied on the following decisions: **Pius Kimaiyo Langat V Cooperative Bank of Kenya Ltd (2017) eKLR; and Tusker Mattress Ltd V Bank of Baroda (Kenya) Ltd & Another (2017) eKLR**"

The Plaintiff has sought for orders of injunction against the Defendant and contend that it should be restrained from dealing with the suit lands. As to whether the Plaintiff has established a prima facie case with a probability of success at the trial, I will rely on the principles established in the case of **Giella Vs Cassman Brown & Company (1973) EA 358** as well as the definition of a prima facie case as stated in the case of **Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125**. The Plaintiff claims the Defendant unlawfully terminated the Lease and was in breach of the terms therein as it paid the rents. The Defendant insists the Plaintiff failed to pay the required rent, sublet premises to third parties and it decided to terminate the Lease. I note the Plaintiff and the Defendant have admitted the existence of the Lease Agreement which they signed. The Plaintiff has not denied moving from the suit land. Looking at the documents as presented, I note the Lease Agreement was very clear and as per Clause 3.5 (iv) (a) & (b) of the said Lease Agreement, the Plaintiff was to pay Kshs. 26,000,000 on or before 1<sup>st</sup> December, 2019 but it only paid Kshs. 3,000,000 which demonstrates it actually breached the terms by failing to pay the requisite rent. It further emerged that a notice was issued to the Plaintiff and the WhatsApp messages have been annexed to the replying affidavit, notifying it of the termination of the Lease. The Plaintiff denies leaving the suit lands and insists it was evicted with the aid of Police Officers. It argues that the Defendant should not have entered the suit lands as no proper notice was issued to it. It is trite that injunctive reliefs are equitable reliefs and a party seeking it must be candid. In this instance, I note the Plaintiff filed this suit when it was no longer on the suit lands. Further, it failed to pay the full rent as per the terms of the aforementioned Lease. The Defendant has also indicated that the Cooperative Tribunal vide Nairobi CTC No. 150 of 2020 Samuel Mwanzia Kithuka & Others vs. Muka Mukuu FCS & Others had made an order that the issue of leasing the suit lands should revert to the members to make the decision. To my mind, at this juncture, I do not find the Plaintiff is candid in some of its averments. Further, that it is seeking injunctive reliefs too late in the day. In the circumstance, I find that the Plaintiff has not demonstrated a prima facie case as against the Defendant to warrant the orders sought. In relying on the principles established in the case of **Nguruman Limited V Jan Bonde Nielsen & 2 Others (2014) eKLR**, I will decline to deal with the other two limbs on injunctions.

It is against the foregoing that I find the Plaintiff's Notice of Motion application dated the 14<sup>th</sup> December, 2020 unmerited and will disallow it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**