



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 111 OF 2019

KENOL KOBIL PLC.....PLAINTIFF

VERSUS

CANARIAN HOLDINGS LIMITED.....DEFENDANT

RULING

(Application by plaintiff for an injunction to restrain the defendant from interfering with its use of certain demised premises; counter-application by the defendant for vacant possession; plaintiff having leased three properties from the defendant and operating petrol stations on the same; plaintiff now alleging that the defendant is interfering with two of these properties; defendant filing counterclaim contending that the plaintiff has morphed from a public company to a foreign owned private company; defendant pleading that it needed to give its consent before the change of ownership of the company or else the lease would be forfeited; defendant asserting that it was within its rights to ask the plaintiff to vacate the premises; defendant further seeking vacant possession of the third premises on the claim that the lease has expired; an assessment of the three leases showing that two of the leases have expired; the third lease set to expire in a period of about 4 months; plaintiff ordered to give vacant possession of the two premises where the leases have expired; no need of the court entering into a lengthy legal discourse on the third property as the lease is about to expire; order for the parties to let the lease run its course; costs in the cause)

1. This ruling is in respect of two applications, the first dated 20 June 2020, filed by the plaintiff contemporaneously with the plaint, and the other dated 24 September 2019 filed by the defendant. The first application seeks the following orders :-

- i. Spent (a certification of urgency)
- ii. Spent (interim orders pending inter partes hearing)
- iii. That pending the hearing and determination of the suit herein this Honourable Court do and hereby grants an interlocutory injunction restraining the defendant, whether by itself and/or its advocates, servants, agents or other persons under its control or otherwise howsoever from evicting the plaintiff from the properties known as Subdivision Number 653 (Original number 133/4) Section V Mainland North and Subdivision Number 3904 (Original numbers 918,919, and 1071) Section III Mainland North.
- iv. That the costs of this application be provided for.

2. The second application, that dated 24 September 2019 and filed by the defendant, seeks the following orders :-

- i. That the plaintiff's plaint dated 20 June 2019 be struck out on the grounds that it is frivolous and vexatious and may prejudice, embarrass or delay the fair trial of the action.
- ii. That interlocutory judgment be entered for the defendant (plaintiff in the counterclaim) as prayed for in the counterclaim.
- iii. That further and in the alternative, this Honourable Court be pleased to enter judgment on admission compelling the plaintiff to yield up vacant possession of all properties known as Sub-Division Number 653/V/MN (Original number 13314) and Sub-Division Number 3904/III/MN (Original number 918. 919, and 1071) and Sub-Division No. 3071/VI/MN (Original No. 219/5) Mombasa as prayed in the Counterclaim.
- iv. That further and in the alternative, this Honourable Court be pleased to enter summary judgment as against the plaintiff compelling the plaintiff to yield up vacant possession of the property known as Sub-Division No. 3071/VI/MN, Sub Division No. 6533/V/MN and Sub Division No. 3904/III/MN as prayed in the counterclaim.

3. It will therefore be seen from the orders, that on one hand, the plaintiff seeks to restrain the defendant from interfering with its possession of the suit properties, whereas on the other hand, the defendant seeks to have the plaintiff evicted from the suit properties. It was agreed that the two applications could be heard together and a consolidated ruling delivered. This is that ruling.

4. To put matters into context, this suit was commenced by way of a plaint filed on 21 June 2019. The plaintiff has pleaded that through a lease dated 23 August 2001, it leased from the defendant the property known as Subdivision No. 653/Section V/MN (Plot No.653) for a period of 20 years commencing on 1 November 2000. Through another lease dated 19 April 2000, it again leased from the defendant the property Subdivision No. 3904/Section III/MN (Plot No. 3904) for a period of 20 years commencing 1 February 2002. The plaintiff avers that it is entitled to peaceful occupation of the demised premises subject to its observance of the terms of the agreements. It pleaded that the defendant has threatened to interfere with its peaceful occupation and threatened to forcibly evict it from the demised premises. In the suit, the plaintiff has sought orders to permanently restrain the defendant from the suit properties until the expiry of the terms of lease, damages for breach of contract and costs.

