



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC E 200 OF 2020

FOCUS GLASS AND ALUMINIUM LIMITED.....PLAINTIFF

=VERSUS=

SHELTER MANAGEMENT LIMITED.....1ST DEFENDANT

BALON NANGALAMA t/a HEBROS AUCTIONEERS.....2ND DEFENDANT

RULING

1. The Plaintiff/Applicant is a tenant in the 1st Defendant's premises on LR No.209/136/107. The Applicant had entered into a lease with the 1st Respondent for a period of 5 years and 3 months with effect from 1st January 2017 at a monthly rent of Kshs. 140,000/ payable quarterly in advance. The lease provided for a monthly increment of 10% after every two years.
2. Following the outbreak of Covid 19 , the Applicant requested the 1st Respondent to reduce rent by 50% . The 1st Respondent wrote back and offered to reduce rent by 10% to take into account the effects of Covid 19 on businesses generally. The Applicant insisted on reduction of rent by 50% . When the 1st Respondent refused to reduce the rent more than the 10% offered, the Applicant asked the 1st Respondent to take back 50% of the space leased to the Applicant so that the Applicant can retain the remaining 50%.
3. The Applicant has not paid any rent from April 2020 and when the 1st Respondent insisted on payment of rent due less the 10% reprieve offered, the Applicant moved to Milimani Chief Magistrate's Court where it filed CMCC No.3074 of 2020 against the 1st Respondent in which it sought to restrain the 1st Respondent from levying distress against it. The Applicant also sought orders compelling the 1st Respondent to accept rent of 50% during the subsistence of Covid 19 and for reference of the matter to mediation.
4. The lower court declined to entertain the matter on grounds of lack of jurisdiction. It is after this that the Applicant moved to this court and filed a notice of motion dated 21st October 2020 in which it seeks the following orders:-
 - 1) Spent
 - 2) Spent
 - 3) Pending hearing and the determination of the main suit the 1st Defendant/ Respondent through its agents the 2nd Defendant/ Respondent and /or through any other auctioneers be and is hereby restrained from attaching and selling the Plaintiff's goods by public auction and/or by any other mode of sale as scheduled to take place on 27th October 2020 , 3rd November 2020 and/or thereafter.
 - 4) Spent
 - 5) Pending hearing and the determination of the main suit the 1st Defendant /Respondent be prevailed upon to accept rent for 50% of the leased premises with effect from April 2020 to date while it takes back the remaining 50% of the premises and leases them to other tenants.
 - 6) Pending hearing and the determination of the main suit the 1st Defendant be compelled to apply the Kshs. 500,000/= it is holding in the Plaintiffs account towards offsetting the rent arrears owed.
 - 7) That the cost of this application be provided for.

5. The Applicant contends that its business was affected by Covid 19 and that as a result, it has given notice to the 1st Respondent that it shall be terminating the lease by 28th February 2021 and hand over the leased premises back to the 1st Respondent on 1st March 2021. The Applicant contends that instead of the 1st Respondent proceeding to auction the proclaimed goods which include a personal car of its Director, the 1st Respondent should apply the Kshs. 500,000/= deposit towards reduction of the rent due which is now over one million shillings.

6. The Applicant contends that there were two proclamations which were carried out by the 2nd Respondent which were expiring on 27th October 2020 and 3rd November 2020 when the proclaimed goods were expected to be sold. The Applicant argues that it has been saving 50% of the rent which it is willing to pay to the Respondent and that therefore the court should grant it the orders which it is praying for.

7. The Applicant during the hearing of this application submitted through its advocate that this is a matter which can be sorted out if the parties are given time to negotiate.

8. The 1st Respondent opposed the Applicant's application based on a replying affidavit sworn by its director on 30th October 2020. The 1st Respondent contends that following the outbreak of Covid 19 and its effects on various businesses, the Applicant wrote to it and requested for a reduction of rent by 50%. The 1st Respondent wrote back and indicated to the Applicant that it was willing to reduce rent by 10% which is what the other tenants were offered.

9. The Applicant through its director insisted on a 50% reduction and when the 1st Respondent brought to the attention of the Applicant that it had not increased rent as per the lease due to a request by the Applicant, the Applicant insisted that it was to pay rent less 50% . The 1st Respondent tried to persuade the Applicant to commit itself on how it was going to repay the outstanding rent but the Applicant became doggy.

10. The Applicant had even sub-let part of the leased premises without consent of the 1st Respondent and it was still enjoying the benefits of maintenance of common areas without payment of rent. The 1st Respondent argues that the Applicant is not being genuine in its demands and that the Applicant wants the court to assist it to remain in the business premises without paying rent. The 1st Respondent takes issue with the fact that the Applicant did not disclose the fact that it had filed another case which is still pending before the lower court.

11. I have considered the Applicant's application as well as the opposition to the same by the 1st Respondent. I have also considered the oral submissions by the Advocates for the parties. Besides orders staying auction of the proclaimed goods, the Applicant seeks orders which if given are mandatory in nature which will determine the matter even before it is heard. The first issue for determination on this matter is whether the Applicant has made a case for grant of stay of sale of the proclaimed goods and secondly whether the court can compel the 1st Respondent to take 50% of the leased premises and be compelled to apply the Kshs. 500,000/= deposit towards reduction of the rent owed.

12. It is clear that the 1st Respondent was considerate in agreeing to reduce the rent by 10% . The lease agreement had stated that rent was to be increased by 10% after every two years but upon request by the Applicant even before Covid 19 set it, the 1st Respondent agreed not to increase rent. When Covid 19 affected businesses, the 1st Respondent agreed to reduce rent by 10% . Despite this reduction and the fact that the Applicant had sub-let the leased premises, the Applicant has refused to pay any rent from April 2020 to date. This is despite the fact that the Applicant has admitted that it has been saving rent of 50%. Which it is willing to pay towards reduction of the rent due.

13. Issues to do with leases are matters of a contractual nature and one party cannot seek to dictate what rebate it should have. The Applicant has already indicated its intention to leave the premises by 1st March 2021. Before then, it has to meet its obligations of paying rent less what the 1st Respondent has offered. Deposits are made for a purpose, like taking care of any damages which may have been occasioned during the lease period. It will be unfair for a court to make orders that the same be applied towards reduction of rent.

14. It will also be against the law for a court to order that a landlord takes half of the premises leased and leave the other half to a tenant who is not being keen to pay even the half rent which it has admitted it has been saving. Distress of rent is one of the lawful means used to recover rent arrears and courts can rarely interfere unless it is shown that the distress has no basis. In the instant case, the 1st Respondent has tried to accommodate the Applicant but the Applicant is not ready to commit itself on how it will repay the outstanding rent. During the hearing, the counsel for the 1st Respondent even indicated that his client is ready to accommodate the Applicant by even applying the deposit towards reduction of the rent if there is an agreeable exit plan.

15. It is therefore clear that the Applicant is trying to use the court process to avoid its obligations and the court cannot in the circumstances come to its aid particularly when there is no commitment to pay even what it is admitting has been saving. I find no merit in this application which is dismissed with costs to the 1st Respondent.

It is so ordered.

Dated, Signed and Delivered at Nairobi on this 3rd day of November 2020.

E.O.OBAGA

JUDGE

In the virtual presence of:-

M/s Mwaura for Applicant

M/s Murangiri for Mr Ali for Respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE