



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**PETITION E014 OF 2020**

**IN THE MATTER OF ARTICLES 22(1)**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**AND FREEDOMS UNDER ARTICLES 27,40,47, AND 48 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF RENEWAL OF LEASES IN RESPECT OF LR. NO 209/3558 AND L.R NO.209/3559**

**BETWEEN**

**DESIGNS UNLIMITED LIMITED.....1<sup>ST</sup> PETITIONER**

**MECOL LIMITED.....2<sup>ND</sup> PETITIONER**

**=VERSUS=**

**KENYA RAILWAYS CORPORATION.....RESPONDENT**

**RULING**

1. The two Petitioners/Applicants are sister companies having common directors and shareholders. On 30<sup>th</sup> November 1983, the 2<sup>nd</sup> Applicant was granted a lease over LR No.209/3558 and 3559. On 24<sup>th</sup> June 1998, the lease in respect of LR No.209/3559 was assigned to the 1<sup>st</sup> Applicant with the consent of the Respondent. In or around 2014, the two Applicants resolved that the lease held by the 1<sup>st</sup> Applicant was to revert back to the 2<sup>nd</sup> Applicant. On 10<sup>th</sup> June 2020, when the Applicants made application for renewal of the leases, they indicated that the lease held by the 1<sup>st</sup> Respondent was to revert back to the 2<sup>nd</sup> Applicant.
2. On 24<sup>th</sup> August 2020, the Respondent wrote two letters addressed to the Applicants in which it offered to extend the two leases for a period of 45 years with effect from 1<sup>st</sup> October 2020. The terms of the new offers were spelt in the two letters. The Respondent asked the Applicants to signify their acceptance of the offers within 30 days from the date of the letters.
3. The Applicants through their lawyers wrote two letters on 14<sup>th</sup> September 2020 in which they accepted the Respondent's offer to renew the two leases for a period of 45 years each but expressed the hope that the letters of offer were a beginning of negotiation process on the terms as envisaged under the special conditions contained in the two grants. The Applicants further requested for extension of the acceptance period by 60 more days to facilitate negotiations. The letters were delivered to the Respondent on 14<sup>th</sup> September 2020 by a messenger who was turned away and advised that the letters be delivered via e-mail. The Applicants complied by e-mailing the two letters on 14<sup>th</sup> September 2020 and 17<sup>th</sup> September 2020 respectively.
4. The Respondent did not respond to the Applicants' letters. This is what prompted the Applicants to file a petition contemporaneously with a notice of motion in which they seek the following orders:-

**1) Spent**

**2) Spent**

3) Spent

4) *That this Honourable court be pleased to suspend /stay the offers dated 24<sup>th</sup> August 2020 to renew leases in respect of LR No.209/3559 and LR No.209/3558 made by the Respondent to the Petitioners until the hearing and determination of this petition.*

5) Spent

6) *That as an alternative to 4 above, an injunction do issue restraining the Respondent whether by itself or agents or servants from imposing on the petitioners terms of renewing leases in respect of LR No.209/3559 and LR No.209/3558 respectively contained in the letters of offer dated 24<sup>th</sup> August 2020 issued to the petitioners by the Respondent pending hearing and determination of this petition.*

7) *That the cost of this application be provided for.*

5. The Applicants contend that the terms in the offer letters were imposed on them without affording them an opportunity to negotiate the terms therein contrary to special condition No.14 contained in grant in respect of LR No.209/3558 and condition number 15 contained in grant in respect of LR No.209/3559. The Applicants argue that the special conditions in the two grants which are identical provided that in case of renewal, such renewal was to be granted subject to such rent and conditions as may be agreed upon.

6. The Applicants further contend that they have been paying stand premium and other charges together with rates since 1983 and that what the Respondent is offering in the letters of offer is an increment of over 5000% which is too high and that the period required for compliance is short and that no one can raise a combined sum of over 24 million shillings within a short time given the state of business during this time of Covid 19. The 2<sup>nd</sup> petitioner is engaged in the business of manufacturing of office furniture and equipment.

7. The Applicants argue that the Respondent delivered the letters of offer on 7<sup>th</sup> September 2020 which in essence left them with only 14 days to comply with the terms of the offer. The Applicants argue that the Respondent's action amounts to compulsory acquisition of the two properties without paying any compensation and that the clause on termination of the lease is meant to unjustly enrich the Respondent as it provides that in case of termination, the Applicants will move out of the leased premises without any claim against the Respondent.

