



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 23 OF 2021

KILIFI BOATYARD LIMITED.....PLAINTIFF

-VERSUS-

KILIFI PLANTATION LIMITED.....1ST DEFENDANT

DARTSTAR LIMITED..... 2ND DEFENDANT

CHRISTOPHER DENNIS WILSON3RD DEFENDANT

NATIONAL LAND COMMISSION4TH DEFENDANT

COMMISSIONER FOR LANDS5TH DEFENDANT

RULING

1. By the Notice of Motion dated 29th March, 2021, Kilifi Boatyard Limited (*the Plaintiff*), prays for an order of injunction to issue restraining the Defendants herein whether by themselves, their agents or servants from entering upon, evicting the Plaintiffs, occupying, demolishing any portion, erecting upon or in any way transferring, charging, leasing, alienating or otherwise dealing with the whole or any part of the suit property being parcel number Group V 429 situate in Kilifi.

2. The application which is supported by an affidavit sworn by the Plaintiff's director Peter Bateman is premised on the grounds that:

- (a) On 22nd March, 1985, the 5th Defendant granted the 1st Defendant a Temporary occupation license over the suit property;
- (b) In the year 2001 and having acquired the assets of Swynford Boatyard who had been in occupation of the property since 1982, the Plaintiff entered into a lease agreement with the 2nd Defendant under the authority and instructions of the 1st Defendant to occupy the suit property;
- (c) Negotiations to enter into the lease agreement were carried out by the 3rd Defendant as a director of the 1st Defendant and under the 1st Defendant's authority to have the 2nd Defendant as a lessor in the agreement with an express indication that the Temporary Occupation license was in the process of being rectified accordingly to reflect the 2nd Defendant as the Licensee;
- (d) The lease negotiated between the Plaintiff and the 1st, 2nd and 3rd Defendants in 2001 was to run for a period of 20 years and would thereafter be compulsorily extended for a further period of 10 years upon application by the Plaintiff;
- (e) As a result of the guaranteed long-term occupation period, the Plaintiff carried out an Environmental Impact Assessment over the suit property prior to carrying out a large building program, erecting buildings, compacting land and tidying up the residue left behind by Swynford Boatyard at a great economic cost;
- (f) With the impending expiration of the 2001 lease agreement set for 1st of April, 2021 and with the Plaintiff's application for extension having been denied by the 1st Defendant in breach of the terms of the lease, the Plaintiff is justifiably apprehensive that the 1st Defendant's threat to evict it from the suit property will be carried out;
- (g) The refusal by the 1st Defendant to extend the lease is in bad faith, malicious and intended to frustrate the Plaintiff's investments

made in the suit property and is meant to cause the Plaintiff extreme economic distress which would occasion irreparable harm to the Plaintiff;

(h) The Plaintiff has attempted to reasonably resolve this matter with the 2nd Defendant through arbitration but even through the arbitral proceedings were in favour of the Plaintiff, the 1st Defendant has declined to renew the lease; and

(i) It is in the interest of justice that the Defendants be restrained from evicting the Plaintiff from the suit property even as the issues of occupation of the suit land between the parties herein are properly determined.

3. The application is opposed by the 1st Defendant – Kilifi Plantation Limited. In a Replying Affidavit sworn by its director Betty Bundotich, the 1st Defendant avers that it is not the owner of the suit property and that it only has a Temporary Occupation License granted to it by the 5th Respondent.

4. The 1st Defendant further avers that it was not a party to the alleged lease dated 1st November, 2001 between the Plaintiff and the 2nd Defendant and that it has no lease agreement between itself and the Plaintiffs. The 1st Defendant asserts that the Plaintiff, itself and the 2nd Defendant are different legal entities distinct from their shareholders and directors and further that it did not acquire any enforceable rights or obligations under the lease between the Plaintiff and the 2nd Defendant.

5. The 1st Defendant avers that the Plaintiff occupies its property without its consent and without paying any rent. It further asserts that the orders sought by the Plaintiff are illegal as they have the effect of creating a 10 year lease between the Plaintiff and the 1st Defendant without any valid instrument or compensation.

6. The 1st Defendant further avers that the orders sought are *res judicata* the award of the arbitrator delivered on the subject property between the same parties herein on 2nd March, 2021 and urges the court to dismiss the same.

