



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. E107 OF 2020**

**BUSH AIR SAFARIS LIMITED.....PLAINTIFF**

**=VERSUS=**

**ENRICA FORNO.....1ST DEFENDANT**

**KENYA AIRPORTS AUTHORITY.....2ND DEFENDANT**

1. The plaintiff initiated this suit through a plaint dated 3/9/2020. Its case is that pursuant to a tenancy agreement entered into in 2011, it is a *bonafide* sub-tenant of the 1st defendant, occupying Hangar Number 16, located on Land Reference Number 209/13080, Wilson Airport, Nairobi. The head landlord is the 2nd defendant. The plaintiff further contends that the agreed annual rent is Kshs 1,000,000 payable in instalments over the year. It owns and operates 12 aircrafts on the said Hangar. Its operations are duly authorized by the 2nd defendant as head landlord. It has occupied the said Hangar as a sub-tenant since 2011. The only rent due from it to the 1st defendant is the annual rent for the Year 2020 which it is ready to pay.

2. The plaintiff further contends that on 27/8/2020, the 1st defendant issued it with a seven days notice requiring it to vacate the business premises or face eviction under the pretext that it was in rent arrears of Kshs 12,500,000, a figure which it vehemently contests, contending that the figure is based on balances arising from aircrafts sold to it by the 1st defendant. The plaintiff avers that the issue of rent relating to business premises is governed by statute and the defendant's threat to evict it is contrary to the provisions of the statute. Consequently, the plaintiff seeks the following verbatim reliefs in the plaint:

***1) A permanent injunction to issue against the defendants by themselves, their servants or agents or and one authorized by them, or claiming under them, from in any manner, distressing or otherwise howsoever interfering by subjecting the plaintiff its servants or agents to any harassment with the intention thereby of inducing or compelling the plaintiff to vacate the demised suit premises or any part thereof and/or in any manner to occasion the frustration or termination of the tenancy enjoyed by the plaintiff over the business premises namely Hangar 16, LR No 209/13080, Wilson Airport (the suit property).***

***2) Costs of this suit.***

3. Together with the plaint, the plaintiff brought a notice of motion dated 3/9/2020 seeking the following verbatim interlocutory reliefs:

***1) That the service of this application be dispensed with in the first instance in view of its urgency.***

***2) That a temporary injunction to issue against the defendants by themselves, their servants or agents or any one authorized by them, or claiming under them, from in any manner distressing or otherwise howsoever interfering by subjecting the plaintiff its servants or agents to any harassment with the intention thereby of inducing or compelling the plaintiff to vacate the demised suit premises or any party thereof and/or in any manner to occasion the frustration or termination of the tenancy enjoyed by the plaintiff over the business premises namely Hangar 16, LR No 209/13080, Wilson Airport, pending the hearing and final determination of this application.***

***3) That a temporary injunction to issue against the defendants by themselves, their servants or agents or any one authorized by them, or claiming under them from in any manner distressing or otherwise howsoever interfering by subjecting the plaintiff its servants or agents to any harassment with the intention thereby of inducing or compelling the plaintiff to vacate the demised suit premises or any part thereof and/or in any manner to occasion the frustration or termination of the tenancy enjoyed by the plaintiff over the business premises namely Hangar 16 LR No 209/13080, Wilson Airport, pending the hearing and final determination of the suit filed herein.***

