



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 355 OF 2013**

1. RAJO PRINTERS & STATIONERY LTD.
2. COLOUR GEMSTONES LTD
3. DENTAL & MAXILLOFACIAL IMAGING CENTER LTD
4. REGIONAL CENTRE FOR TOURISM & FOREIGN

LANGUAGES LTD

5. MARY MUSYOKI
6. ANN NJERI KIMANI T/A LEADERS INSTITUTE

OF PROFESSIONAL STUDIES.....PLAINTIFFS

VERSUS

BARCLAYS PENSION SERVICES LIMITED .....DEFENDANT

**RULING**

By a Notice of Motion dated 12<sup>th</sup> of August 2013 brought under sections 3 and 3A of the Civil Procedure Act, Order 40 rule 2 of the Civil Procedure Rules, the Plaintiff/Applicants are seeking the following orders;

1. Spent.
2. **THAT** pending the hearing and determination of this application and the suit the defendant its agent's servants and/or employees be restrained from continued breach of contract by failure to provide a lift service by repairing and operating the existing lifts or installing new ones in the building known as Eagle House Land Reference 209/607 Nairobi as provided for in the lease and/or tenancy agreements with the plaintiffs.
3. **THAT pending** the hearing and final determination of this suit the plaintiff be allowed by the court to retain the whole or part thereof of rent payable to the defendant until the breach complained of is discontinued and/or rectified.
4. Costs of this application be provided for.

The application is based on the following grounds;

- a. **THAT** the building is a business premises which ought to have operational lifts in accordance with the lease and/or tenancy agreements between the plaintiffs and the defendant and by the law.
- b. **THAT** the defendant has failed to fulfill its obligations and duties under the lease and/or tenancy agreements between itself and the plaintiffs and under the law.

- c. **THAT** the plaintiffs have been suffering since early 2012 especially due to lack of lifts and adequate security within the building which has led to loss of business and property.
- d. **THAT** due to the defendant's failure to perform its part of the contracts the plaintiffs have sometimes been unable to pay rent when the same has fallen due and the defendant has resorted to sending auctioneers to levy distress for rent.
- e. **THAT** the building cannot be accessed by older members of society, children, expectant women and person with disability most especially those on wheel chairs in its current state.
- f. **THAT** the plaintiffs have constantly complained to the landlord for a period exceeding one (1) year, about the lifts, insecurity and cleanness in the building, without any positive outcome.
- g. **THAT** the plaintiffs continue facing insecurity and loss of business as clients find it inconvenient to access the building, especially the upper floors.

The application is supported by the affidavit of Grace Wanja Manyara. The application was opposed. The respondent filed grounds of opposition on the 30<sup>th</sup> October 2013 and an affidavit by Anne Owillah dated 30<sup>th</sup> of April 2014. I have read the said affidavits and this is what I gather; the Plaintiffs are tenants of the Defendant at Eagle house building L. R No. 209/607 situated along Kimathi Street. They signed various lease agreements. According to the plaintiff's the Defendant who is the Land Lord is required to provide the following services;

- a. Maintaining, repairing and where appropriate treating washing down, painting and decorating the retained parts including the entirety of all walls, floor and ceilings surrounding and all doors and windows and all door and window frames in the retained parts.
- b. Maintaining an adequate supply of mains water and electricity for the building.
- c. Inspecting, maintaining, repairing and overhauling all plant.
- d. Maintaining and repairing all pipes in, on and under the building.
- e. Maintaining and renewing all fire alarms, fire prevention and firefighting equipment in the retained parts.
- f. Cleaning, treating, polishing and lighting the retained parts to a proper standard.
- g. Keeping clean the exterior of all windows and window frames in the building.
- h. The provision and maintenance of equipment for the collection and disposal of refuse from the building.
- i. The provision of adequate security arrangements for the building.
- j. Any other service that the landlord or its agent shall deem necessary for the proper maintenance and operation of the building.

The Plaintiffs claim that the Landlord has failed to provide certain services as required under the leases amongst them being;

- a. **Security**; that there is inadequate security as tenants have lost property to both petty thieves and armed robbers within the building.
- b. **Cleaning of the building**; that the general upkeep of the building has declined
- c. **Repairs**; that the lifts in the building have completely broken down for a period exceeding 1 year.
- d. **Maintenance of electricity stand by generator**: that the back –up generator broke down in the mid-year 2010 and has since not been operational.

