REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 15 OF 2020

GARDEN HOTEL MACHAKOS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

1. **ELIZABETH NGII MAINGI**
2. **ROY MAKOMA MAINGI** *(Deceased)*
3. **DERRICK MUTWII MAINGI** *(as the Legal Representatives of the Estate of*

LABAN MAINGI KITELE *(Deceased)*…**DEFENDANTS/RESPONDENTS**

RULING

Introduction:

1. In the Application dated 24th February, 2020, the Plaintiff has prayed for the following orders:

> ***a) That a temporary injunction do issue restraining the Defendants whether by themselves, their agents, officers, employees or other persons claiming under them in any manner or howsoever subjecting the Plaintiff, its servants or agents to any harassment with the intention thereby of evicting or otherwise interfering with the Plaintiff's quiet enjoyment in respect of the suit property pending the hearing and determination of this suit.***
>
> ***b) That in the alternative the Defendants reimburse the Plaintiff Kenya Shillings Twenty Nine Million Seven Hundred and Twenty Four Thousand Eight Hundred and Seventy Eight (Kshs. 29,724,878/-) being the costs of renovations.***
>
> ***c) That the costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the Plaintiff's Director who has deponed that in 1991, the Plaintiff entered into an Agreement with the deceased whereby the Plaintiff financially contributed to the construction of the Garden Hotel which is situated on parcel of land known as Machakos Town/Block II/537 *(the suit property).*

3. According to the Plaintiff's Director, in exchange, when the hotel opened its doors in 1993, and for a period of 16 years, no rent was charged on the hotel until the Plaintiff fully recovered the costs it had put in the construction of the hotel.

4. The Plaintiff's Director deponed that upon the expiry of the 16 years, the Plaintiff entered into a Lease Agreement with the deceased on 1st March, 2008 for the suit property for a period of six (6) years; that the said Lease stipulated that for the first two (2) years, the rent payable was Kshs. 6,000,000 and that the rent payable for the last two years was Kshs. 7,935,000.

5. It is the Plaintiff's case that on 1st February, 2014, the Lease was extended for a further period of five (5) years and six (6) months which was to expire on 28th February, 2020; that during the pendency of the said Lease, the parties agreed to renovate the hotel; that as of 3oth April, 2015, 41 rooms had been fully renovated and that the renovation of the remaining 20 rooms was to be completed by end of May, 2015.

6. Consequently, it was deponed by the Plaintiff's Director, as of 30th April, 2015, the total cost of renovating the rooms was Kshs. 18,050,000; that the final cost of renovation was Kshs. 29,724,878 and that on 26th October, 2019, the Plaintiff informed the Defendants about the leaking of the hotel which was interfering with the business of the hotel.

7. According to the Plaintiff's Director, the Plaintiff has been experiencing a slump in business and therefore will not be able to recover the funds it expended on renovating the hotel before the expiry of the Lease; that the Plaintiff is willing to vacate the hotel on condition that the

Defendants refund it Kshs. 29,724,878 being the costs of renovations and that in the alternative, the Lease should be extended to allow the Plaintiff recover the costs of the renovations.

8. In reply, the 1st Defendant deponed that the deceased developed the suit property without any assistance from the Plaintiff; that since 1991, the Plaintiff was paying to the deceased rent for use of the suit property and that they agreed that the Plaintiff could renovate the hotel to fit its business of running a hotel at its costs.

9. The 1st Defendant deponed that the second Lease between the deceased and the Plaintiff ended on 28th February, 2020 by which time the Plaintiff had rent arrears of Kshs. 2,217,591; that there was no formal Agreement that was entered into with the Plaintiff to renovate the building and that there was no Agreement between the parties on the refund of the money expended on renovating the hotel by the Plaintiff.

10. According to the 1st Defendant, it was not the responsibility of the deceased or the Defendants to repair, renovate or refurbish the hotel; that since the Lease period had ended on 28th February, 2020, and the Plaintiff had agreed in writing to vacate the suit premises, the suit was filed as an afterthought and that this court has no jurisdiction to re-write a contract.