***4) That the OCS Wilson Airport Police Station do ensure compliance with this orders.***

**5) That the costs of this application be provided for.**

4. This ruling relates to the said application. The ruling also relates to a subsequent application dated 10/9/2020 brought by the plaintiff, seeking police assistance in the enforcement of an interim order granted by the court in this matter.
5. The court considered the plaintiff's application dated 3/9/2020 on 3/9/2020 and observed that, at that stage, it was not clear why the plaintiff had opted not to seek redress in the Business Premises Rent Tribunal (the Tribunal) given that the present dispute relates to a tenancy relationship relating to business premises. The court directed the plaintiff to serve the application and come back for interpartes hearing on 5/10/2020.
6. Subsequently to that, the plaintiff brought a second application dated 4/9/2020 through which it urged the court to grant it interim orders in terms of the application dated 3/9/2020 because the operations of the Tribunal had been suspended by an order of the court and it stood to suffer irreparably if the defendants were allowed to eject it out of Hangar 16. Satisfied with the explanation tendered by the plaintiff to the effect that operations of the Tribunal had been suspended, the court issued a conditional preservatory order allowing the plaintiff to continue occupying the suit premises.
7. The plaintiff brought a third application dated 10/9/2020, seeking police assistance in enforcement of the order of 4/9/2020. This third application is what triggered the bringing forward of the disposal of this matter. The said application is one of the two applications which are the subject of this ruling. Because it relates to enforcement of the order of 4/9/2020, it will stand spent upon determination of the application dated 3/9/2020.
8. The defendant opposes the application dated 3/9/2020 through her replying affidavit sworn on 16/9/2020. She deposes that in the year 2011, under an oral agreement, she allowed the plaintiff to occupy Hangar 16 because the plaintiff needed to conduct checks on aircrafts which she had sold to it. At that point in time, they were sharing rent of Kshs 1,000,000 payable to the 2nd defendant. In the Year 2013, the plaintiff was in full occupation of Hangar 16 and was using her equipment at the Hangar and it was consequently orally agreed that the plaintiff would pay an annual rent of Kshs 2,200,000 payable every six months, and further that out of the above sum, the plaintiff would pay the 2nd defendant Kshs 1,000,000 and pay her the balance Kshs 1,200,000 annually.
9. The defendant added that they enjoyed a good relationship with the plaintiff until the plaintiff started dishonouring the terms of the oral agreement. She added that the plaintiff issued her with a cheque dated 17/3/2020 for USD 5,000 settling its rent dues but the cheque bounced. Further, on 13/8/2020, the plaintiff promised to pay her USD 10,000 towards reducing its rent arrears but did not pay the money. Consequently, on 25/8/2020, she instructed her advocates to demand the money.
10. The defendant further deposes that the plaintiff has failed to pay utility bills relating to Hangar 16 and balance of aircrafts purchase price in the sum of USD 22,248. Lastly, she deposes that the applicant failed to disclose to the court that it was no longer on the suit premises at the date of filing the present motion. She urges the court to dismiss the application.
11. The two applications were canvassed orally in virtual court on 22/9/9/2020. Mr Mbichire, counsel for the plaintiff submitted that the plaintiff was a *bona fide* tenant of the 1st defendant, paying an annual rent of Kshs 1,000,000. He added that the plaintiff had paid rent faithfully save for the period when the Government shut all airports in the Country ( from March 2020). Counsel argued that the notice served on the plaintiff by the defendant, requiring the plaintiff to vacate Hangar 16 was illegal and contravened the provisions of the Land & Tenant (Shops, Hotels and Catering Establishments) Act (**the Act**). He added that the agreed annual rent was Kshs 1,000,000 and urged the court to refer to the previous payment receipts. Counsel further submitted that the plaintiff's aircrafts were still in the Hangar. He urged the court to grant the injunctive order stating that the plaintiff was willing to deposit the rent of Kshs 1,000,000 in court.
12. On her part, Ms Nyabuto, counsel for the defendant, submitted that the agreed annual rent was Kshs 2.2 million, payable in two instalments. She added that the plaintiff owed the defendant rent arrears of Kshs 9,587,000, covering several years. She added that, besides rent arrears, the plaintiff owed the defendant Kshs 2.2 million being unpaid purchase price for aircrafts sold to the plaintiff by the defendant. She added that parties had differed on the amount of rent owing. Further, counsel for the defendant submitted that the plaintiff's business licence had expired and had not been renewed.
13. On jurisdiction of this court, Ms Nyabuto submitted that this dispute should not be in this court and should instead be adjudicated by the Business Premises Rent Tribunal (the Tribunal). She added that there was already a new tenant in the premises. She urged the court not to grant the injunctive order.
14. I have considered the two applications together with the rival affidavits and submissions. I have also considered the relevant legal frameworks and jurisprudence. As indicated above, the notice of motion dated 10/9/2020 seeks police assistance in the enforcement of the existing court order. It will stand spent once the motion dated 3/9/2020 is disposed.
15. Two issues fall for determination in the notice of motion dated 3/9/2020. The first issue is whether this court can properly exercise jurisdiction in this dispute in the absence of the Business Premises Rent Tribunal (the Tribunal). The second issue is whether the plaintiff has satisfied the criteria upon which jurisdiction to issue an injunctive order is exercised. I will make brief pronouncements on the two issues sequentially in the above order.
16. The first issue is whether this court can properly exercise jurisdiction in this dispute in the absence of the Business Premises Rent Tribunal. There is common ground that the relationship between the parties in this suit is that of landlord and tenant. There is also common ground that the suit premises were rented to the plaintiff for business purposes. Thirdly, both parties agree that the primary adjudicatory authority in this dispute is the Tribunal. The defendant has objected to this court's exercise of jurisdiction on that ground. On its part, the plaintiff contends that it came to this court because operations of the Tribunal were suspended by dint of an order issued by the Employment and Labour Relations Court. On my part, I take judicial notice that appointments made to the Tribunal were challenged in the Employment and Labour Relations Court and the said court issued an order staying the appointments. Consequently, the Tribunal is not quorate at the

moment and cannot discharge its statutory mandate.