The Plaintiffs further claim that they have held meetings with the defendant's representative, Regent Management with the aim of resolving the said complaints and in particular to provide lifts either by operating, repairing and maintaining the already installed lifts or install new ones but nothing has been done. As a result they have lost clients and property due to the inaccessibility to the building. According to the Plaintiffs the only way to stop ongoing loss is to have the defendant restrained from continued breach of contract and to have it compelled to perform its duties under the leases. They claim that they stand to suffer irreparable loss that cannot be compensated by way of damages. That by a letter dated 17<sup>th</sup> of January 2014 they informed the Defendants of their intention to retain all rents payable unless and until all issues raised by the tenants are resolved; that the Defendant did not object to the said retention of rent but responded by saying the issues are being addressed.

In the affidavit of Anne Owillah a property manager with Regent Management Limited she depones that the Defendant retained Schildler Limited to manufacture and install lifts at the Eagle House, Kimathi Street Nairobi, which company confirmed that it would take a period of 32 weeks as follows; manufacture 14 weeks, pre-shipment 2 weeks, shipment (by sea) 4 233ks, clearance at port 2 weeks and installation 10 weeks. That as per the records kept by Regent Management Limited the plaintiffs were as at 31.03.2014 in rent arrears in the cumulative sum of Kshs.2,480,854.00 as follows;

1<sup>st</sup> Plaintiff Rajo Printers Kshs. 399,122.90

3<sup>rd</sup> Plaintiff DAMIC Kshs. 156,590.00

4<sup>th</sup> Plaintiff Regional Centre for Tourism Kshs. 710,503.00

5<sup>th</sup> Plaintiff Mary Musyoki Kshs. 94,414.00

6<sup>th</sup> Plaintiff Leaders Institute Kshs. 1,120,225.00

Parties filed written submissions, which I have read together with the cases cited. Counsels made oral submissions in court on the 11<sup>th</sup> of June 2014. In an application for injunction the plaintiffs have to satisfy the court that they have a prima facie case with a probability of success, that if the injunction is not granted they will suffer irreparable loss and if in doubt the court will decide the case on a balance of convenience (see *Geilla Vs. Cassman Brown Ltd 1973 E.A 358* ). The Plaintiffs have exhibited a letter of offer to the 3<sup>rd</sup> Plaintiff dated 14<sup>th</sup> May 2012 and a letter of offer to the 2<sup>nd</sup> Plaintiff dated 4<sup>th</sup> August 2014. In the said letters the monthly rents as stated and a clause on the service charge amongst other clauses. There is no lease that is attached. The Defendant does not dispute that there is an issue with the lift. There is correspondence attached by the plaintiff that shows that the parties have discussed the non-functioning of the lifts and generator and that the Landlord was to repair the same. According to the Landlord they have retained the services of Schildler Limited to manufacture and install the lifts. Some action is being taken by the defendant. Mr. Echesa submitted that the process is still ongoing and that it would be superfluous for the court to grant the said order as the process is taking place. I do agree that the Landlord has an obligation to perform his part which it is currently doing as the process of getting a lift installed is ongoing. It would therefore be superfluous as stated by the Respondent to grant the prayer of injunction to restrain the Defendant from an alleged continued breach. I find that there is no breach of contract as the defendant has given its word that the process of getting a lift installed is ongoing in line with the clauses that it is their duty to maintain the premises.

The plaintiffs have not denied that they are in arrears of rent. Their argument is that they are withholding the rent because of the non action by the defendant. I do agree that he who comes to seek an equitable remedy must come to court with clean hands. The plaintiff's arguments cannot stand as they are in breach of the lease agreements by withholding rents. I agree with Justice Waweru's holding in the case of *Samuel Kipkorir Ngeno & another V. Local authorities Pension Trust (Registered Trustees) & another (2013) eKLR* , that "a tenant who is in huge arrears of rent is undeserving of the court's discretion. That the court cannot be the refuge of a tenant who fails to meet his principle obligation of paying rent as and when it becomes dues". It is my view that the plaintiffs can mitigate their losses or can move to other premises if the current premises does not meet their needs. Though I find no merit in the application, I urge the defendants to hasten the process of installing the lift. The application is dismissed costs to the Defendant.

Orders accordingly.

Dated, signed and delivered this 4<sup>th</sup> Day of November 2014

**R. E OUGO**

**JUDGE**

In the presence of:

.....**Plaintiffs/Applicants**

.....**Defendant /Respondent**

.....**Court Clerk**