



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 115 OF 2020

LASER EYE CENTRE LIMITED.....PLAINTIFF

VERSUS

PBM NOMINEES LIMITED.....DEFENDANT

RULING

The facts giving rise to this suit are to a large extent not disputed. The plaintiff carries on business as a day care eye hospital under the name Laser Eye Centre. The defendant is the registered owner of all that property known as L.R No. 187/IX/159(Original Number 88-95) popularly known as Sarit Center. On 15th February, 2017 the plaintiff and the defendant entered to a sub-lease in respect of the premises known as Unit No. TF9 on the 3rd Floor of the said property (hereinafter referred to as “the suit property”). The sub-lease was for a term of 5 years 6 months with effect from 1st February, 2015 and expiring on 31st July, 2020.

On 8th July, 2019, the defendant wrote to the plaintiff notifying the plaintiff that it did not intend to renew the plaintiff’s sub-lease upon expiry on 31st July, 2020. The defendant informed the plaintiff that the notice was intended to enable the plaintiff to look for alternative premises in good time. The defendant asked the plaintiff to ensure that the suit property is handed back to the defendant on 31st July, 2020 in accordance with the terms of the sub-lease. At the request of the plaintiff, the defendant agreed to grant the plaintiff a license to continue occupying the suit property for a further 1 year from the date of expiry of the current sub-lease on terms and conditions that were contained in the defendant’s letter dated 6th May, 2020. By a letter dated 13th May, 2020, the plaintiff informed the defendant that the terms under which a license was being offered to the plaintiff were harsh and oppressive. The plaintiff informed the defendant that it had considered its options and had decided to move out of the suit property when its lease expires on 31st July, 2020.

On 11th June, 2020 less than a month after its letter dated 13th May, 2020 in which it informed the defendant that it will move out of the suit property at the expiry of its lease on 31st July, 2020, the plaintiff wrote again to the defendant requesting for the extension of the lease over the suit property. In the letter, the plaintiff stated that after its letter of 13th May, 2020 aforesaid, it proceeded to approach international suppliers of their state-of-the-art laser eye surgical and technical medical equipment to provide qualified technicians for the purposes of dismantling and re-installing the equipment at its new premises before the end of its sub-lease on 31st July, 2020. The plaintiff stated further in the said letter that the said suppliers which are based in Italy, United States of America and South Africa indicated that they were unable to send their technicians to Kenya any time soon due to the worsening worldwide Covid-19 pandemic. The plaintiff requested the defendant to grant it a 12-month lease extension on similar terms and conditions. Through a letter dated 15th June, 2020, the defendant informed the plaintiff that the defendant was prepared to grant it a license for a period of 1 year at the expiry of its sub-lease on 31st July, 2020 on the terms and conditions that had been communicated to the plaintiff in its letter dated 6th May, 2020. The defendant asked the plaintiff to confirm in writing by 17th June, 2020 that the terms and conditions that were contained in the defendant’s letter dated 6th May, 2020 were acceptable to it. The defendant informed the plaintiff that if the defendant did not receive the plaintiff’s confirmation of the said terms by 17th June, 2020, the defendant would assume that the plaintiff would vacate the suit property by 31st July, 2020. The plaintiff wrote to the defendant on 17th June, 2020 reiterating that the terms under which the defendant had offered them a license was not acceptable to them and that they would not submit to the defendant’s demands even with the change in the circumstances. The plaintiff stated that they were only prepared for a lease extension on the same terms and conditions as the present sub-lease. By a letter dated 18th June, 2020, the defendant told the plaintiff to accept the terms and conditions under which it had offered it a 1-year license or make arrangements to move out of the suit property at the end of its sub-lease on 31st July, 2020.

On receipt of the defendant’s said letter dated 18th June, 2020, the plaintiff decided to file this suit on 25th June, 2020 seeking the following reliefs;

1. A permanent injunction restraining the defendant from evicting or interfering with the plaintiffs’ possession of the suit property for a period of 12 months or such time as Covid-19 pandemic is brought under control worldwide or in Kenya in particular, upon the

plaintiff's payment of the current rent and service charge.

