



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 188 OF 2019

NANJALA LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

MAYHOUSE LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff herein Nanjala Limited (herein after “**the tenant**”) sued the defendant (Landlord) on 14th August 2019 seeking the following orders: -

i. That this Honourable court does declare that the Post Dated Cheques issued by the plaintiff and accepted by the defendant relating to renegotiation of the Interest Rate and which does not concern the subject matter herein.

ii. A declaration that the defendant has not issued any notice for re-entry as per the lease agreement.

iii. The honourable court be pleased to issue an order or Permanent Injunction, restraining the defendant, either by themselves, agents, servants and/or employees, from re-entering upon, interfering with, evicting, levying Distress, leasing out to any Third Party and/or otherwise interfering with plaintiff’s possession, occupation and use of the Demised Premised without due regard to the law or at all.

iv. That this Honourable court be pleased to grant any other appropriate orders as it may deem fit and proper in the circumstances.

v. That the costs of this suit be awarded to the plaintiff.

2. Concurrently with the plaint, the plaintiff also filed an application dated 14th August 2019 seeking the following orders:

1. Spent

2. This honourable court be pleased to issue an Order of Temporary injunction restraining the defendant or its agents from re-entering upon, interfering with, evicting, levying distress, leasing out to any third party and/ or otherwise interfering with the plaintiff’s possession, occupation and use of the demised premises;

3. This honourable court declares that the Post Dated Cheques issued by the plaintiff and accepted by the defendant as payment of the rent serve as rent payment unless they are dishonoured.

3. On 8th November 2019 the defendant filed a statement of defence and counterclaim wherein it vehemently denied the plaintiff's claim and made a counterclaim for the following orders:

i. The sum Kshs 41,272,533/-.

ii. Interest on (i) above at the rate of 5% above the prevailing base lending rates of the NIC Bank Kenya or 15% per annum whichever is higher from October 2019 until payment in full.

iii. The defendant be granted vacant possession of the premises occupied by the plaintiff on the ground floor of Six Eighty Hotel situate on Land Reference Number 209/6775.

iv. Costs of this suit and the counterclaim.

v. Any other relief which this Honourable court may deem fit to grant.

4. Concurrently with the defence and counterclaim the defendant also filed an application dated 7th November 2019 seeking the following orders for vacant possession, judgment on admission and the striking out of the plaint.

5. This therefore ruling relates to two applications dated 14th August 2019 and the defendant's application dated 7th November 2019.

6. A summary of the plaintiff's case is that on 26th June 2016, it entered into a lease agreement with the defendant for a period of 10 years at an agreed monthly rent of Kshs 915,360 commencing on 1st July 2015 subject to annual increment at an interest Rate of 5% over and above the prevailing base lending rate of the NIC Bank Kenya of 15% per annum whichever is higher.

7. The plaintiff concedes that due to difficulties in business, it fell into arrears but that after holding several discussions with the defendant, it was agreed that the plaintiff would issue post dated cheques to cover the rent due and continue occupying the premises while the defendant would waive the current Interest Rates and interest on arrears.

8. It is the plaintiff's case that even though it issued the defendant with the post dated cheques for Kshs 7 million as settlement of the rent arrears as agreed, the defendant still continued to levy interest to the rent arrears and threatened legal action and to terminate the lease agreement thus precipitating the plaintiff's suit and application.

9. On its part, the defendant admits that it entered into the subject lease agreement with the plaintiff which agreement was governed by the terms set out in the lease document.

10. The defendant's case is that the plaintiff severally defaulted in its obligations to pay rent despite making numerous promises to pay the rent. The defendant states that as a result of the continuous default by the plaintiff, it on 2nd July 2018 it notified the plaintiff to remedy the breach failure of which it would invoke its right to re-enter the premises.

11. The defendant contends that the plaintiff did not remedy the breach or vacate the premises and that as at October 2019, the outstanding rent and mesne profits stood at Kshs 41,272,533. The defendant further states that the proceedings filed against it by the plaintiff before the lower court, being Nairobi CMCC No. 9849 of 2018 wherein the plaintiff sought also orders for quiet possession as well as an order compelling the defendant to renegotiate the terms of the lease were dismissed.

12. It is this defendant's case that it is entitled to the orders sought in the application dated 7th November 2019 (hereinafter "**the second application**") while the plaintiff's application dated 14th August 2019 (hereinafter "**the first application**") ought to be dismissed for lack of merit.