11. The 1st Defendant finally deponed that the Plaintiff filed in the Business Tribunal in Nairobi Case No. 129 of 2020 a suit against the Defendants and obtained orders; that the claim by the Plaintiff of Kshs. 29, 724,878 shows that the Plaintiff can be compensated as damages and that the Application for injunction should be dismissed.

Submissions

12. The Plaintiff's advocate submitted that the Plaintiff has a right over the suit premises, which right is at risk of being violated by the Defendants by evicting the Plaintiff, and thus interfering with its quiet enjoyment of the suit premises.

13. Counsel submitted that at this juncture, the court need not examine the merits of the case closely, but to satisfy itself that the Plaintiff/Applicant has raised a *bona fide* question as to the existence of the right which it alleges has been violated or is at risk of being violated. Plaintiff's counsel relied on the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR* where the Court of Appeal stated:-

> *"We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right, which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities."*

14. It was submitted that applying the above principles to the matter at hand, the Applicant has demonstrated it has a *prima facie* case with a probability of success.

15. Counsel submitted that the Plaintiff has invested huge sums of money into the hotel business in order to place it at per with its competitors; that the said investment has yet to be utilized and that in a bid to cash in its investment, the Plaintiff made several bookings and accepted monies for conferences scheduled for the month of March.

16. It was submitted that if the Defendant evicts the Plaintiff from the suit premises, the Plaintiff will not only lose monies that it has expended on the business, but stands to suffer on its reputation and standing, which cannot be quantified in monetary terms.

17. Counsel submitted that the balance of convenience tilts in favour of the Plaintiff; that the Plaintiff stands to suffer more than the Defendant if the injunction is not granted because of the costs it has incurred in carrying out renovations amounting to Kshs. 29,724,878, as well as its unutilized investment and standing as a business in the hotel industry and that the Application dated 24th February, 2020 should be allowed as prayed.

18. The Defendants' advocate submitted that there is no Landlord and Tenant relationship between the parties in which injunctive orders can issue; that the Lease in respect of the suit property ended on 28th February, 2020 and that the Plaintiff agreed in writing to vacate the suit property.

19. The Defendants' counsel submitted that the Lease that ended on 28th February, 2020 had no Clause to the effect that the Plaintiff was to be reimbursed for the repairs or renovations; that the court has no power to re-write the Lease Agreement and that once the Lease expired, there was no meeting of the minds.

20. It was submitted that the Plaintiff has prayed for specific damages of Kshs. 29,724,878 being the costs of the alleged renovation; that where damages are quantified, then the issue of irreparable damages does not arise and that the Application should be dismissed with costs. Counsel relied on numerous authorities which I have considered.

Analysis and findings:

21. The only issue for determination is whether the Plaintiff is entitled to an order of injunction in respect to land known as Machakos Town/ Block II/537, on which "*Garden Hotel"* has been constructed; or in the alternative, whether the Plaintiff can be refunded Kshs. 29,724,878

being the costs of renovating the said hotel.

22. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction have been well laid out as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience *(See Giella vs. Cassman Brown & Co. Ltd (1973) EA 358 and Fellowes and Son vs. Fisher [1976] I QB 122).*

23. What amounts to a *prima facie* case, was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* case as follows:

> *"...in Civil cases, it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

24. It is trite that interlocutory orders are granted without full investigation of the merits of either side's case. To be granted interlocutory relief of injunction, the Plaintiff must show a more than an arguable case. *(See Fessenden vs. Higgs and Hill Ltd [1935] ALL ER 435).* In *Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR, the* Court of Appeal held as follows:

> *"The party on whom the burden of proving* a *prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."*

25. In *Francome vs. Mirror Group Newspapers Ltd., [1984] 1 WLR 892,* Sir John Donaldson MR, while criticizing the expression *'balance of convenience'*, an expression posited in the House of Lords decision in *American Cynamid vs. Ethicon, [1975] AC 396,* said this about the purpose of interim injunctions:

> *"Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience."*

26. It is not in dispute that on 1st February, 2014, the late Laban Maingi Kitele *(the deceased)* entered into an Agreement of Lease over the suit property with the Plaintiff for a period of 5 years and 6 months. It is also not in dispute that the said Lease terminated by effluxion of time on 28th February, 2020.