2. A permanent injunction restraining the defendant from forcibly or otherwise gaining entry into the suit property in order to protect the confidential records of the plaintiff's patients for a period of 12 months or such time as Covid-19 pandemic is brought under control worldwide or in Kenya in particular.

3. An order compelling the defendant to grant the plaintiff an extension of its sub-lease dated 15th February, 2017 for a period of 12 months or such time as Covid-19 pandemic is brought under control worldwide or in Kenya in particular.

4. In the alternative to (3) above, an order that the plaintiff does remain in occupation of the suit property and be allowed to utilize the suit property for the use and purpose as a Consultant Ophthalmologist and Laser Eye Centre for a period of 12 months or such time as Covid-19 pandemic is brought under control worldwide or in Kenya in particular.

5. An order compelling the defendant to continue to receive rent and service charge from the plaintiff as may be due from the plaintiff at the current rate.

6. A permanent injunction restraining the defendant from denying the plaintiff's patients access to the suit property for a period of 12 months or such time as Covid-19 pandemic is brought under control worldwide or in Kenya in particular upon the plaintiff's payment of the current rent and service charge.

7. Any other relief that the court deems fit and just to grant.

8. Costs of the suit.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 24th June, 2020 seeking the following orders;

1. A temporary injunction restraining the defendant from evicting or interfering with the plaintiffs' possession of the suit property upon the plaintiff's payment of the current rent and service charge pending the hearing and determination of the suit.

2. A mandatory injunction compelling the defendant to continue to receive rent and service charge from the plaintiff as may be due from the plaintiff at the current rate pending the hearing and determination of the suit.

3. A temporary injunction restraining the defendant from forcibly or otherwise gaining entry into the suit property in order to protect the confidential records of the plaintiff's patients pending the hearing and determination of the suit.

4. An order of status quo, that is to say; that the plaintiff be allowed to continue to utilize the suit property for the use and purpose as a Consultant Ophthalmologist and Laser Eye Centre and that its patients be granted unrestricted access to the suit property pending the hearing and determination of the suit.

5. The costs of the application to be awarded to the plaintiff.

The application was brought on the grounds set out on the face thereof and on the affidavit of the plaintiff's medical director, Dr. Mukesh Joshi sworn on 24th June, 2020 in which he set out the history of the dispute between the plaintiff and the defendant which I have highlighted at the beginning of this ruling. It is not necessary for me to repeat all that I have stated above here. In summary: The plaintiff averred that it was impossible for the plaintiff to yield up and vacate the suit property upon the expiry of its sub-lease on 31st July, 2020 in the absence of specialist engineers to decommission the plaintiff's medical equipment owing to the unforeseen circumstances presented by the worldwide Covid-19 pandemic. The plaintiff averred that it attempted to engage the defendant in light of the prevailing conditions with a request that it extends the sub-lease dated 15th February, 2017 for a period of 12 months on the current terms and conditions but the defendant was adamant and reiterated its offer to grant to the plaintiff 1-year license on the impossible and non-negotiable terms. The plaintiff averred that in an effort to coerce the plaintiff to accept the said impossible and non-negotiable terms, the defendant threatened the plaintiff that it would start showing the suit property to prospective tenants and that it expected the plaintiff to vacate the premises by 31st July, 2020. The plaintiff averred that there was no prospective tenant that had made payment to the defendant to occupy the suit property and as such the defendant stood to suffer no prejudice if the orders sought in its application were granted.