7. Messrs Dartstar Limited and Christopher Dennis Wilson (*the 2nd and 3rd Defendants respectively*) are equally opposed to the application. In a joint Replying Affidavit sworn on their behalf by the 3rd Defendant who doubles up as a director of the 2nd Defendant, they aver that the 2nd Defendant is the owner of the suit property being Parcel Number V 429 situate in Kilifi.

8. The 2nd and 3rd Defendants assert that the 2nd Defendant does not have a Temporary Occupation License granted by the 5th Defendant as alleged. On the contrary, the 2nd Defendant is the landlord in the lease agreement dated 1st November, 2001 as executed between itself and the Plaintiff over Parcel No. V. 429.

9. The 2nd and 3rd Defendants further aver that the Plaintiff does not occupy the Parcel No. V. 429. They assert that the 1st and 2nd Defendants are separate and distinct legal entities distinct from their shareholders and directors and that the 2nd Defendant entered into the lease agreement as an independent entity.

10. Like the 1st Defendant, the 2nd and 3rd Defendants equally assert that the suit herein is *res judicata* the decision of the arbitrator delivered on 2nd March, 2021 and urge the court to dismiss the same.

11. I have carefully perused and considered the application and the response thereto. I have similarly considered the written submissions and authorities placed before me by Mrs. Akwana the Learned Advocate for the Plaintiff herein. The Defendants did not file any submissions for my consideration.

12. The Plaintiff herein has sought an order of injunction to restrain the Defendants from *inter alia* entering the suit property, evicting them therefrom, occupying or transferring the same or in any manner dealing therewith pending the hearing and determination of the suit filed contemporaneously with this application.

13. As Spry V-P stated in the oft-cited case of **Giella -vs- Casman Brown & Company Limited (1973) EA 358:**

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

14. That being the case, the first question that this court has to answer is whether or not the Plaintiff herein has established a *prima facie* case with a probability of success at the trial. As to what would amount to a *prima facie* case, the Court of Appeal offered guidance as follows in **Mrao Limited –vs- First American Bank of Kenya Limited and 2 Others (2003) eKLR:**

“A *prima facie* case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. In the matter before me, the Plaintiff asserts that sometime on 1st November, 2001, following successful negotiations between itself on one hand and the 1st, 2nd and 3rd Defendants on the other, it did execute a 20 year lease agreement with the 2nd Defendant for the purpose of

building and running a boatyard as well as a beach-bar and restaurant on a marked portion of a parcel of land described as Group V 429 situated at Kilifi effective 1st April, 2001.

16. The Plaintiff has told the court that the lease was to run for a period of 20 years and that thereafter, upon application by the Plaintiff, the same would be compulsorily extended for a further period of 10 years. Given the long-term nature of the lease, the Plaintiff told the court it did carry out a large scale building program which involved erection of buildings thereon, compacting the land and tidying up the residue left behind by a firm that had been previously running the yard for many years.

17. It is the Plaintiff's case that contrary to the express terms of the lease agreement, when the Plaintiff approached the 2nd Defendant in November, 2020 for a renewal of the lease which was due to lapse on 1st April, 2021, the 2nd Defendant refused to do so and told the Plaintiff it had no authority to lease or license the subject property as the same belonged to the 1st Defendant under a Temporary Occupation License issued to the 1st Defendant in 1986.

18. The Plaintiff avers that the refusal to extend the lease is in bad faith, malicious and intended to frustrate investments it has made on the suit property and thereby cause the Plaintiff economic distress.

19. On its part, the 1st Defendant states that it was not a party to the lease agreement dated 1st November, 2001 executed between the Plaintiff and the 2nd Defendant. It further asserts that it is a different legal entity from the 2nd Defendant and that it is distinct and separate from its shareholders and directors. The 1st Defendant accused the Plaintiff of occupying its property without its consent and without paying any rent to itself.

20. That position is supported by the 2nd and 3rd Defendants who assert that the 2nd Defendant entered into the lease agreement with the Plaintiff as an independent entity and not at the behest of the 1st Defendant which is a separate and distinct legal entity.

21. From the material placed before me, it is indeed undisputed that the 1st Defendant acquired a Temporary Occupation License for the subject property from the then Commissioner of Lands (*sued herein as the 5th Defendant*) sometime in July 1985. Subsequently in the year 1986, the 1st Defendant sub-let the property to an entity known as Swynford Boatyard Limited.

