



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

RULING

Introduction

1. The dispute in this suit relates to a tenancy in respect of business premises at Wilson Airport, namely, Hangar No 16. The dispute should ordinarily have been adjudicated by the Business Premises Rent Tribunal. This court admitted it in exercise of its original jurisdiction because the Employment and Labour Relations Court stayed the assumption of office by persons who had been appointed to the Tribunal. Consequently, the Tribunal is currently not constituted.

2. Before me for determination are two applications. The first application is a notice of motion dated 29/9/2020 brought by the 1st defendant seeking an order of stay of execution of the ruling delivered by this court on 24/9/2020. The second application is the notice of motion dated 2/10/2020 brought by M/s Streak Agencies Limited (Intended Interested Party) seeking joinder, stay of execution, and/or setting aside orders. I will dispose the two applications simultaneously. Before I do that, I will set out a brief background to the two applications.

Background

3. In 2011, the plaintiff and the 1st defendant entered into an oral tenancy agreement relating to Hangar No 16 situated on Land Reference Number 209/13080, Wilson Airport, Nairobi. The two parties do not contest this fact. What is in contest is the annual rent payable at the time the present dispute arose in August 2020. The plaintiff contends the annual rent was Kshs 1,000,000 while the 1st defendant contends it was Kshs 2,200,000. Secondly, both parties agreed at the stage of hearing of the notice of motion which culminated in the impugned ruling that the tenancy was a controlled one and that the Business Premises Rent Tribunal is the adjudicatory body which should be exercising primary jurisdiction in the dispute. The new counsel who was recently appointed by the 1st defendant and who appeared for her for the first time today seem to be departing from that position.

4. On or about 25/8/2020, the 1st defendant through the Firm of Moindi & Company Advocates, issued the plaintiff with a notice requiring them to vacate Hangar No 16 within seven (7) days. The 1st defendant further demanded US Dollars 125,000 from the plaintiff. Aggrieved by the demand, the plaintiff moved to this court through the e-platform on or about 3/9/2020 and sought, among other reliefs, an interlocutory injunctive order.

5. Upon hearing the parties, the court made an interlocutory finding to the effect that, at that interlocutory stage, there was *prima facie* evidence that the mandatory and elaborate statutory procedure set out in the Landlord and Tenant (Shops, Hotel & Catering Establishments) Act (Cap 301) may not have been followed by the 1st defendant in her attempt to terminate the tenancy. The court further made a finding that the plaintiff had satisfied the criteria in **Giella v Cassman Brown (1973) EA 358**. The court indicated that it remained alive to the fact that the proper primary forum for adjudication of this dispute was the BPRT. In the end, the court, through its ruling rendered on 24/9/2020 issued the following disposal orders:

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.

6. The two applications under consideration were triggered by the said ruling.

Application dated 2/10/2020 by the Intended Interested Party.

7. The Intended Interested Party, Streak Agencies Ltd, (the I.I.P) brought its application on 6/10/2020. The 1st defendant's application dated 29/9/2020 had already been argued on 5/10/2020 and was slated for ruling today. Given that the two applications raised similar issues, the court opted to hear the Intended Interested Party's application today and render a ruling covering the two applications.

8. The Intended Interested Party seeks orders of joinder, stay and setting aside of the orders made on 24/9/2020. Their case is that they entered into a joint venture agreement with the 1st defendant on 1/7/2020. The purpose of the joint venture agreement was collaboration in the business of contracting and/or offering engineering and maintenance of aircraft services at Wilson Airport, Hanger 16, Nairobi. The 1st defendant's contribution to the joint venture was Hangar 16 and the same was to be availed for use on or before 1/7/2020. They seek joinder because the orders of 24/9/2020 have affected them. They want the court to pronounce itself of their fate.

9. The plaintiff opposes the application vehemently, contending that Mr. Omagwa, counsel for the Intended Interested Party is deliberately misleading the court because on 25/8/2020 he signed the termination notice which purported to terminate the controlled tenancy through a seven days' notice. He adds that on 25/8/2020, Mr Omagwa was categorical that the Hanger belonged to the 1st defendant. He adds that the 1st defendant has always been categorical that the premises are subject to CAP 301 and that this case should be in the BPRT. He contends that the Intended Interested Party is not a tenant and is not entitled to participate in these proceedings.

10. I have considered the application within the few minutes I have had to prepare this ruling. I have also considered the plaintiff's response and the parties' respective submissions. Two questions fall for determination in the Intended Interested Party's application dated 2/10/2020. The first question is whether the Intended Interested Party has met the criteria for joinder. The second question is whether the Intended Interested Party has satisfied the court on the criteria for grant of stay order or setting aside order. I will make pronouncements on the two issues sequentially.

11. The criteria upon which the courts exercise jurisdiction to grant orders of joinder is spelt out in Order 1 rule 10 (2) of the Civil Procedure Rules which provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

12. The Intended Interested Party was therefore required to demonstrate that their presence as a party in this matter is necessary for the effectual and complete adjudication and settlement of the present tenancy dispute.