5. The defendant filed defence and counterclaim. It pleaded that when the properties were leased to the plaintiff, the plaintiff was a public company listed at the Nairobi Securities Exchange (NSE) and subject to supervision and regulation by the Capital Markets Authority (CMA). It pleaded that the plaintiff has now morphed into a private limited company, controlled by a foreign company, whose intention is to make the plaintiff its wholly owned subsidiary and to delist the plaintiff from the NSE. It is pleaded that on 20 December 2018, the plaintiff, without notifying the defendant, issued a notice to its shareholders that it had obtained an offer for sale of all its issued shares from Rubis Energie SAS (said to be a foreign company). It is pleaded that the offer closed on 18 February 2019 and the plaintiff was suspended from the NSE on 19 February 2019. It is pleaded that it was a term of the leases that prior consent of the defendant was needed before effecting any transfer (of shares) which would result in the change of control of the plaintiff. It is pleaded that this breach would lead to a forfeiture of the lease and entitles the defendant to re-let the premises. The defendant has pleaded that despite giving notice to the plaintiff, the plaintiff has failed to comply, and has refused to yield the premises to the defendant. The defendant has further pleaded that apart from the two plots cited by the plaintiff, there is a third demised property, being Subdivision No. 3071/VI/MN (Plot No. 3071) which was leased for a term of 20 years from 1 May 1999 and whose term expired on 30 April 2019. It is pleaded that despite this lease having expired, and the plaintiff being asked to vacate, the plaintiff has continued to remain in occupation. It is averred that the plaintiff failed to exercise its right to renew the lease by not issuing a notice 6 months prior to the expiry of the lease as provided in the lease agreement. In the counterclaim, the defendant has sought various orders including the order of vacant possession of the three properties, a declaration that the plaintiff breached the lease agreements by transferring its shares and passing control of the company to M/s Rubis Energie SA without the prior written consent of the defendant, mesne profits and interest on the same, general damages for trespass, and costs.

6. The plaintiff filed a reply to defence and defence to counterclaim. It pleaded that its status remains that of a limited liability company. It denied that it had an obligation to seek the consent of the defendant as a condition of the lessor-lessee relationship. It averred that there is no dispute over the Plot No. 3071 and that by a letter dated 19 August 2019, the plaintiff informed the defendant that it would hand over vacant possession on 28 August 2019 and pay the rents outstanding. It pleaded that it is unconscionable for the defendant to rely on equity while it has all along been accepting rent and cannot therefore approbate and reprobate. The defendant filed a reply which essentially joins issue with the plaintiff.

7. There are various affidavits filed to support and to respond to the two applications on record. I have gone through them. They essentially reiterate the positions of the parties as pronounced in the pleadings. I do not find it necessary to quote the affidavits at length. I have also gone through the written submissions of counsel for the plaintiff and counsel for the defendant and I have considered the same alongside the various authorities that they have attached before arriving at my decision.

8. I am alive to the principles applicable in an application for an injunction and I am also alive to the principles regarding entry of summary judgment. I have considered all these but I opt to take a very practical, rather than an overly legalistic approach, over the issues at hand.

9. In fact, I must say that I am rather surprised that I have to do a ruling, for the matters in dispute, to me, appear rather simple, especially given that the leases have either expired or are just about to expire, as we shall shortly see. It is not prudent for parties to be overly litigious when it is not necessary. As I have said, I will be simple and practical, and desist from being overly legalistic, for I do not think that the situation at hand calls for that approach.

10. It is common ground that the three suit properties are owned by the defendant and were at various periods leased to the plaintiff. The first lease is that dated 19 July 1999 over the Plot No. 3071, through which this property was leased to the plaintiff for a period of 20 years with effect from 1 May 1999. The second lease is that dated 19 April 2000 leasing the Plot No. 3904 to the plaintiff for a term of 20 years from 1 February 2000 (not from 1 February 2002 as pleaded by the plaintiff). The third lease is that dated 23 August 2001, over the Plot No.653, leasing that property to the plaintiff for a term of 20 years from 1 November 2000. The plaintiff operates petrol stations in the demised properties. At the time that the properties were leased, the plaintiff was known as Kenya Oil Company Limited. It later changed its name to Kenol Kobil Limited. There is no issue regarding this change of name. All these leases have a term providing for an option to renew for a further term of 10 years [Clause 3 (j)]. This is to be exercised by the lessee making a written request to the lessor at least 6 months before expiry of the term. There is also a term [Clause 1 (cc)] that during the last 3 months before expiry of the leases, the lessee is to allow the lessor the right to view the premises and fix any notice for re-letting. There is a clause [Clause 1 (dd)] that on expiry of the term, possession would be given to the lessor with the storage tanks, fuel pumps, plant, machinery, equipment, fixtures and fittings, all in good repair and condition.