22. As it turned out, the Plaintiff took over the core business of the said Swynford Boatyard Limited sometime in the year 2001. Upon acquisition of the said business, the Plaintiff decided to negotiate a lease for the suit property with the 1st Defendant. A perusal of the correspondence exchanged between the parties (*Annexure PB 7 to 13 of the supporting affidavit*) reveals that the negotiations were done exclusively through the 3rd Defendant in his capacity as the director of the 1st Defendant.

23. By a letter dated 15th July, 2001 addressed to the 3rd Defendant as the director of the 1st Defendant, the Plaintiff forwarded a copy of the draft lease to the 1st Defendant and requested for the 1st Defendant's Bank account details. That letter equally forwarded a cheque to the 1st Defendant for rent for the months of May, June, and July, 2001.

24. In his response to the Plaintiff's said letter, the 3rd Defendant wrote on the 1st Defendant's letter-head as follows on 24th July, 2001:

"Re: Boatyard Lease

Thank you for the next instalment of the suggested lease. I would make two comments –

(1) The company name will now be Dartstar Limited not Kindimba Limited. The plot number is V. 429 Area 57.36 Hectares.

(2) In my letter of 14th May, 2001 point 5, I stated clearly that Kindimba Limited has no interest in purchasing any of the buildings etc at the end of the lease. This position holds.

After the initial and then extension of the lease plus any whatever would revert to Dartstar Limited.

Please incorporate this and I think we can proceed."

25. The said Dartstar Limited in whose name the lease was now to be made is the 2nd Defendant herein. Reacting to this new development, the Plaintiff wrote to the 3rd Defendant on 7th October, 2001 enclosing a copy of the new lease. At paragraph 5 of the letter, the Plaintiff's Rene Faber states as follows:

"I am a little confused with the various legal entities involved in this lease:

I correspond with Kilifi Plantations, take out a lease with Dartstar and pay the rent to Mr. Wilson. Is it possible that we tidy this up?

From an accounting point of view, it would be better for me if I could pay the rent to an account in the name of Dartstar. Can we discuss this?"

26. It was not clear from the correspondence availed if the situation was tidied up as suggested by the Plaintiff or if indeed the parties discussed the matter any further. What was clear was that at paragraph 'C' of the lease Agreement, the 2nd Defendant expressly indicated that it had applied for a Temporary Occupation License for the area and that it had agreed to lease to the Plaintiff.

27. That being the case, it was clear to me that the Plaintiff executed the lease on the assurance and with the expectation that the 2nd Defendant would regularize the position with its sister company who is the 1st Defendant herein. It was also clear to me that for the next 20 years, the 1st Defendant which remained in possession of the Temporary Occupation License and whose director, the 3rd Defendant was involved in the negotiations never protested the presence of the Plaintiff on the land.

28. The distinction between the 1st and 2nd Defendants remains blurred. From annexure PB1 of the Further Affidavit filed by the Plaintiff on 23rd June, 2021, it is clear that both the 1st and 2nd Defendants remain closely related as the invoice for rent dated 1st September, 2018 was sent to the Plaintiff under an email signed off on behalf of the 1st Defendant.

29. Looking at the circumstances herein, I am persuaded that the Plaintiff has made out a prima facie case with a probability of success at the trial. As was stated by the Court of Appeal in **Central Bank of Kenya and Another –vs- Uhuru Highway Development Limited and 4 Others (1998) eKLR**:

“In considering whether to grant an interlocutory injunction, the right course for a Judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.

It is not part of the Court’s function at an interlocutory stage of litigation to try to solve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations.”

30. In the circumstances herein, the contention by the Defendants that these proceedings are res judicata the arbitral proceedings do not hold water. The arbitrator could not have granted the orders of injunctions sought herein and I am accordingly of the view that this court is seized of the necessary jurisdiction to hear and determine all the issues raised herein.

31. I am also persuaded that the orders sought herein do not have the effect of creating an extension of the lease over the property as purported by the 1st Defendant. Instead the orders sought for have the appropriate effect of preserving the property even as the court delves into the evidence and proceeds to make a declaration on whether or not the lease agreement should automatically be extended as provided under Clause 4 of the agreement executed between the Plaintiff and the 2nd Defendant.

32. The upshot is that I find merit in the application dated 29th March, 2021. The same is allowed in terms of prayer No. 3 thereof with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 16TH DAY OF DECEMBER, 2021 VIA MICROSOFT TEAMS.

In the presence of:

Mrs Akwana for the Plaintiff/Applicant

Mr. Mutugi for the Respondents

Court assistant - Wario

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J. O. OLOLA

JUDGE