13. The Intended Interested Party's plea for joinder is entirely predicated on a joint venture agreement dated 1/7/2020. If indeed the joint venture agreement was executed on 1/7/2020, this happened when the plaintiff was in occupation of the suit premises as a sub-tenant of the 1st defendant. Indeed, the impugned notice of termination of tenancy which triggered these proceedings was witnessed by the present counsel for the Intended Interested Party, Mr Omagwa, on 25/8/2020. Under the joint venture agreement, the 1st defendant undertook to avail Hangar No 16 as her contribution to the joint venture. The Hangar was to be available from 1/7/2020. The 1st defendant's attempt to terminate the plaintiff's tenancy was made on 25/8/2020. Given that the Hangar was not available on 1/7/2020, the logical conclusion is that the joint venture agreement was made subject to the 1st defendant successfully terminating the then existing tenancy. Her attempt to terminate the tenancy has been challenged through these proceedings.

14. Challenge against the 1st defendant's endeavor to terminate the tenancy does not, in my view, make the Intended Interested Party a necessary party to this tenancy dispute. The dispute is a tenancy dispute arising from a tenancy contract. The Intended Interested Party was not privy to the tenancy contract. The mere fact that the 1st defendant undertook to make Hangar No 16 available for the purpose of actualizing the joint venture agreement does not, in my view, make the Intended Interested Party a necessary party in the adjudication and settlement of the tenancy dispute. My finding on the first issue therefore is that the Intended Interested Party has failed to satisfy the criteria for joinder.

15. In light of the court's finding on the first issue, it follows that the Intended Interested Party has not met the criteria for stay and or setting aside orders. The Intended Interested Party's notice of motion dated 2/10/2020 is therefore rejected.

1st Defendant's Application Dated 29/9/2020

16. M/s Nyabuto, counsel for the 1st defendant, contended that the 1st defendant had already dispossessed the plaintiff the suit premises by the time the orders of 24/9/2020 were issued. She argued that the 1st defendant had exhibited a joint venture agreement to demonstrate that she had already entered into another relationship. She further argued that the 1st defendant had demonstrated that the plaintiff was in rent arrears. Counsel argued that these aspects were proof of substantial loss.

17. Opposing the application, Mr Mbichire, counsel for the plaintiff argued that the plaintiff had paid rent as directed by the court and was in occupation of the premises. He added that the joint venture was manufactured after the court rendered its ruling on 24/9/2020 because it was never placed before the court during the hearing of the application for injunction. In response, Ms Nyabuto submitted that the date of 1/7/2020 was an error; that it should read August 2020 instead of July. She conceded that the 1st defendant had received rent of Kshs 1,000,000.

18. I have considered the 1st defendant's application. I have also considered the response thereto and the parties' respective submissions. The single issue falling for determination in this application is whether the 1st defendant has satisfied the criteria upon which an order of stay pending appeal is granted. The said criteria is set out in Order 42 rule 6(2).

19. The 1st defendant was required to demonstrate the likelihood of substantial loss and offer appropriate security. The 1st defendant relied on the joint venture agreement dated 1/7/2020 and the alleged rent arrears as evidence of substantial loss. First, the joint venture agreement was signed during the subsistence of the plaintiff's tenancy. The joint venture agreement has been there since 1/7/2020. It was in existence by the time the 1st defendant issued the impugned seven day notice of termination of tenancy. Secondly, there is evidence that the plaintiff is running its business in the Hangar. Thirdly, there is no evidence that the joint venture has been operationalized into a business entity and is carrying out business under any name within the suit premises.

20. Counsel argued that the rent owed was substantial and that was proof of substantial loss. Both the plaintiff and the 1st defendant agree that the tenancy agreement was oral. The plaintiff contends that the annual rent was Kshs 1,000,000 while the defendant contends that it was Kshs 2,200,000. This is therefore an issue to be determined by the Tribunal. The contested figure presented by the 1st defendant cannot, in my view be taken as conclusive evidence of rent arrears. Lastly, no offer was made in terms of security.

21. In light of the foregoing, the court's finding on the 1st defendant's notice of motion dated 29/9/2020 is that she has failed to satisfy the criteria upon which jurisdiction to grant an order of stay pending appeal is exercised. The application dated 29/9/2020 is, in the circumstances, dismissed for lack of merit.

Disposal Orders

22. In light of the foregoing, the court makes the following disposal orders in relation to the 1st defendant's notice of motion dated 29/9/2020 and the Intended Interested Party's notice of motion dated 2/10/2020.

- a. The 1st defendant's notice of motion dated 29/9/2020 is dismissed for lack of merit.**
- b. The notice of motion dated 2/10/2020 by M/s Streak Agencies Limited is dismissed for lack of merit**
- c. The respective applicants in the two applications shall bear costs of the applications.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2020.

B M EBOSO

JUDGE

In the presence of: -

Mr Mbichire for the Plaintiff

Mr Maina for the 1st Defendant

Mr Wachira for the Intended Interested Party

Court Clerk - June Nafula