11. In respect of the Plot No. 3071, it is apparent that the lease expired on 30 April 2019. The position of the defendant is that it never received any request to renew as provided in clause 3 j of the lease agreement and that it issued a notice of re-entry through the letter dated 20 March 2019. It is further apparent, that in respect of the Plot No. 3904, the lease expired on 31 January 2020. I have gone through the affidavits sworn by Martin Kimani, on behalf of the plaintiff. He has deposed inter alia that the plaintiff wrote to the defendant on 19 August 2019, indicating its willingness to hand over vacant possession of the Plot No. 3071 and pay all outstanding rent. The plaintiff does not consider this property to be in dispute. In fact, in his affidavit sworn on 18 November 2019, Mr. Kimani has deposed that this property was handed over to the defendant on 8 November 2019. This seems to be confirmed in the affidavit of Alex Trachtenberg sworn on 4 March 2020 only that there is complaint about the status of the property in terms of repairs.

12. My finding over the Plot No. 3071 is that since it is apparent that the plaintiff has no interest in renewing its lease, then the defendant deserves vacant possession of it. There is an issue about the state of repair of the premises. My view is for the parties to conduct a joint inspection exercise and if there is a dispute that arises on the state of the property this can be subject to legal proceedings either in arbitration or in court.

13. The lease over the second property, Plot No. 3904 has also expired, and it is apparent that the defendant does not wish to renew the lease over this plot. The plaintiff has not stated that it has exercised its option to renew. I have no reason not to ask the plaintiff to also hand over vacant possession of this plot forthwith and no later than the last day of August 2020. The parties should also agree on a handover date and a joint inspection, and if a dispute arises, the same can also be subject to arbitration or court litigation. They can also agree on what is reasonable rent for the period that the plaintiff will have held over beyond the term of the lease.

14. That only leaves the Plot No. 653. The lease over this property is for a period of 20 years from 1 November 2000, which means that it will expire on 31 October 2020. It is now July 2020, meaning that the lease has just about 4 months before it expires. I have not heard any mention within these proceedings of exercise of the option to renew. In fact, it does appear to me that the defendant would probably not renew the lease. I have asked myself whether there is any point of going into a lengthy discourse over a lease that is set to expire in 4 months and I see no purpose. I think the practical thing to do in the circumstances, is to let the lease run its course, and the defendant be protected by giving it a right of inspection pending the determination of the lease. I do this, being alive to the overriding objective as set out in Section 1A of the Civil Procedure Act, Cap 21, Laws of Kenya, which provides that the court ought to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. There is no point in dragging out this litigation, since the lease is soon to expire.

15. I have deliberately avoided going into whether or not the plaintiff's suit should be struck out, whether to enter interlocutory judgment for the defendant, or whether to enter summary judgment for the defendant, or judgment on admission. These would require a legal hypothesis which is not necessary as I have explained above. I will make various orders, and upon assessment of those orders, the parties can assess their positions and pronounce themselves later, on whether further litigation in this matter is necessary.

16. These are the orders that I chose to make to dispose of the two applications :-

a. The plaintiff is hereby ordered to hand over to the defendant vacant possession of the Plot No. 3071 (if it has not already done so) by or at the end of the month of July 2020. That if there is a dispute over the state of repair of the premises, or rent payable for the duration of the holding over after the formal expiry of the term of the lease, the parties to enter into negotiations over the same, and if they cannot agree, the parties to either pursue an arbitration or litigation in court over the same, or even make an application within this suit if deemed appropriate.

b. The plaintiff is hereby ordered to hand over and give vacant possession of the Plot No. 3904 by the end of the month of August 2020 (if it has not already handed over possession). Within this period, the plaintiff is to permit the defendant to enter and inspect the premises and the parties to agree on when to conduct the formal handover to the defendant. If there is any dispute on the rent payable till the time of handover, or on the state of the premises, the parties to enter into negotiations over the same, and if they cannot agree, the parties to either pursue an arbitration or litigation in court over the same or even file an application within this suit.

c. That in respect of the Plot No. 653, the plaintiff to hand over the premises to the defendant on expiry of the lease, which is set to expire on 31 October 2020, in the manner agreed in the lease instrument. The plaintiff to continue paying rent as agreed in the lease and allow the defendant to inspect the premises as agreed in the lease.

d. Parties to enter into negotiations on whether there is any right to payment of mesne profits or damages. If they cannot agree, the parties to inform court and the court will give further directions on the same.

e. In respect of the costs of the two applications, costs to be in the cause.

17. Orders accordingly.

DATED AND DELIVERED THIS 7TH DAY OF JULY, 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA