



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC 36 OF 2020

TUSKER MATTRESSES LTD..... PLAINTIFF

VERSUS

SHILOAH INVESTMENTS LIMITED.....1ST DEFENDANT

J.O. JOSIAH T/A NYALUOYO AUCTIONEERS.....2ND DEFENDANT

RULING

Applicants Case

Tusker Mattresses Ltd, (**hereinafter referred to as the applicant**) seeks orders that pending the hearing and determination of the Suit herein, Shiloah Investments Limited (**hereinafter referred to as the 1st Respondent**) be restrained by itself, its agents, directors, assigns or otherwise howsoever from attaching, selling or otherwise dealing with the Plaintiff/Applicant's goods stated in the proclamation dated 11/05/2020 issued by J.O. Josiah T/A Nyaluyo Auctioneers (**hereinafter referred to as the 2nd respondent**).

The applicant prays that pending the hearing and determination of the suit herein 1st Respondent be restrained by itself, its agents, directors, assigns or otherwise howsoever from harassing, levying distress or evicting the Plaintiff/Applicant from the suit premises known as Mega Plaza 2 erected on land title number Kisumu Municipality Block 7/380 and from otherwise interfering with the Plaintiff's peaceable and quiet possession of the said premises. That the applicant is not liable to pay the Auctioneer's Fees as the proclamation and distress herein is irregular and illegal; Costs of this Application be borne by the Defendants/Respondents.

The application is based on grounds that the applicant, limited liability Company carrying on the business of retail stores in the name and style of "Tuskys Supermarkets" with branches across the country, entered into a lease of commercial space measuring 36,920sq. ft. in the building popularly known as MEGA PLAZA 2 erected on land Title No. KISUMU MUNICIPALITY BLOCK 7/380.

The outbreak of the Coronavirus (Covid -19) Pandemic in Kenya on 13/03/2020 curtailed human and commercial activities within all places that ordinarily thrive due to large gatherings of people including shopping malls such as the demised premises.

The decline of commercial and human activities within the demised premises and the general economic malaise brought about by the COVID-19 Pandemic has resulted in a drastic drop of 35% in the Applicant's sales at the demised premises in April and May 2020 compared to a similar period the previous year.

Due to this negative business environment and the drastic drop in its sales, the Plaintiff has fallen into rent arrears totalling KSHS. 10,406,414.00 being rent and service charge for the months of April and May 2020.

Faced with the above predicament, the Applicant wrote to the 1st Respondent/Lessor (via email) on 2/05/2020 requesting a two months' grace period and offering a payment proposal to settle the rent arrears.

On 8/05/2020 the 1st Respondent wrote back to the Applicant (via email) rejecting the Applicant's proposal and threatening to distress for rent.

The Applicant has made fervent and desperate attempts to prevail upon the 1st Respondent to consider its payment proposal in view of the adverse economic environment brought about by the Covid-19 health/economic crisis to no avail.

On 11/05/2020 the 2nd Respondent acting on instructions from the 1st Respondent issued a Proclamation to attach the Applicant's movable goods in distress for rent.

The Proclamation dated 11/05/2020 is overtly illegal and irregular as it fails to comply with the mandatory provisions of Rule 12 of the Auctioneers Rules, 1997 requiring a Proclamation of movable goods to indicate the value of specific items and the condition of each item proclaimed.

The impugned Proclamation does not contain an inventory of the specific items proclaimed and their estimated value and condition as required by Rule 12 of the Auctioneers Rules, 1997 but merely and casually states that “As the Tenants continue with his business selling stock on the premises, we hereby proclaim all the goods in the supermarket... And that an itemized inventory shall be made upon actual seizure on the expiry of this proclamation within 14 days as indicated above”.

The requirements of Rule 12 of the Auctioneers Rules are mandatory and cannot be dispensed with and any distress or execution made pursuant to an irregular Proclamation is illegal and void *ab initio*.

The 2nd Respondent (Auctioneer) has raised an Invoice of Kshs. 1,040,641.40 against the Applicant on the basis of the irregular and illegal proclamation and distress. The 2nd Respondent (Auctioneer) is not entitled to claim the costs of an illegal distress more so when the illegality is occasioned by the Auctioneer.

The proclaimed goods constitute the Applicant's entire stock which is primarily its tools of trade as The Applicant would not be able to operate a supermarket business without any stock.

The Applicant employs 94 employees at the premises all of whom will be rendered redundant and jobless should the Applicant be forced to close down the demised premises due to the illegal attachment and sale of its entire stock.

On 15/03/2020 the National Council on the Administration of Justice (NCAJ) under the chairmanship of the Chief Justice of the Republic of Kenya Hon. Justice David K. Maraga directed that in view of the COVID-19 pandemic in Kenya execution of civil orders, decrees and evictions be suspended until further notice.

In line with the directions of the NCAJ, the Chairman of the Auctioneers' Licensing Board issued a Memo directing all Auctioneers to adder to the NCAJ directive.

The proposed distress for rent is not only illegal and irregular as aforesaid but it also unjust and insensitive. The Applicant stands to suffer great prejudice and irreparable loss and damage if the Respondents proceed with the illegal distress including closure of business as a result of the attachment and sale of entire stock and disruption in business and disturbance to customers/shoppers and employee during proposed attachment which will worsen the already bad business environment. He laments that there will be loss of revenue from sales of attached goods and that the attachment may force the Applicant to abruptly shut down the branch and declare redundancy of its 94 employee working in the branch.

The loss that the Applicant stands to suffer aforesaid cannot be compensated by an award of damages.

On its part the 1st Respondent stands to suffer no loss or prejudice as the Applicant has offered a payment plan and moreover the 1st Respondent is holding a Deposit of Kshs. 9,414,600/= as security for the payment of rent and service charge. (See:- Sublease p.2).

