



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CAUSE NO. 390 OF 2016

REGISTERED TRUSTEES GERTRUDE'S GARDENS.....APPLICANT

- VERSUS -

KENYA MEDICAL WOMEN'S ASSOCIATION.....RESPONDENT

KEYSIAN AUCTIONEERS.....INTERESTED PARTY

RULING

- 1.** The **KENYA MEDICAL WOMEN'S ASSOCIATION** owns a property, **L.R No. 37/262/2 KODI ROAD, NAIROBI**. Upon the said property the said Association has constructed a building.
- 2.** The plaintiff, **GERTRUDE'S GARDEN CHILDREN'S HOSPITAL**, has leased the building belonging to the defendant, **KENYA MEDICAL WOMEN'S ASSOCIATION**.
- 3.** The relationship between the 2 parties is that of a Landlord and a Tenant, and the said relationship is grounded upon a Lease Agreement dated 11th September 2013.
- 4.** On 19th August 2016, the Landlord, acting through **KEYSIAN AUCTIONEERS**, levied distress in respect of alleged rental arrears amounting to Kshs. 6,927,115/50.
- 5.** The proclamation issued by the Auctioneers also indicated that the auctioneer's charges was Kshs. 800,000/-, whilst the advocate's charges would be Kshs. 200,000/-.
- 6.** It is the action taken by the auctioneers which prompted this case.
- 7.** The Applicant's case was that there were no rental arrears payable by it.
- 8.** The sums being claimed by the Landlord are said to be erroneous, as the very foundation upon which they are based was doubtful.
- 9.** According to the Applicant, the parties had negotiated all the pertinent terms of the Lease Agreement, including the rents. And the rent which was allegedly agreed upon was Kshs. 400,000/-.
- 10.** However, the landlord is said to have sneaked into the lease document, a clause which stipulated that the rent was agreed upon in the sum of Kshs, 500,000/-.

11. On the other hand, the landlord categorically denies having done anything that was clandestine. Indeed, the landlord points out that it did draw the attention of the Applicant to the fact that there were proposed changes to pages 2 and 3 of the lease agreement.
12. As those two pages of the lease contained terms for the payment of rent, it is the view of the landlord that when the tenant signed the lease, that signified the tenant's acceptance of the terms contained therein.
13. But the tenant's view was that an acceptance, in the circumstances prevailing could only have been signified through the same kind of negotiations as had taken place earlier, in relation to the other terms of the lease.
14. After the lease was signed, the landlord sent an invoice to the tenant, citing the Quarterly rent payable. Upon receipt of the invoice, the tenant noted that the landlord had cited the rent as being Kshs. 500,000/- per month.
15. As the tenant "knew" that the rent it had negotiated for was Kshs. 400,000/- per month, it remitted payments based on the figure.
16. Each of the parties stuck to their respective positions, but they then entered into negotiations.
17. The tenant has provided correspondence which shows, on a *prima facie* basis, that the dispute was ultimately resolved on 11th March 2016.
18. The terms of the alleged agreement were as follows;
- i) The tenant would pay rental arrears from February 2013 up to, and including February 2015;**
 - ii) The arrears would be pegged on a rate of Kshs. 500,000/- per month;**
 - iii) The landlord would give a concession of 50% of the arrears;**
 - iv) Arrears would be paid by the tenant, whereupon the landlord would surrender the lease dated 11th September 2013, and the parties would sign a fresh lease.**
 - v) The fresh lease would have the monthly rent of Kshs. 400,000/- from 1st October 2015, with a 5% yearly escalation.**
 - vi) The tenant would give to the landlord, some room wherein the landlord would run a "Well Woman Clinic".**
19. Although the terms of the alleged resolution were set out in a letter from the landlord's advocates, the landlord has denied the existence of the said resolution.
20. The landlord has also disowned the invoices which indicated the terms of the alleged "new rents".
21. Meanwhile, the tenant indicated that, in reliance upon the terms of the resolution, it had already effected payment to clear the arrears.
22. The landlord took steps to levy distress for rents because it insisted that there were still outstanding arrears of rent. But the tenant insists that there were no rental arrears.
23. Clearly, therefore, the parties were not reading from the same page, save to the extent that they agree that they both executed the Lease dated 11th September 2013.