13. Parties canvassed both applications by way of written submissions which I have considered. The issues for determination are as follows:

a) *Whether the plaintiff has made out a case for the granting of orders of injunction.*

b) *Whether the defendant is entitled to orders for vacant possession, judgment on admission for the sum of Kshs 17,896,097 and for the striking out of the plaintiff's case.*

Injunction

14. The principles governing the granting of orders of injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Ltd* [1973] EA 358 as follows:

"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 an application on the balance of convenience.

Prima facie case

15. In the instant case, the plaintiff contends that the defendant is barred by the doctrine of estoppel from re-entering the leased premises having waived the interest on rent arrears and having accepted the post dated cheques issued by the plaintiff.

16. For this argument, the plaintiff cite the Lord Denning, Master of the Rolls, *The Discipline of Law* (Butterworths, 1979) pgs 206 and 217 wherein it is stated:

"If the defendant led the plaintiff to believe that he would not insist on the stipulation as to time and that if they carried out the work he would accept it, and they did it, he would not afterwards set up the stipulation as to time, against them. Whether it be called waiver or performance on his part it is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations."

"Where a man has led another to believe in a particular state of affairs he will not be allowed to go back on it when it would be unjust or inequitable for him to do so."

17. The plaintiff argued that under the doctrine of equitable estoppel, one party is prevented from taking advantage of another when through false language or conduct, the person to be stopped has induced another person to act in a certain way with the result that the other person has been injured in some way. According to the plaintiff, the defendant having both expressly and impliedly agreed to waive the accrued interest on rent arrears and having accepted the post dated cheques as payment of the rent arrears, the defendant is stopped from not only charging interest on the rent arrears, but also from terminating the lease agreement and re-entering the premises on account of alleged rent arrears. The plaintiff therefore maintained that it had established a prima facie case against the defendant.

18. On its part, the defendant submitted that the plaintiff has not established a prima facie case against it so as to warrant the granting of orders of injunction. The defendant maintained that by failing to pay rent when due, the plaintiff is in breach of the clear terms of the lease which it highlighted as follows:-

a. Clause 3.1 as read with Clause 3.17.1, required the plaintiff to pay the rent for the suit property not later than seven days from the date rent becomes due;

b. Clause 3.17 provides that if the plaintiff fails to pay rent or other sums due under the lease within seven days after such payments are due, the plaintiff shall pay the defendant interest on the rents or other such sum at the Interest Rate;

c. Clause 1.15 provides that interest rate in the event of a default is 5% over and above the prevailing base lending rates of the NIC Bank Kenya or 15% per annum whichever is higher.

d. The second schedule to the lease provides for an escalation/gradual increment of rent over the 10 year term of the lease.

e. Clause 6.1 entitles the defendant to re-enter the premises if the plaintiff continues with its default 30 days after being given notice.

19. The defendant further argued that the plaintiff's claim that the parties agreed that rent would be paid by way of post dated cheques is bereft of any proof as their relationship was strictly governed by the terms of the lease.

20. I have perused the plaintiff's affidavit in support of the application and I note that at paragraphs 3, 6 and 14 thereof, the plaintiffs deponent states as follows:

3. That this Honourable court be pleased to issue an order of temporary injunction, restraining the defendant, either by themselves, agents, servants and/or employees, from re-entering upon, interfering with, evicting, levying Distress, leasing out to any Third Party and/or otherwise interfering with plaintiff's possession, occupation and use of the demised premises pending the hearing and determination of this application.

6. That costs of this application be provided for.

14. That this made the plaintiff to fall into further arrears wherein the defendant wrote to it vide letter dated 2nd July, 2018 demanding for the settlement of the rent arrears and threatening legal consequences.

21. I further note that in the plaintiff's advocates letter dated 26th July 2018 (defendant's annexure "RS1" to the replying affidavit), the said advocates state as follows at paragraph 2 thereof:

"We have conferred with our client and note that, foremost, it is not contested that ours is in arrears and that cheques in payment thereof are currently being paid on presentation. This much was conceded in our letter dated July 3, 2018 addressed to your client with a copy shared with you via email."

22. Having regard to the above stated contents of the plaintiff own affidavit and letter, I find that it is not disputed that the plaintiff is in arrears of rent and is therefore in breach of the terms of the lease agreement.

23. I further find that even though the plaintiff alleged that it had made substantial payments, by way of post-dated cheques towards the settlement of the rent arrears due, no material was placed before this court to show that all the post dated cheques released to the defendants had been paid save for the payment made on 12th April 2019 for Kshs 583,333 and 13th March 2019 also for Kshs 583,333.