8. The Applicants contend that they have invested over 200,000,000/= in the two properties and that if they were to exit the premises, they will suffer loss which will not be compensated. It is on this basis that the Applicants are seeking the orders prayed for in their application.

9. The Respondent opposed the Applicants' application based on grounds of opposition dated 6<sup>th</sup> October 2020 in which it contends that the application by the Applicants is misconceived, fatally defective, incompetent, bad in law, mischievous, frivolous, vexatious and is otherwise an abuse of the process of the court. The Respondent further contends that the petitioners have not demonstrated any cause of action and therefore the application lacks merit.

10. I have considered the Applicants' application as well as the opposition thereto by the Respondent. I have also considered the oral submissions by counsel for the Applicants and the Respondent. The only issue for determination in this application is whether the Applicants have made out a case for suspension of the letters of offer or in the alternative whether the Applicants have made out a case for grant of conservatory orders.

11. To begin with, the Applicants have in principle accepted the offer by the Respondent to extend their leases for 45 more years each. What they seem not to agree with are the terms as contained in the said offer letters. The petitioners are particularly uncomfortable with the rate of increment and the termination clause vis-a vis the period within which they were expected to comply with the terms.

12. In this petition, the petitioners are contending that their rights under Articles 40 and 47 of the constitution have been violated. Article 40 of the constitution guarantees protection of rights to property. Article 47 of the constitution guarantees right to fair administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair. The Applicants argue that in the Respondent unilaterally imposing conditions without affording them an opportunity to negotiate breaches both Articles 47 and 40 of the Constitution. It is in light of these arguments that I will determine whether to suspend the offers or in the alternative grant conservatory orders.

13. The Respondent is governed by the Kenya Railways Act which under Section 87(a) provides as follows:-

***“Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—***

***(a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent; and”.***

14. The Applicants have intimated their acceptance of the renewal and as has been indicated hereinabove, their only problem seems to be on the terms which in their opinion ought to be agreed upon. The relationship between the Applicants and the Respondent is contractual. One of the prayers in the Petition is a declaration that section 87 of the Kenya Railways Act is unconstitutional. The Applicants were alive to the provisions of Section 87 of the Kenya Railways Act but they have argued that they could not comply with the provisions of the said section as they could not do so given the 30 days period they were given to accept the offers.

15. During the hearing on this application, counsel for the Respondent indicated that the Respondent had no intention of evicting the Applicants and that if the Applicants did not wish to comply with the terms of the offer, they were free to do so and that they will be given time to move out. There is nothing to suggest that the Respondent was not amenable to negotiations. The Applicants moved to court on the basis that there was no response to their letters of 14<sup>th</sup> September 2020. This being the case, there is no basis upon which this court can suspend the offer letters.

16. On the issue of conservatory orders, it has been held that the same may be granted where the circumstances show that they are deserved. This was the holding by Justice Manjaja in **Geothermal Development Company Limited Vs Attorney General & 3 Others (2012) e KLR**. The Judge in this case considered the circumstances of the Applicant company in reaching his decision.

17. In the instant case, the Applicants moved to court ab initio prematurely. Letters of offer had been granted to them. There is no evidence that they gave a counter offer. They just moved to court and sought to have the offers suspended or conservatory orders granted. In constitutional petitions, conservatory orders may be given depending on the circumstances of the case. In the instant case, the Applicants have not demonstrated that they deserve any conservatory orders. They have not demonstrated that they have a prima facie case or that they will suffer loss which will not be compensated. There is no need to consider balance of convenience as already the Applicants have accepted renewal save for the terms which are attached to the same and which were open to negotiation which the Applicants seem not to have bothered to engage in. I therefore decline to grant any conservatory orders and proceed to dismiss the Applicants' application with costs to the Respondent.

It is so ordered.

**Dated, Signed and Delivered at Nairobi on this 5<sup>th</sup> day of November 2020.**

**E.O.OBAGA**

**JUDGE**

In the virtual presence of:-

Dr Kamau Kuria for Applicant

Mr Dachi for Mr Nyaanga for the Respondent

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**