The plaintiff averred further that it was a fully paid up tenant and would continue to honor its obligations to pay rent and service charge to the defendant. The plaintiff averred that it was at risk of having its medical equipment forcibly removed from the suit property by the defendant and being forcibly evicted. The plaintiff averred that unsecure dismantling of its medical equipment will pose a health hazard and risk to human life and the environment as well as cause damage and/or complete destruction to the said equipment. The plaintiff averred that it was in the interest of justice for the court to grant an equitable relief to the plaintiff in light of the unforeseen intervening obstacles created by the Covid-19 pandemic which had rendered the plaintiff's ability to vacate the suit property practically impossible. The plaintiff averred that if the orders sought were not granted, the plaintiff would suffer irreparable loss as it would be forced to close down thereby denying thousands of patients essential services and critical ophthalmological care offered by the plaintiff.

The plaintiff's application was opposed by the defendant through a replying affidavit sworn on 10th July, 2020 by its Chief Operations Officer, Nitin Shah. In the affidavit, the defendant averred that the plaintiff's sub-lease would be determined by effluxion of time on 31st July, 2020 and under clause 24 of the sub-lease, no landlord and tenant relationship would be capable of being created between the parties other than by an agreement in writing signed by both parties. The defendant averred that it had no intention of renewing or extending the plaintiff's lease and had given the plaintiff a notice to that effect on 8th July, 2019. The defendant averred that it was until 8 months later on

7th April, 2020 that the plaintiff informed the defendant that it was unable to secure alternative premises and made a request for renewal of the lease. The defendant averred that through a letter dated 15th April, 2020, the defendant informed the plaintiff that it had no intention of renewing the lease upon its expiry on 31st July, 2020.

The defendant averred that thereafter there were without prejudice discussions between the parties for the defendant to issue the plaintiff with a 12 months' license to occupy the suit property. The defendant averred that plaintiff rejected its offer of a license and indicated that it would vacate the suit property upon the expiry of its sub-lease. The defendant averred that plaintiff initiated negotiations again with a view to retain possession of the suit property and that the defendant reiterated its offer of a license which was once again rejected by the plaintiff which insisted on occupying the suit property on its own terms. The defendant averred that after rejecting the defendant's license offer, the plaintiff was bound to vacate the suit property upon the expiry of its sub-lease on 31st July, 2020. The defendant averred that by rejecting the defendant's offer of a license and turning to court to obtain extension of the sub-lease on terms unacceptable to the defendant, the plaintiff was misusing the and abusing the court process. The defendant averred that the single reason that the plaintiff has given for its alleged inability to vacate the suit property at the expiry of the sub-lease is flimsy and untenable. The defendant averred that the plaintiff had not placed any evidence before the court of the alleged special nature of its equipment on the suit property. The defendant averred that there was no evidence that Kenyans could not move the said equipment. The defendant averred that the said excuse given by the plaintiff for refusing to move out of the suit property was an afterthought in that the same was raised for the first time in a letter dated 11th June, 2020. The defendant averred that the plaintiff knew from mid-march that the country was under lockdown and waited until June to claim that it could not vacate the suit property due to lack of experts to move its equipment.

The defendant averred that granting of the orders sought would amount to a grave violation of the defendant's constitutional right to property as guaranteed and protected under article 40 of the Constitution of Kenya. The defendant averred that the plaintiff's suit had no basis in that; the defendant was not guilty of breach of the sub-lease, there was no violation of any of the plaintiff's rights, the sub-lease that created landlord and tenant relationship between the parties expires on 31st July, 2020 and the parties had not entered into any other agreement creating any new relationship between them. The defendant averred that the orders sought if granted would defeat the purpose of freedom of contract and would set a bad precedent for tenants who would use and abuse the court process to force extension of leases without the necessary agreement between parties.

The defendant averred that the plaintiff had failed to establish a prima facie case to warrant the court's intervention in its situation and as such the orders sought were not warranted. The defendant averred further that if the orders sought were granted, the court would have in effect made the plaintiff a protected tenant under the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Chapter 301 Laws of Kenya against the wishes of the defendant. The defendant averred that the court had no jurisdiction to coerce the defendant to enter into an agreement with the plaintiff and on terms not acceptable to the defendant.