24. I also note that even though the plaintiff alleged that a consensus was reached by the parties to enable it pay rent by installments and to waive interest, no material was placed before me to prove that such an agreement exists.

25. From the above foregoing, I find that the plaintiff admitted that it is truly indebted to the defendant for rent arrears and that it has not established that it has a prima facie case against the defendant so as to warrant the issuance of the orders of injunction.

26. In view of my findings on the issue of prima facie case, I do not deem it necessary to consider if the other 2 conditions for granting orders of injunction have been proved. The plaintiff's prayer that the post-dated cheques it issued to the plaintiff serve as payment of rent is not capable of being granted at this stage more so considering my findings that only 2 cheques have so far been paid.

27. My finding is that the plaintiff is not entitled to the orders sought in the application dated 14th August 2019 which I hereby dismiss with costs to the defendant.

28. I now turn to consider the prayers sought in the defendants application dated 7th November 2019. The defendant seeks:

- a) *Vacant possession pending hearing and determination of the counterclaim.*
- b) *Judgment on admission for the sum of kshs 17,896,097 and;*
- c) *The striking out of the plaintiff's suit and the entry of judgment in favour of the defendant in the counterclaim.*

Vacant possession and judgment Kshs 17,896,097

29. Flowing from my findings that the plaintiff admits owing the defendant rent arrears of Kshs 17,896,097, I find that the defendant has established that it is entitled to the prayer for judgment on admission for the said amount.

30. Similarly, the fact that the plaintiff admits owing the staggering sum of Kshs 17,896,097 rent arrears is a clear pointer that it is a breach of the terms of their tenancy agreement. I note that Clause 6.1 of the lease agreement grants the defendant the right to re-enter the leased premises in the event of a default in rent payments. The said Clause stipulates as follows:

6.1 Re-entry

If and whenever during the Term:

6.1.1 the rents (or any of them or any part of them) under this lease are outstanding for fourteen (14) days after becoming due; or

6.1.2 there is a material breach by the Tenant of any covenant or other term of this Lease or any document supplemental to this Lease for a continuous period or one month; or

6.1.3 the Tenant

6.1.3.1 enters into liquidation whether compulsory or voluntary; or

6.1.3.2 has a receiver appointed; or

6.1.3.3 has a winding-up petition presented against it either actual or threatened; or

6.1.4 the Tenant enters into an arrangement for the benefit of its creditors; or

6.1.5 the Tenant has any distress or execution levied on a material portion goods due to a judgment entered against the Tenant.

the Landlord may after having given the tenant thirty(30) days' notice and the tenant fails to remedy the breach within the notice period peaceably and in accordance with the law re-enter the premises (or any part of them in the name of the whole) at any time (and even if any previous right of re-entry has been waived) and then the term will absolutely cease but without prejudice

to any rights or remedies which may have accrued to the Landlord against the tenant in respect of any breach of covenant or other term of this Lease(including the breach in respect of which the re-entry is made).

31. It is trite law that courts exist to enforce agreements between parties and that a court of law cannot re-write the contract between the parties. (See ***National Bank of Kenya Limited v Pipeplastic Samkolit & Another*** [2002] 2EA 495).

32. My finding is that the defendant has established that not only is it entitled to the admitted rent arrears of Kshs 17,896,097 but that it is entitled to the vacant possession of the leased premises. I therefore allow the defendants application in terms of prayers (3) and (4) thereof.

33. Turning to the defendant's prayer for the striking out of the plaintiff's suit and the entry of judgment for the defendant as sought in the counter claim, I find that these are prayers that can only be granted after hearing the main suit and counter claim on their merits. I note that the defendant has not established the position regarding the post-dated cheques issued to it by the plaintiff as at the time of the delivery of ruling and if the rent arrears still stands, as was stated in the counterclaim or if the amount has reduced or increased.

34. Courts have taken the position that they will not strike out suits or pleadings summarily except in very exceptional circumstances. In ***Crescent Construction Company Ltd v Delphis Bank Ltd*** [2007] eKLR it was held:-

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honored legal principle.”

35. In conclusion and as I have already stated in this ruling, the plaintiff's application dated 14th August 2019 is hereby dismissed with costs to the defendant while the defendant's application dated 7th November 2019 is allowed in terms of prayers 3 and 4 thereof with costs to the defendant.

Dated, signed and delivered via Microsoft Teams at Nairobi this 11th day of June 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Nyanchoka for Omiti for the plaintiff.

Mr. Owiti for the defendant

C/A – Sylvia