



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL CASE NO. 3 OF 2019**

**WILD LIVING COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**VARIZONE LIMITED.....DEFENDANT**

**Coram: Hon. Justice R. Nyakundi**

**Mr. Wachira for the appellant**

**Mr. Ngaira for the Respondent**

**RULING**

In a notice of motion dated 20<sup>th</sup> May, 2019 before this court the applicant seeks the following orders expressed to be brought under Section 1A, 1B, 3, 3A and Order 40 Rules (1), (2) and (4) of the Civil Procedure Rules: -

- b. The defendant be restrained form terminating the lease dated 1.7.2017 on grounds of breach of clause 13 of the lease regarding the sublease dated 1.1.2019 between the plaintiff and Endoros enterprises Limited pending the inter-partes hearing of this application.**
- c. The defendant be restrained form terminating the lease dated 1.7.2017 on grounds of breach of clause 13 of the lease regarding the sublease dated 1.1.2019 between the plaintiff and Endoros Enterprises Limited pending the determination of this application.**
- d. The dispute herein be referred to the parties' arbitrator, Mr. Dennis Kinaro Advocate for hearing and determination.**
- e. The defendant be restrained form terminating the lease dated 1.7.2017 on grounds of breach of clause 13 of the lease regarding the sublease dated 1.1.2019 between the plaintiff and Endoros enterprises Limited pending the hearing and determination of the intended arbitration.**
- f. Costs of this application be provided for.**

The applicant filed an affidavit in support of the main.

The respondent filed grounds of opposition stating that thee exist a lease agreement between the parties dated 1<sup>st</sup> July, 2017. That the lessee has been in breach of clause 13 of the said lease agreement by entering into a sub-lease with a third party without the consent of the lessor. The respondent in response raised a plea of the applicant having breached the terms of the lease and then rushing to court to seek an injunction.

I have considered the notice of motion affidavits, grounds of opposition and brief submissions. I shall not delve into the merits of the alleged violations of the lease agreement.

In this application under consideration determination of the question raised is whether the applicant has satisfied the criteria for grant of interlocutory injunction.

It is a trite law that there are those conditions to be met before an interlocutory injunction can be granted as exposted in **Giella v Cassman Brown Co. Ltd 1973 E.A. 358**.

**“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 harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”**

In the instant motion it should be observed that an affidavit shown by the applicant and grounds of opposition show existence of a valid lease agreement that in so far as the terms of the ease are concerned the applicant is in breach of clause 13 of the said lease agreement. These facts do not constitute grounds or evidence bearing upon the principles outlined in the case of **Giella** (supra) cited above.

A good deal of the arguments in this case as submitted by applicant counsel as I understand them fail to establish a prima facie case with a probability of success at the trial of the main suit.

In line with the dicta by the Court of Appeal in **Housing Finance Company of Kenya Ltd v Njuguna 1176 (CCCK)** where the court held: -

**“Courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they are at liberty to negotiate and even vary the terms as and when they choose. This they must do together with the meeting of the minds. If it appears to a court that one party varied the terms of a contract with another, whether the knowledge, consent or otherwise of the other and the other demonstrates that the contract did not permit such variation, this court will say no to the enforcement of such a contract.”**

Applying the above principles and divergences arising from the interpretations and execution of the lease agreement will first be settled by arbitrations between the parties to the contract. In this case not only have the parties agreed to arbitration though the arbitration clause is yet to be invoked. It would in my view be quite wrong to allow the same parties approach this court to endeavor in settling the issue in dispute at this forum.

I am of the view that the applicant fails in both limbs of **Giella v Cassman Brown** and also on this court being asked to enter into the province of interpreting the lease notwithstanding existence of an arbitration clause. In the result the application is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

.....

**R. NYAKUNDI**

**JUDGE**