



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 324 OF 2012

**FREDRICK KIRITU t/a SAATCHI KABIRO &
ASSOCIATES:.....:PLAINTIFF**

VERSUS

**TURN-O-METAL ENGINEERING LTD.
:.....:DEFENDANT**

R U L I N G

1. Before the Court is a **Notice of Motion** application dated **21st May 2012** brought under **Section 1A, 1B & 3B** of the **Civil Procedure Rules, Order 40** and **Order 51** of the **Civil Procedure Rules 2010**. The Applicant seeks for orders that:

- a. Pending the hearing and determination of this suit the Landlord be restrained from evicting the Plaintiff/Applicant from leased premises.
- b. The Court be pleased to order the defendant to provide electricity, water, toilets, watchman’s office and to level the ground and render it fit for commercial occupation.

Simultaneously with the said Notice of Motion the Plaintiff also filed a suit seeking a permanent injunction restraining the Defendant from further breaching the lease agreement. The background facts of the application are contained in the Plaintiff.

2. The application is supported by the affidavit of **FREDRICK KIRITU** filed in court on **23rd May 2012** together with its annexures as well as a Supplementary affidavit of **FREDRICK KIRITU** filed in Court on **11th June 2012**. The main ground of the application is that the Plaintiff entered into a lease agreement with the defendant which the defendant has failed to honour.

3. The Application is opposed by way of a Replying Affidavit of **SURINDER SINGH BIRDI** filed in Court on **4th June 2012** and a further Affidavit filed on **11th June 2012**.

4. The brief facts of the application are that the Plaintiff and the Defendant entered into a Lease Agreement for a term of five years three months. The Lease Agreement contained a number of rights and obligations to be fulfilled by both the plaintiff and defendant. It was a condition of the Lease Agreement that the Plaintiff would use the leased premises for maintaining his trucks and the Defendant was required to level it and apply stone (hardcore) to render it usable and to connect it to utilities like electricity, water, toilet and a watchman’s office. It is the Plaintiff’s claim that the foregoing has not been done to date despite the fact that he paid a deposit of Kshs. 500,000 to the defendant on the promise that the leased

premises would be ready for occupation by the beginning of February. As a result of the foregoing, the Plaintiff brought a suit against the defendant for breach of the lease agreement.

5. The Plaintiff's case is that he executed the lease agreement on condition that the leased premises would be ready for occupation by the beginning of February. The Plaintiff paid the deposit of Kshs.500,000 on the premise that the same would be used by the defendant to level the ground and connect utility supplies on the leased premises. The Plaintiff alleges that the defendant instead used the money to service its loans and that up to date the leased premises are not in a usable state. Further, the Plaintiff states that the defendant has issued him with eviction threats and has also re-advertised the leased premises for leasing to other persons while he is still in possession. It is the Plaintiff's contention that the Defendant has interfered with his enjoyment of quiet possession.

6. The defendant's case is that by way of a lease dated 22nd day of February 2012, they entered into a lease agreement with the Plaintiff for a term of five years three months. The defendant alleges that the Plaintiff is in arrears of rent and has failed to pay the balance of the deposit and therefore is in breach of the said agreement. The defendant also accuses the Plaintiff of parting with possession of the leased premises. The Defendant further submits that the leased premises have always been in usable condition and produces a report by Clayton Valuers Limited corroborating the same. The defendant further states that they serviced the premises with the required facilities and leveled the ground as was agreed.

7. From the above I find that the main issues for determination are;

- a) whether there was a breach of the lease agreement; and
- b) whether the applicant is entitled to the orders he is seeking.

It is not in dispute that the parties herein entered into a Lease Agreement and the Plaintiff made a deposit of Kshs.500,000 to the Defendant. The dispute is as to whether or not the parties fulfilled their obligations in the lease agreement. The Court will rely on the Lease Agreement dated **22nd February 2012** attached to the Defendant's Replying Affidavit as it is the one duly executed by both parties.

8. It is clear from the agreement that the Plaintiff was to pay a deposit of **Kshs.517,242** on the date of the commencement of the lease. Further to this the Plaintiff was to pay one month's rent in advance to the tune of **Kshs.172, 414**. The Plaintiff has only paid **Kshs.500,000** to date. The Plaintiff has not expressly stated to this Court why he did not pay the balance due on the deposit and the one month's advance rent. On the part of the defendant, it was required that they service the premises with amenities like water and electricity as well as level the ground with hardcore stones. The evidence on record indicates that what was brought to the leased premises was not hardcore as agreed but quarry chippings. The invoices attached by the defendant of quarry chips they purchased are not evidence that they leveled the ground as required. The defendant also attached a report by Clayton Valuers dated **6th of June 2012** which basically indicates that the property is in useable condition and is serviced with the required amenities. At this point, the Court would not find the report to be of probative value as it is not conclusive evidence of the state of the leased premises. The defendant has not convinced this Court that they performed part of their bargain in the lease agreement. From the foregoing, I find that both parties are in breach of the said agreement.

9. To say the least, the Plaintiff brought this application prematurely. The Plaintiff himself is in breach of the Lease agreement. He is owing rent in arrears yet he confidently enters the doors of the Court of equity.

In order to assist both parties I make orders as follows:-

- a) Pending the hearing and determination of this suit the Landlord be restrained from evicting the plaintiff/applicant from leased premises.
- b) Pending the hearing and determination of the application the defendant/respondent be restrained from

harassing, intimidating, communicating directly with the plaintiff's clients blocking access to the leased premises, carting away the property belonging to the plaintiff and or his clients and or in any other way interfering with the plaintiff's enjoyment of quiet possession of the leased premises.

c) The defendant/respondent to provide electricity, water, toilets, watchman's office and to level the ground and render it fit for commercial occupation.

Parties shall bear their own costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI

THIS 16TH DAY OF JULY 2012

E.K.O OGOLA

JUDGE

PRESENT

Ngige H/B for Mwangi for the Plaintiff

M/s Rajab H/B for Kago for Defendant

Teresia – court clerk