



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 193 OF 2013

VILLA CARE

LTD.;

PLAINTIFF

-VERSUS-

REGISTERED TRUSTEES OF THE

NATIONAL

FUND FOR THE DISABLED OF

KENYA:.....DEFENDANT

RULING

1. This Ruling relates to the Notice of Motion dated **15th May 2013** and filed in Court on **17th May 2013**. The Application is taken out under **Order 3 Rule 2, Order 40 rules 1&2 and Order 51** of the **Civil Procedure Rules**. It is also taken out under **Section 3A** of the **Civil Procedure Act**.
2. The Application seeks for one main order that pending the hearing and determination of this suit, the Defendant, its servants and/or agents or otherwise howsoever be restrained from distressing rent, harassing, evicting, or threatening to evict and or in any other way interfering with the Plaintiff’s quiet occupation and enjoyment of its tenancy on the 6th floor new Rehema House erected on L.R no. 870/VI/260.
3. The Application is premised on the grounds stated on the face of the application and supported by the affidavit of **DANIEL OJIJO** sworn on **15th May 2013**.
4. Briefly, the Plaintiff avers that it is the *bona fide* tenant of the 6th floor new Rehema House erected on L.R No. 870/VI/260 Nairobi (herein the “suit premises”) having leased half of the premises sometimes in 2003 with a Lease expiring on 31st December 2008. In 2006, the Plaintiff while occupying wing A of the suit premises further requested to lease wing B and the request was accepted culminating into a further Lease Agreement. It is averred on behalf of the Plaintiff that it became administratively complicated to occupy the whole floor under two Leases. Therefore, the parties agreed to amalgamate the two leases into one Lease for easier management.
5. It is also averred that the Plaintiff expressed its desire to renovate and occupy the neglected and dilapidated terraces that were on the floor and the Defendant agreed to the Plaintiff’s proposal. According to the Plaintiff, there was a mutual arrangement between the parties that the Plaintiff would occupy the same at no cost in light of the substantial improvements and beautification to

the area.

6. It is further averred that the Defendant drew the amalgamated Lease agreement of the suit premises and forwarded it to the Plaintiff for execution but the same is yet to be executed.
7. It is the Plaintiff's case that during the subsistence of the Tenancy the Defendant had been arbitrarily increasing the service charge without making any improvements to the property. It is also the Plaintiff's case that the Defendant demanded rent for the terraces which rent had previously not been payable by consent and which unlawful events prompted the Plaintiff not to execute the draft amalgamated Lease.
8. The Plaintiff avers that the Defendant has in their letter dated **22nd January 2013** demanded for rent payment of **Kshs. 2,960,680** for the terrace area and has even issued an invoice with notice to levy distress for payment and or evict the Plaintiff. The Plaintiff further avers that the Defendant in their letter dated **8th May 2013** further demanded **Ksh. 2,548,609.29** as rent for the terrace area beginning March 2011. The Plaintiff is apprehensive that it will be evicted and or unlawfully distressed for rent in the event that the Court does not restrain the Defendant.
9. The Application is opposed vide the Replying Affidavit of **ANNIE MUGAMBI** described as the Chief Executive Officer of the Defendant and sworn on **21st June 2013**. In the said affidavit, the deponent avers that it is dishonest of the Plaintiff to challenge the demand for rent payment for the terraces at this point in time yet it already paid a total sum of **Kshs. 1,071,351/=** as partial rent for the same. Therefore, what is being sought by the Defendant is only the balance and arrears accrued thereafter. *The Defendant attached copies of the receipts issued to the Plaintiff upon partial settlement of the rent for the terraces.*
10. The deponent further avers that despite the Plaintiff admitting to receiving a Letter of Offer way back in March 2010 for formalization of the lease of the terraces prior to preparation of a formal lease and despite admitting to receiving various demands to pay rent thereon, the Plaintiff is still insisting on free occupation thereof.
11. The deponent denies that the Defendant during the meeting of **27th March 2006** or at any other time allowed the Plaintiff to occupy the said terraces "free of charge". It is averred that the Minutes relied upon by the Plaintiff do not by any stretch of imagination show any acceptance by the Defendant for occupation of the terraces "free of charge". It is the Defendant's case that the occupation of the terraces by the Plaintiff was done unilaterally since the Defendant never let out the said terraces.
12. It is further averred by the Defendant that the Letter of Offer dated **6th February 2009** for Lease of the amalgamated space, accepted and signed by the Plaintiff, demonstrates clearly that the Terraces are not included in and are not part of the demised area. Pursuant to the aforesaid letter of offer, the Defendant prepared and forwarded the Lease to the Plaintiff for execution, which Lease has not been executed by the Plaintiff to date. According to the Defendant, the Plaintiff's allegation that it has withheld the Lease because the Defendant has arbitrarily increased service charges is an afterthought.
13. It is averred on behalf of the Defendant that the purported minutes for the meeting of **18th November 2008** annexed by the Plaintiff in its Supporting affidavit as Exhibit "DO 3" is not anywhere signed or sanctioned by the Defendant as being correct as regards what was discussed or agreed at the said meeting. According to the Defendant, information from its officers who attended the said meeting of **18th November 2008** is that the purported minutes are skewed and contain substantial inaccuracies.
14. According to the Defendant what was discussed in the said meeting was simply that the Defendant would evaluate the Plaintiff's request. The Plaintiff was also informed that it was irregular for the