The plaintiff filed a supplementary affidavit sworn by Dr. Mukesh Joshi on 13th July, 2020. In the affidavit, the plaintiff averred that in the negotiations that the plaintiff had with the defendant on the extension of the lease, the defendant insisted on malicious terms and impossible and unaffordable conditions for the grant of a 12 month's license to the plaintiff. The plaintiff averred that the said terms and conditions were tailored to make the acceptance thereof impossible for the plaintiff. The plaintiff denied that it waited for one year to work out the logistics for moving out of the suit property. The plaintiff averred that the difficulties that it was facing were not foreseeable as at the time it received a notice from the defendant that the defendant would not renew the sub-lease. The plaintiff reiterated that the defendant would not suffer any prejudice if the orders sought were granted. The plaintiff denied that a controlled tenancy would be created by granting of the orders sought by the plaintiff.

The plaintiff's application was heard by way of written submissions. The plaintiff filed submissions dated 17th July, 2020 while the defendant filed submissions dated 22nd July, 2020. In its submissions, the plaintiff framed three issues for determination namely; whether the plaintiff has serious/fair issue to be tried in the main suit, whether the plaintiff stands to suffer irreparable harm and whether the balance of convenience lies in favour of the plaintiff. On the first issue the plaintiff submitted that it had established a prima facie case which raises serious issues. Among these issues, the plaintiff contended were whether the plaintiff was entitled under common law to an equitable relief in the absence of force majeure clause in the sub-lease between the parties, whether the plaintiff had been prevented from meeting its obligations to the defendant to vacate the suit property by 31st July, 2020 and whether the court could issue equitable relief by way of extension of the plaintiff's sub-lease out of necessity in light of the unforeseen circumstances presented by the Covid-19 pandemic. On whether the plaintiff is likely to suffer irreparable harm, the plaintiff submitted that the defendant had insisted that the plaintiff must vacate the suit property by 31st July, 2020 and as such if the court fails to grant the orders sought, the plaintiff would be forcibly evicted from the suit property which will result in the destruction of its valuable medical equipment on the suit property and suffering not only to the plaintiff but also to thousands of patients. On whether the balance of convenience tilts in favor of the plaintiff, the plaintiff submitted that that is the case because the defendant had not yet let the suit property to any other party and will not suffer any prejudice if the orders sought are granted. The plaintiff urged the court to grant the orders sought in its application. Together with the submissions, the plaintiff filed a digest of authorities dated 17th July, 2020.

In its submissions in reply, the defendant framed four issues for determination by the court namely; whether a tenant can impose itself on a landlord, whether the plaintiff had established a prima facie case with a probability of success, whether the plaintiff stands to suffer irreparable harm that cannot be compensated by way of damages and whether the balance of convenience favours the plaintiff. On the first issue, the defendant cited Kasturi Limited v Nyeri Wholesalers Limited [2014]eKLR and submitted that a tenant cannot impose or force him/herself/itself on a landlord. The defendant submitted that the issues before the court are too plain for argument. The defendant submitted that the plaintiff's sub-lease is set to expire on 31st July, 2020 and that the plaintiff was served with a notice of non-renewal of the said lease in good time. The defendant submitted that the reasons advanced by the plaintiff cannot be a basis for grant by the court of an order extending the plaintiff's sub-lease. On whether the plaintiff had established a prima facie case, the defendant submitted that the plaintiff's suit was misguided and unwarranted. The defendant reiterated that; there was no allegation that the defendant had breached any of the terms of the sub-lease dated 15th February, 2017, there was no evidence of violation of the plaintiff's rights, the plaintiff's sub-lease is set to expire on 31st July, 2020 and the parties had not entered into any other agreement creating a relationship between them. The defendant averred that after the plaintiff's sub-lease expires by effluxion of time on 31st July, 2020, by virtue of clause 24 of the said sub-lease, no landlord and tenant relationship is capable of arising otherwise than by agreement in writing signed by both parties. The defendant submitted that the court

cannot be called upon to force the plaintiff on the defendant's premises without agreement between the parties. The defendant submitted that the plaintiff's application was not based on any right, legal or equitable nor any wrong done to the plaintiff.