24. But even on the issue of the rent amount cited in that Lease, there is controversy. The landlord says that the Lease speaks for itself, so that the “*Agreed Rent*” is Kshs. 500,000/- per month. However, the tenant insists that the negotiated and “*Agreed Rent*” was Kshs. 400,000/- per month.
25. The question that then arises is whether or not the landlord had inserted the rental sum of Kshs. 500,000/- into the Lease, without the concurrence of the tenant.
26. In my considered opinion that failure to agree, constitutes a dispute.
27. Another dispute has arisen regarding the tenant’s assertion that the first dispute (*over the monthly rents payable*), had been resolved after protracted negotiations.
28. This court would have the ability to make a determination on the issues. However, it is an express term of the Lease dated 11th September 2013 that;
- “Save as may be specifically provided all questions hereinafter in dispute between the parties hereto, any claim for compensation or otherwise not mutually settled and agreed between the parties hereto shall be referred to arbitration by a single arbitrator assisted by such assessors or professional advisors as the arbitrator shall deem necessary to appoint to sit with him to be appointed in default of agreement by the chairman for the time being of the Institute of Surveyors of Kenya and every award made under this clause shall be expressed to be made under the Arbitration Act 1995 or any Act or Acts for the time being in force in Kenya in relation to arbitration”.**
29. By incorporating the Arbitration Agreement into the Lease, the parties had chosen the medium through which the disputes between them would be resolved.
30. The Law enjoins the court to respect the said choice and to give effect to it.
31. Meanwhile, if the tenant’s assets were to be sold-off by the Distress Bailiff, that would literally mean that the tenant could not operate the medical facility which is located at the suit premises. The goods which have been proclaimed include hospital beds and microscopes, as well as reception chairs and fridges.
32. Of course, the tenant cannot be permitted to use the fact that it provides medical services to deprive the landlord of its rental dues.
33. But it is equally true that if the Distress Bailiff were permitted to cart away the tenant’s property whilst the dispute was being referred to arbitration, the arbitral process may be rendered futile. I so find because reputation is a vital element in the service industry, such as a medical facility.
34. I would like to believe that the interest of the landlord is not to destroy the tenant, but only to recover what is due to it.
35. In that respect, justice also demands that whilst the subject matter of the dispute needs to be safeguarded, the landlord cannot be kept away from its entitlement.
36. If funds were to be either paid into court or into a joint interest – earning account, that would mean that the money was not getting to the landlord.
37. Whilst the quantum payable remained an issue to be resolved, it is clear that the tenant concedes that, Kshs. 400,000/- is payable to the landlord, monthly. There is no reason to warrant the withholding of that sum from the landlord.
38. On its part, the landlord wants to receive the full sum of Kshs. 500,000/- monthly. Because that sum is the very source of the dispute, I find that it is premature for the court to order the tenant to pay it in full,

whilst the dispute was being addressed through arbitration.

39. The next question is what should happen to the difference of Kshs. 100,000/- per month.

40. In my considered opinion, neither of the parties should derive a benefit from that sum; but neither should the parties be exposed to the prejudice which would accompany a situation in which either of the parties was holding the said funds. If the tenant held onto the funds, but was later held to be liable to pay it all, the burden may be heavy. On the other hand, if the landlord received the money, but had to either pay it back or had to give credit for it, that would be disruptive of its accounts.

41. The most appropriate interlocutory remedy therefore, is to have the said sums held in an interest-earning account, in the joint names of the advocates for the parties; and that is what I direct should happen.

42. When the arbitrator gives his award, the money would be paid out in line with the award; and any interest already earned would also be paid out in accordance with the arbitral award. To my mind, neither of the parties would be prejudiced by this order.

43. In the final analysis, I order that the dispute be referred to arbitration in accordance with the Arbitration Agreement embodied in the Lease.

44. The tenant will pay rents of Kshs. 400,000/- per month, to the landlord.

45. The tenant will deposit Kshs. 100,000/- monthly, into a joint interest-earning account, to be held in the names of the advocates for the respective parties.

46. These orders will remain in force until the arbitrator makes his award.

47. The process of levying distress shall be put on hold, and may only resume if the tenant fails to comply with the orders herein.

48. The fee, if any, payable to the distress bailiff, for the work it had already done, will be paid by the party as determined by the arbitrator. In other words, the arbitrator will determine, inter alia, whether it is the plaintiff or the defendant who is liable to pay the distress bailiff. That decision will be informed by, amongst other factors, the question of who the arbitrator finds liable.

49. Finally, the costs of the application dated 29th August 2016 shall abide the decision of the arbitrator. If the applicant is successful in the arbitration, it will also get the costs of the application. Whilst if the respondent succeeds in the arbitration, it shall also get the costs of the application herein.

DATED, SIGNED and DELIVERED at NAIROBI this 15th day of March 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Biwott for Kimathi for the Applicant

Miss Fundi for the Respondent

No appearance for the Interested Party

Collins Odhiambo – Court clerk.