- Plaintiff to have annexed the terraces for its own use.
15. It is further averred that subsequently and upon evaluation and consideration of the Plaintiff's request to occupy the terraces free of charge, the Defendant decided that the said request was not tenable. The request was accordingly refused and the same was communicated to the Plaintiff. The Defendant avers that the Plaintiff was informed that it would be charged rent and it was given an offer to take a Lease for the said terraces.
 16. I have considered the pleadings herein as well as submissions filed by both parties. The main issue for determination is whether the Plaintiff is entitled to the interim injunction orders it seeks.
 17. From the pleadings, it is evident that the dispute herein relates mainly to the terraces. There is no dispute as regards the Plaintiff's lease for the rest of the 6th floor which, save for the terraces, was let out to the Plaintiff. Therefore, on one hand, it is the Plaintiff's claim that there was a mutual arrangement between the parties that it would occupy the terraces at no cost in light of substantial improvements and beautification the Plaintiff would make to the area. On the other hand, it is the Defendant's grievance that the Plaintiff has unlawfully proceeded to unilaterally annex the terraces and is refusing to pay for the same.
 18. I have perused the Minutes of the meeting held on 27th March 2006 attached to the Plaintiff's supporting affidavit and marked as "DO 4". Nowhere in the minutes is it expressed that the Plaintiff was to occupy the terraces free of charge. Under Minute 3 of the minutes which deals with the proposed use of the terraces, what is clear is that the Plaintiff expected to use the terraces free of charge as a concession as he was occupying the whole floor and was improving the beauty of the building. At the conclusion of that discussion, as I understand it, it seems that it was agreed that the Defendant would do a further evaluation on the proposal to see whether the tenant should pay something for the terraces at least, if not at the full rate of the other premises.
 19. As is averred by the Defendant, the Plaintiff's request to occupy the terraces free of charge was refused. Instead, the Plaintiff was informed that it would be charged rent and it was given an offer to take a Lease for the said terraces. It is also averred by the Defendant that the Plaintiff had already paid partial rent for the terraces to the tune of **Kshs. 1,071,351/=**. In that event, it means that the Plaintiff was well aware that the terraces were to be occupied at a fee.
 20. Furthermore, most of the allegations made by the Defendant if not all have not been controverted by the Plaintiff. In that case it only means that indeed the Plaintiff did not have consent from the Defendant to occupy the terraces free of charge.
 21. To say the least, the Plaintiff's application for injunction orders seems premature at this stage. The Defendant has not levied any distress on the Plaintiff. There is also no substantial evidence put forth by the Plaintiff to show that the Defendant is in any way interfering with the Plaintiff's quiet occupation and enjoyment of its tenancy on the 6th floor new Rehema House erected on L.R no. 870/VI/260.
 22. The principles upon which this Court can grant a prayer of injunction are well settled. I am satisfied that the grounds given by the Plaintiff fall far below the standards established in the celebrated case of **GIELLA VS CASSMAN BROWN (1973) E.A 358**.
 23. The upshot of the foregoing is that the Plaintiff's Notice of Motion Application dated **15th May 2013** and filed in Court on **17th May 2013** is hereby dismissed with costs.

It is so ordered

DATED, READ AND DELIVERED AT NAIROBI

THIS 4TH DAY OF NOVEMBER 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Simiyu for the Plaintiffs

Omosa holding brief for Wananda for the Defendants

Teresia – Court Clerk