27. The Plaintiff's case is that during the pendency of the Lease, the parties agreed to renovate the hotel and that as of 3oth April, 2015, 41 rooms had been fully renovated and that the renovation of the remaining 20 rooms was to be completed by end of May, 2015.

28. The Plaintiff's Director deponed that the final cost of renovation was Kshs. 29,724,878. It was deponed that the Plaintiff has been experiencing a slump in business and therefore would not be able to recover the funds it expended on renovating the hotel before the expiry of the Lease.

29. It is the Plaintiff's case that it is willing to vacate the hotel on condition that the Defendants refunds it Kshs. 29,724,878 being the costs of renovations and that in the alternative, the Lease should be extended to allow the Plaintiff recover the costs of the renovations. The Defendants' response is that the deceased or the Defendants have never entered into an Agreement with the Plaintiff on the issue of renovating the suit premises.

30. I have perused the numerous correspondence between the Plaintiff and the Defendants. In the letter dated 30th July, 2018, the Defendants' advocate informed the Plaintiff that the Lease was to end on 31st August, 2019. In the same letter, the Defendants sought to be provided with any documents showing that the deceased agreed with the Plaintiff to have new cubicles installed and the renovation of the Hotel at his cost.

31. In the letter dated 20th September, 2019, the Plaintiff informed the Defendants' advocate that the Plaintiff will vacate the demised premises on 28th February, 2020 when the Lease expires. In the same letter, the Plaintiff forwarded to the Defendants' advocate a cheque for Kshs 1,900,000 and cash of Kshs. 100,000 for rent. The Plaintiff promised to pay the outstanding rent arrears of 1,600,000 within seven (7) days.

32. The Plaintiff did not raise the issue of being paid any amount of money by the Defendants for renovation before moving out of the suit premises in its letter dated 20th September, 2019. Indeed, the Plaintiff has not provided any written Agreement it had with the Defendants or the deceased for a refund of monies it will expend on renovating the premises.

33. To the contrary, Clause 4 (6) of the Lease obligated the Plaintiff, and not the Lessor, to keep the exterior of all windows and the interior of the suit premises clean and in tenantable repair, and at the end of the Lease to yield up the demised property to the Lessor in such state and condition as the same were in at the commencement of the Lease. This Clause means that the cost of renovating the interior of the suit premises was to be borne by the Plaintiff.

34. It is trite that where parties enter into a written Agreement like in this case, they are bound by the terms of the Agreement. The parole evidence rule governs the extent to which parties to a case may introduce in court evidence contemporaneous to the Agreement in order to modify, explain or supplement a contract in issue.

35. The parole evidence rule excludes the admission of parole evidence, meaning that when the parties to a contract have made and signed a contract, evidence of antecedent negotiations will not be admissible for the purpose of verifying or contradicting what is written into the contract.

36. Indeed, courts have stated times without number that it is not their business to re-write contracts between parties. In the case of *National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & another [2001] eKLR,* the Court of Appeal held as follows:

> *"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):*
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> > *"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".*

37. The Lease of the suit property ended on 28th February, 2020. The Plaintiff received letters to the effect that the Lease was not going to be renewed by the Defendant after 28th February, 2020. Indeed, the Plaintiff wrote a letter dated 20th February, 2019 accepting to vacate the premises without any conditions.

38. That being the case, and considering that the Lease between the Plaintiff and the deceased did not have a Clause to the effect that the Plaintiff was to be reimbursed for the repairs or renovations of the suit premises before the Plaintiff could vacate the suit premises, it is my finding that the Plaintiff has not established a *prima facie* case with chances of success

39. Furthermore, the Plaintiff has quantified the damages that it is purportedly entitled to in the Plaint. Having pleaded in the Plaint that the Lease should be extended so that it can recover Kshs. 29,724,878 being the costs of renovations, the Plaintiff will not suffer injury that cannot be compensated by way of damages. However, whether the Plaintiff is entitled to the said amount can only be determined at trial, and not at this stage.

40. For those reasons, I dismiss the Plaintiff's Application dated 24th February, 2020 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2ND DAY OF OCTOBER, 2020.

O.A. ANGOTE

JUDGE