REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1503 OF 1998

IPA LABORATORIES LTD...PLAINTIFF

VERSUS

SPRINGFIELD PROPERTIES LTD

ANIL K. KAPILA NATURE PHARMACY LTD.....................DEFENDANT

R U L I N G

The facts of this case are clear and straightforward. The plaintiff is a tenant of the first defendant who is the registered proprietor of premises known as L.R. No. 209/4282, Nairobi upon which stands a building known as Kenya Cinema Plaza. The plaintiff holds a lease to shop NO. 14 therein located on the first floor. From the record before me, the lease was first granted on or about 1st august, 1991 for six years and on expiry on 31st July, 1997 the same was renewed for a further period of six years from 1st August 1997 to 31st July, 2003.

The terms and conditions of the tenancy are set out in the lease dated 25th August 1997 and registered in the land Titles Registry at Nairobi as No. L.R. 9212/69 on 17th November, 1997.

The plaintiff has been and still operates a Chemist/Pharmacy in the leased premises. It is the plaintiffs case that it was an implied term of the lease that the first and 2nd defendants would not grant a lease of any portion of the suit premises particularly the ground floor to any other person for a similar purpose of running an/or operating a chemist/pharmacy as long as the plaintiff's lease was in force.

The second defendant is an employee of the first defendant incharge of managing, controlling and/or letting out the suit premises for and on behalf of the first defendant.

Not withstanding the implied term aforesaid and a mutual agreement between the first and second defendants not to let the suit premises for a similar purpose it is the plaintiffs' case that the first and second defendants have agreed to grant a lease for a portion of the suit premises on the ground floor and located right on the passage to the staircase and lifts and known as shop no. 6 to the 3rd defendant with effect from 1st July, 1998 to the detriment of the plaintiff. The 3rd defendant is to run and/or operate a similar business as that of the plaintiff.

In a lengthy; and detailed plaint, the plaintiff has set out the actions and/or omissions of each of the three defendants which will adversely affect its business.

Alongside the plaint there was filed an application by way of chamber summons for injunction orders to

(a) restrain the first and second defendants from leasing and/or offering for lease shop No.6 on the ground floor of the building on L.R. 209/4282 to the 3rd defendant to operate a

chemist/pharmacy.

> b) restrain the 3rd defendant from running and/or operating a chemist/pharmacy in shop no.6 on the ground floor or on any other portion of the building thereof pending the hearing and determination of this suit, and
>
> (c) restrain the defendant from breaching the implied terms of the lease and the mutual agreement entered between the plaintiff and the 1st and 2nd defendant in respect of the lease of shop No.14 aforesaid until the determination of the suit.

All learned counsel appearing for the respective parties herein have ably presented their cases. Several cases have been cited which I have read and noted.

Like in all applications of this nature, the only evidence available at this stage is by way of affidavits which evidence has not been subjected to crossexamination. With the assistance of all counsel however and the visit I made to the premises the notes of which are on record. I have been able to appreciate the evidence vis-a-vis the pleadings.

The plaintiff is bound to show a prima-facie case with a probability of success; that an award of damages would not be an adequate remedy and in the event of any doubt the court will decide the matter on a balance of convenience - see Giella -v- Cassman Brown. ltd. (1975) E.A 358 The courts will not make contracts for the parties but will give effect to their clear intention see Jiwaji and Others -v- Jiwaji and Another (1968) E.A 547.

Further as stated in the English case of Reigate Velluion manufacturing company (Ramsbottom), limited and Elton Cop Dyeing Company Limited (1918) 1 K.B 592 at 605.

> “ The first thing is to see what parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, “ what will happen in such a case”, they would both have replied,” of course, so and so will happen; we did not trouble to say that; it is too clear.” Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.”

The plaintiff raised concern over the turn of events before the filing of the suit. For about seven years no similar business had been set up which was indirect competition with its business. Any such business in the same premises would lead to the collapse of its business.

It has been shown by minutes of the tenants that the second defendant has allowed competing businesses to be set up which have effectively led to the collapse of existing businesses. This the second defendant has not denied.

The plaintiff is not worried that much about an overlap of business transactions but is opposed to identical operations in the same suit premises and as in the present case, at close proximity.

I had occasion to visit the premises. I noted several businesses being operate along the arcade on the ground floor and on the first floor. The location of the shop NO.6 is as set out in the pleadings. And so is shop No. 14 occupied by the plaintiff.

Of all the businesses viewed by the court, not a single one can be said to be identical to the other both on the ground floor and on the first floor.

This position appears to me to fortify the plaintiffs case that all along the implied term and mutual agreement were in existence not only in relation to the plaintiff but all other tenants.

I am prepared to accept the submissions that there is no privity of contract between the plaintiff and the 3rd defendant but I am persuaded by the submission that what is there is the privity of estate between the two vis-avis the first defendant as the proprietor of the suit premises.

Several allegations have been made against the second defendant that border on impropriety. These have not been denied and prima facie are a reflection of the strength of the plaintiff's case.

On my part, the plaintiff has presented a very strong prima facie case to warrant the orders sought. If the lease to the 3rd defendant is allowed to come into operation the sure result is that the plaintiff shall close down. I do not think any measure of damages can compensate the plaintiff if that were to happen.

On the other hand, the first defendant can quantify its damages pegged on the rent payable. The third defendant has not moved in and looking at the premises, not a single shelf or anything reflecting the setting up of a pharmacy/chemist can be seen. That also makes me doubt the averment that stock worth kshs.2 million has been purchased in readiness for the opening of the business.

Be that as it may, even if I were to be in doubt about my findings hereinabove, which is not the case, the balance of convenience would tilt in favour of the plaintiff. It is a running concern. There is a valid and subsisting lease. It has not been alleged that the plaintiff has breached any of the terms of that lease. The court on such a case will maintain the status quo.

And so, in the end, the plaintiff's application hereby succeeds.

Injunction orders shall issue forthwith in terms of prayers(a) (b) and (c) of the chamber summons dated 7th and filed on 8th July, 1998.

The plaintiff shall also have the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 28th day of January, 1999.

MBOGHOLI MSAGHA

JUDGE