17. Where should litigants seek redress in the prevailing circumstances? The answer to this question lies in Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Court Act. Article 162(2) (b) of the Constitution sets out in broad terms the jurisdiction of this court, namely, hearing and determining disputes relating to the environment and the use and occupation of, and title to land.

18. Section 13 of the Environment and Land Court Act elaborates in more details the jurisdiction of this court. It states thus:

**13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—**

**a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**b) relating to compulsory acquisition of land;**

**c) relating to land administration and management;**

**d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**

**e) any other dispute relating to environment and land.**

**(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.**

**(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.**

**(5) Deleted by Act No. 12 of 2012, Sch.**

**(6) Deleted by Act No. 12 of 2012, Sch.**

**(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—**

**(a) interim or permanent preservation orders including injunctions;**

**(b) prerogative orders;**

**(c) award of damages;**

**(d) compensation;**

**(e) specific performance; (**

**g) restitution;**

**(h) declaration; or**

**(i) costs.**

19. In my view, and without saying much, given that the Act grants this court both original and appellate jurisdiction to hear and determine all disputes contemplated under Article 162(2) (b) of the Constitution, in the absence of a functional Tribunal, this court can properly invoke its original jurisdiction and admit urgent applications which would, under normal circumstances, be adjudicated at the Tribunal. Am therefore satisfied that this court has jurisdiction to entertain the present application in the absence of a functional Tribunal.

20. The second issue is whether the plaintiff has satisfied the criteria upon which jurisdiction to issue an injunctive order is exercised. That criteria was spelt out in the case of **Giella v Cassman Brown (1973) EA 358**. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Secondly, the applicant is required to demonstrate that unless an injunctive order is issued, he would

stand to suffer irreparable injury that cannot be adequately indemnified through an award of damages. Thirdly, should the court have doubts on both or either of the above two limbs, the application is to be determined on a balance of convenience.

21. While exercising jurisdiction in an application for interlocutory injunctive relief, the court does not make conclusive or definitive findings on the substantive issues before it. Its focus is limited to establishing whether the above criteria has been satisfied.

22. Both parties to this application agree that there has been a tenancy relationship involving business premises. It is also not contested that the impugned notice to vacate the business premises within seven (7) days, dated 25/8/2020, was issued by the 1st defendant through her lawyers. The tenor and import of the said notice was to purport to terminate a controlled tenancy through a seven days notice.

23. The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (the Act) provides an elaborate statutory procedure which must be followed by a landlord wishing to terminate a controlled business premises tenancy. At this interlocutory stage, there is prima facie evidence that the said statutory procedure may not have been followed by the 1st defendant in her attempt to terminate the plaintiff's tenancy.

24. Secondly, the plaintiff runs an airline in the demised premises. Its fleet of 12 aircrafts are served by the demised premises. The contention that the unprocedural termination of its tenancy in the circumstances will hurt it irreparably is therefore not without basis.

25. Although counsel submitted from the bar that there was another tenant in the premises, no evidence of the alleged subsequent tenancy was exhibited. The *prima facie* evidence before court is that the plaintiff's aircrafts are in the Hangar.

26. There being no doubt on either of the first two limbs of **Giella v Cassman**, I will not focus on the third limb. Suffice to say that, the court is satisfied that the plaintiff has met the criteria for grant of an injunctive relief.

27. The court however remains alive to the fact that the proper primary forum for adjudication of the dispute in this suit is the Business Premises Rent Tribunal. I will in the circumstances grant a preservatory injunctive order as a temporary measure of protection limited in time, to the extent that, as soon as the Tribunal is quorate and functional, the plaintiff shall present its dispute to the Tribunal in the prescribed form and the present suit shall be marked as closed with no order as to costs.

28. In light of the foregoing, the plaintiff's applications dated 3/9/2020 and 10/9/2020 respectively are disposed in the following terms:

***a) Pending resumption of sittings by the Business Premises Rent Tribunal (the Tribunal), the defendants are hereby restrained against terminating the plaintiff's tenancy in respect of Hangar 16, located on Land Reference Number 209/13080, Wilson Airport, Nairobi or interfering with the plaintiff's occupation of the said business premises.***

***b) The plaintiff shall with immediate effect pay the defendants the disputed annual rent of Kshs 1,000,000 in relation to Hangar 16, Wilson Airport, and shall continue to make similar annual payments throughout the period of subsistence of this order.***

***c) This order which is an interim measure of protection shall lapse sixty (60) days from the date the Business Premises Rent Tribunal shall hold its first sitting at Nairobi.***

***d) The Officer Commanding Wilson Airport Police Station shall assist in the enforcement of this order.***

***e) This matter shall be mentioned on 16/2/2021 with a view to confirming resumption of sittings by the Tribunal and marking this case as closed.***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF SEPTEMBER 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Mr Mbichire for the Plaintiff

Ms Kalii holding brief for Mr Ombeta for the Defendant

Court Clerk - June Nafula