The defendant submitted that the court had no jurisdiction to coerce the defendant into an agreement in terms dictated by the plaintiff. In support of this submission, the defendant relied on DL Koisagat Tea Estate Limited v Eritrea Orthodox Church Limited [2015]eKLR. The defendant submitted further that the plaintiff had not shown a clear and unmistakable right to be protected by the court which is threatened by the act sought to be restrained. On whether the plaintiff stood to suffer irreparable harm that cannot be compensated by way of damages, the defendant submitted that that was not the case. On the balance of convenience, the defendant submitted that it extended an olive branch to the plaintiff by offering it a 12 months' license but the offer was rejected. The defendant submitted that the plaintiff had approached a court of equity with unclean hands.

In conclusion, the defendant submitted that the orders sought by the plaintiff would amount to mandatory and final orders coercing the defendant into an agreement. The defendant submitted that such orders could not be granted at interlocutory stage. The defendant urged the court to dismiss the plaintiff's application with costs.

I have considered the plaintiff's application together with the two affidavits which were filed in support thereof. I have also considered the defendant's affidavit filed in opposition to the application. Finally, I have considered the written submissions by the parties' respective advocates and the various authorities which they relied on in support of those submissions. From the wording of the orders sought, what the plaintiff is seeking in its application in my view is temporary prohibitory and mandatory injunctions pending the hearing of the suit. Prohibitory injunction is sought to restrain the defendant from evicting the plaintiff from the suit property and taking possession thereof while mandatory injunction is sought is to compel the defendant to accept the plaintiff's continued occupation of the suit property and receive rent and service charge from the plaintiff at the rate which the plaintiff is paying under the current sub-lease which is set to expire on 31st July, 2020.

The principles upon which this court exercises its discretion in applications for interlocutory prohibitory and mandatory injunctions are now well settled. In Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, it was held that an applicant for interlocutory injunction must show a prima facie case with a probability of success and that such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ... All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

An applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court apply in applications for interlocutory mandatory injunction were set out in Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901, where the court stated that:

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.

In Shepherd Homes Ltd. v Shandahu [1971] 1 Ch.304, Meggarty J. stated as follows:

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

It is on the foregoing principles that the plaintiff's application falls for consideration. From the material before me, I am not satisfied that the plaintiff has satisfied the conditions for granting the orders sought in its application. I am in agreement with the defendant's submission that there are some things which are too plain for argument. I am not satisfied that the plaintiff has demonstrated that it has a prima facie case with a probability of success. As I have stated at the beginning of this ruling, the facts giving rise to this suit are not disputed. The plaintiff and the defendant entered into a sub-lease in respect of the suit property. The lease was for a fixed term of 5 years and 6 months commencing on 1st February, 2015 and terminating on 31st July, 2020. The lease had no renewal clause. The defendant informed the plaintiff one (1) year before the expiry of the lease that it did not intend to renew the sub-lease upon its expiry on 31st July, 2020. In April, 2020, the plaintiff requested the defendant for extension of the lease for 1 year due to Covid-19 pandemic that according to the plaintiff had made it practically impossible to re-establish the plaintiff's eye hospital in new premises. The plaintiff mentioned to the defendant in a letter dated 30th April,

2020 that foreign technicians required for moving and calibrating its equipment would not be able to travel to Kenya for several months. Following this request, the defendant agreed to grant the plaintiff a license to occupy the suit property for 1 year upon expiry of its sub-lease on 31st July, 2020 on terms and conditions that were communicated to the plaintiff. The plaintiff found the terms and conditions of the license offered by the defendant onerous and rejected the same through a letter dated 13th May, 2020. In the same letter, the plaintiff informed the defendant that it had decided to move out of the suit property at the expiry of its sub-lease on 31st July, 2020.

All went quiet until 11th June, 2020; less than 2 months to the expiry of the sub-lease on 31st July, 2020 when the plaintiff which had informed the defendant that it was vacating the suit property at the expiry of its sub-lease wrote to the defendant that it was unable to move out because qualified technicians who could move its equipment to new premises were unable to travel to Kenya due to travel restrictions imposed as a result of Covid-19 pandemic. In the letter, the plaintiff renewed its request for the renewal of the sub-lease for 1 year on the same terms and conditions as the existing sub-lease. In response to this request, the defendant informed the plaintiff that it was still willing to grant to the plaintiff 1 year license on the terms and conditions that it had communicated and which the plaintiff had rejected.

On 17th June, 2020, the plaintiff once again rejected the defendant's offer of a license which it claimed had untenable demands. The plaintiff then proceeded to file this suit on 25th June, 2020 seeking the assistance of the court to compel the defendant to grant it an extension of the sub-lease between them upon expiry of the current sub-lease on 31st July, 2020 for a period of 12 months on the current rent and service charge being paid by the plaintiff to the defendant. I am in agreement with the defendant that in contractual arrangements, the court's duty is to protect the rights of the parties and to ensure that the parties honour their obligations to each other. Where there are no rights to be protected or obligations to be enforced, the court has no jurisdiction to intervene in contracts. What the plaintiff has called upon the court to do is to force the defendant to enter into a tenancy agreement with it after the expiry of its current sub-lease on 31st July, 2020 on the terms which have been proposed by the plaintiff and rejected by the defendant. It trite that a court cannot make a contract for the parties. In National Bank of Kenya Ltd. v Pipeplastic Samkolit (K) Ltd. and Another [2002] E. A. 503, the court stated that:

“This in our view is a serious misdirection on the part of the learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.”

The parties herein entered into a fixed term sub-lease with a commencement and expiry date. The lease is set to expire on 31st July, 2020 by effluxion of time. Clause 24 of the sub-lease provides that after the expiry of the sub-lease no new relationship of landlord and tenant shall arise or be capable of arising otherwise than by agreement in writing signed by both parties. The parties attempted to enter into a new agreement to take effect upon the expiry of the current sub-lease but they were unable to agree on the terms. Whereas the defendant agreed to grant the defendant a license for 12 months on new terms, the plaintiff insisted on the renewal of the lease for 12 months on the existing terms. What the court is now being called upon to do is to force the defendant to accept the plaintiff's terms for the renewal of the sub-lease.

Whereas I appreciate that the plaintiff may have challenges in moving out of the suit property at this time due to Covid-19 pandemic, I do not think that the court is the best forum to address those challenges. I have used the word “may have challenges” deliberately. This is because I am tempted to believe the defendant that the whole claim that there are no expert technicians to remove the plaintiff's equipment from the suit property may be an afterthought. As I mentioned earlier, the plaintiff was aware as at 30th April, 2020 that it would require foreign specialist technicians to move its equipment on the suit property to new premises and that the said specialists were not able to travel to Kenya due to Covid-19 travel restrictions. See the plaintiff's letter to the defendant dated 30th April, 2020 in which the plaintiff communicated this fact to the defendant. With that information, the plaintiff boldly wrote to the defendant on 13th May, 2020 that it had considered its options and had decided to move out of the suit property at the expiry of the sub-lease on 31st July, 2020. The plaintiff then made U-turn barely a month later on 11th June, 2020 that it was impossible for it to move out of the suit property. I wonder why the plaintiff did not consult widely on the logistics of moving out of the suit property before it wrote to the defendant on 13th May, 2020 that it will vacate the suit property on the expiry of its sub-lease. I have also noted that the plaintiff has not placed any evidence before the court showing that it had secured alternative premises to move to. This would have demonstrated good faith and the fact that the plaintiff was ready to move and was only hindered by lack of experts to move its equipment.

Without deciding the matter with finality, I am of the view that the court cannot be of assistance to the plaintiff. The plaintiff has not demonstrated that the defendant has breached the sub-lease dated 15th February, 2017 or that it has infringed on any of its rights as a tenant. In other words, the plaintiff has not pointed out any wrong doing on the part of the defendant which can found a cause of action. I have considered the articles and cases cited in the plaintiff's digest of authorities. I do not think that they are of much assistance to the plaintiff's case. The plaintiff has cited a maxim of equity that Equity will not suffer a wrong to be without a remedy. The plaintiff has not demonstrated that the defendant has committed any wrong to entitle the plaintiff to the remedies sought in this suit. The principle behind the maxim as explained in Hanbury and Muauksley, Modern Equity, 12th Edition by Jill E. Martin is that equity will intervene to protect a right which perhaps because of some technical defect is not enforceable in law. In this case, the plaintiff has not demonstrated that it has any right protectable at law or equity. The plaintiff has not satisfied me that the defendant has committed any wrong by refusing to extend its sub-lease in respect of the suit property or that any wrong has been committed by the defendant in imposing onerous terms and conditions for the license that it offered to the plaintiff.

The plaintiff has also cited The Law of Contract, 12th Edition by Edwin Peel on the doctrine of frustration. The plaintiff has not demonstrated that the sub-lease between the plaintiff and the defendant has been frustrated. The lease will expire on 31st July, 2020 and it has been performed by both parties according to the evidence before the court. I am not persuaded that the inability of the plaintiff to move out of the suit property can amount to a frustration of a lease that would have run its full term by 31st July, 2020. I have not found the cases of Said Majid Said v James Titus Kisia [2015] eKLR and McCrary v Park South Properties, Court of Appeal of Louisiana, Second Circuit also cited by plaintiff relevant since the facts of the two cases are distinguishable from the facts of the case before the court.

I am cognizant of the challenges caused by Covid-19 pandemic to businesses. As I have stated above, I am of the view that litigation may not

provide a solution to many of them. I am of the view that what is required is legislative intervention that will apply uniformly to all business. I am of the view that the orders sought by the plaintiff if granted may create a very dangerous precedent. If the court can force the defendant herein to grant the plaintiff an extension of lease on account of the challenges that have arisen due to Covid-19 pandemic on the plaintiff's own terms, I believe a flood gate would be opened for any business facing stress to rush to court for variation of the terms of its tenancy citing hostile business environment caused by Covid-19 pandemic. The fact that the plaintiff is insisting on the extended lease being on the same terms as the current sub-lease which is expiring on 31st July, 2020 shows that a part from the alleged difficulties that the plaintiff may have relating to the movement of its equipment, it has also been affected by the disruption in business caused by Covid-19 pandemic. This may also be part of the reason why it would wish to remain on the suit property for now. I have said enough to show that the plaintiff has not established a prima facie case with a probability of success.

On whether the plaintiff will suffer irreparable harm that cannot be compensated by an award of damages, I do not think so since the plaintiff has failed to establish a prima facie case. In any event, I find the plaintiff's claim that it will suffer irreparable harm based on conjecture. The plaintiff has claimed that it will be forcibly evicted from the suit property and its equipment thrown out. There is no evidence that the defendant has threatened to forcibly evict the plaintiff from the suit property. There is also no evidence that the equipment that the plaintiff has on the suit property cannot be valued and compensated in case they are destroyed by the defendant. The plaintiff has also claimed that its patients would suffer if the orders sought are not granted. That may be so but the patients are not parties to this suit and were not privy to the contractual relationship between the plaintiff and the defendant.

On balance of convenience, the same is considered only when the court is in doubt as to whether or not a prima facie case has been made out and whether or not the applicant would suffer irreparable loss if the injunction is not granted. In this case, I am not in any doubt. For that reason, it is not necessary to consider balance of convenience.

The upshot of the foregoing is that the plaintiff's' Notice of Motion dated 24th June, 2020 has no merit. The application is dismissed with costs to the defendant.

Delivered and Dated at Nairobi this 30th day of July, 2020

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Murgor and Ms. Kala for the Plaintiff

Ms. Nzuki for the Defendant

Ms. C. Nyokabi-Court Assistant