1ST RESPONDENTS REPLY

The Defendants reply is that according to the terms of the tenancy agreement between the Applicant and the Respondent the Applicant's obligation to pay the rents as and when they fall due is not dependent on the business or economic environment but is absolute.

That the lease grants the 1st Respondent unlimited right to levy distress to recover rents and other monetary obligations of the Applicant if the same remain unpaid for seven days whether demanded or not. The Applicant admits being in arrears of rent and service charges for periods exceeding 7 days wherefore the right to f the 1st respondent to levy distress for rent to recover the arrears has arisen.

The directive by the Chief Justice referred to therein is very clear and specific to civil orders, decrees and evictions arising out of Court Judgements and orders. In this instant case the 2nd Respondent is not executing any Court Order or decree.

The directive by the chief justice does not have the force of law and was only applicable before the Courts began holding limited hearings which they are now doing.

That the 1st Respondent admits that the Applicant made a proposal on April 16th 2020 to pay the rent arrears the proposal which he never adhered to and that the 1st Respondent provides services to the tenants in the mall including the Applicant.

These services include electricity and water in common areas, cleaning and security services and insurance for which it pays the service providers from the rents and service charges paid by the tenants.

If the tenants are allowed to not pay rent and service charges, the 1st Respondent will default in the payment of its obligations to the service providers who would then sue the 1st Respondent and also withdraw the services.

The 1st Respondent also has bank loans and overdrafts to service from the rents and service charges paid by its tenants including the

Applicant who is the anchor tenant in the subject mall.

That it is therefore imperative that the Applicant among other tenants pay their share of rents and service charges to the 1st Respondent so that it can in turn meet its obligations to the service providers and so that the 1st Respondent can continue providing services to the tenants and their customers in the subject mall.

The 1st Respondent is a sister company of Grandways Venture Limited and the two companies have common shareholders and directors.

That Grandways Venture Limited owns a property in Kitale Town registered as KITALE MUNICIPALITY/BLOCK7/14 known as MEGA CENTRE. The Applicant has been a tenant of basement, ground and mezzanine floors therein. That on or about the 18th April, 2020 put up a notice at the premises that it had closed its business there for stock-taking.

That contrary to the said notice, the applicant from the said 18th April and 20th April 2020 sneaked out stock, properties from the premises and vacated the same without notice leaving behind rent arrears of Kshs. 3,278,487.00 in respect of the premises and Kshs. 2,200,000.00 in respect of a lease hire agreement for the Landlord's equipment.

The Applicant has in the last three to four months embarked on closing several of its branches countrywide including Kitale and over the same period of the last three to four months, the applicant has defaulted in paying its suppliers for supplies made to it. The applicant is not restocking its supermarket in the suit premises because its suppliers are not supplying it with fresh stock and it is not able to make advance payments or payment on delivery.

The 1st respondent therefore believes that in the event the injunctive orders herein are maintained the applicant will do what it did in their Kitale property by surreptitiously vacating the premises and running away with the rent arrears.

ANALYSIS AND DETERMINATION

I have considered the application and balanced the rights of the applicant against the rights of the 1st respondent and do find that there is no doubt the applicant is in rent arrears. The lease agreement grants the 1st Respondent unlimited right to levy distress to recover rents and other monetary obligations of the Applicant if the same remain unpaid for seven days whether demanded or not. The Applicant admits being in arrears of rent and service charges for periods exceeding 7 days therefore the right to the 1st respondent to levy distress for rent to recover the arrears has arisen.

The applicant's reasons for failing to pay rent are not envisaged in the lease agreement.

As stated by the court of appeal in the case of *Charter House Investments Ltd vs. Simon K. Sang and others, Civil Appeal No. 315 of 2004*:

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the *Giella* case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”

In this case the plaintiff has no real complaint against the 1st respondent other than the mode of attachment by the auctioneers. I do find that the plaintiff has not established a prima facie case with a probability of success as he has admitted that he is in rent arrears.

Moreover this court finds that the damage that is likely to be suffered by the plaintiff cannot be described as irreparable as it can be compensated in monetary terms.

Furthermore on balance of convenience, weighing on the rights of the plaintiff and the defendant and the obligations of both, the 1st defendant, I do find that the 1st respondent will be more inconvenienced if the injunction is issued to stop him from collecting the rent arrears as agreed in the sub lease. This is because the 1st Respondent provides services such as electricity and water in common areas, cleaning and security services and insurance for which it pays the service providers from the rents and service charges paid by the tenants if the court grants an injunction against the landlord from recovering rent arrears he will be seriously inconvenienced.

Lastly, an injunction is an equitable remedy that requires that those who seek the same should come with clean hands. The 1st Respondent has demonstrated that she is a sister company of Grandways Venture Limited and the two companies have common shareholders and directors. That Grandways Venture Limited owns a property in Kitale Town registered as Kitale Municipality/Block7/14 known as Mega Centre. The Applicant has been a tenant of basement, ground and mezzanine floors therein. That on or about the 18th April, 2020 put up a notice at the premises that it had closed its business there for stock-taking. That contrary to the said notice, the applicant from the said 18th April and 20th April 2020 removed stock, properties from the premises and vacated the same without notice leaving behind rent arrears of Kshs. 3,278,487.00 in respect of the premises and Kshs. 2,200,000.00 in respect of a lease hire agreement for the Landlord's equipment.

By failing to pay rent in the Kitale property that is owned by the sister company to the 1st respondent and removing their property from the premises without paying rent, the applicants acted in bad faith.

The upshot of the above is that the application is not allowed. Costs in the cause.

DATED, DELIVERED and SIGNED THIS 8th DAY OF JUNE, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This ruling is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE