



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 16 OF 2020

BRUCE MUTIE MUTUKU T/A DIANI BUSINESS TRAVEL

& DIANI BUSINESS CENTER.....APPLICANT

-VS-

ASHBURTON GROVE LIMITED.....DEFENDANT

RULING

1. This ruling is in respect of the application for injunction dated 20th July 2020 seeking orders restraining the respondent by itself, their servants, employees, agents and any other person whomsoever and howsoever from levying distress for rent and/or in any manner interfering with the applicant's occupation/tenancy and use of electricity and water at the property situate on PLOT KWALE/DIANI BEACH/BLOCK 1588, DIANI pending the hearing and determination of the proceedings between the parties in the Business Rent Tribunal (BPRT) No. 176 of 2020. The applicant's case is that the respondent has been harassing the Applicant in order to frustrate the Landlord-Tenant relationship between the parties by issuing proclamation to levy distress even when there are court orders to stop any interference with the applicant's tenancy. That the respondent issued a proclamation to levy distress for rent dated 10th July 2020 and the goods were due for removal on 24th July 2020. That the respondent has also threatened to evict the applicant from the tenancy premises. The applicant states that he lodged proceedings in BPRT no. 176 of 2020 which is pending determination, though it is not certain when the said proceedings will commence since there are orders restraining the new Chairman and his members issued in ELRC Petition nos.99 and 100 of 2020 Nairobi on 15th July 2020 hence the BPRT cannot sit till the said orders are vacated or set aside. The applicant states that since the BPRT is not in session, the respondent should be restrained from stealing a match against the applicant without due process. That there are four other cases between the parties pending before the tribunal with various restrictive orders but the respondent has gone ahead to disregard them.

2. The application is supported by the affidavit of Bruce Mutie Mutuku sworn on 20th July, 2020. The applicant has annexed copies of some orders of the four matters issued in the Tribunal as well as the pleadings in those cases.

3. In opposing the application, the respondent filed a replying affidavit sworn by Michael John Bell on 24th September, 2020. He has deposed that the applicant has been the respondent's premises since 2009 to date and is in rent arrears amounting to more than KShs.2,547,200 and which continues to accumulate. The respondent admits that various matters have been filed by the applicant in the BPRT and are still pending before the Tribunal and argues that the present application is a waste of this court's time. He has deposed that he has on many occasions engaged the applicant as regards the accrued rent but the applicant has been deviating from paying the said rent arrears through dubious means and through several court cases thus defeating the very fact and cordial tenancy relations and obligations. That the applicant has come to court with unclean hands. It is averred that the distress for rent is legal since the applicant is in rent arrears, including an outstanding power bill. The respondent urged the court not to grant the applicant the orders being sought and asked that the application be dismissed with costs.

4. The application was canvassed by way of written submissions which were duly filed by the advocates for the applicant and the advocates for the respondents. I have considered the application and the rival submission. The application herein is for injunctive orders which are equitable reliefs granted at the discretion of the court. The issue for determination therefore is whether the applicant is deserving of the injunctive orders. The court will take into account that injunctive orders are issued whenever the subject matter of the suit is in danger of disposition or alienation before the issues in dispute have been resolved. A party also seeks injunctive relief when he/she feels that his/her rights have been infringed.

5. The principles upon which an interlocutory injunction may be granted are well settled. One has to establish a prima facie case with a probability of success and an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. If in doubt, the court will decide the matter on a balance of convenience.

6. In the case of **Mrao Ltd –v- First American Bank of Kenya (2003) KLR 125**, a prima facie case was said to be “one 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 from the latter.”

7. The courts have also accepted that in dealing with an application for an interlocutory injunction the court is not necessarily bound by the three principles set out in the **Giella Case**. The court may look at the circumstances of the case generally and the overriding objective of the law. In the case of **Suleiman –v- Amboseli Resort Ltd (2004) KLR 589** Ojwang Ag. J (as he then was) stated thus:

“.....counsel for the defendant urged that the shape of the law governing the grant of injunction relief was long ago in Giella –v- Cassman Brown in 1973 cast in stone and that no new element may be added to that position. I am not, with respect in agreement with counsel in that point for the law always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at page 770 -781. A fundamental principle of... that the court should take whichever counsel appears to carry the lower risk of injustice if it should turn out to have been “wrong”.....

Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –v- Cassman Brown the court has had to consider the following questions before granting relief:

iv) is there a prima facie case....

v) does the applicant stand to suffer irreparable harm.....

vi) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory relief, should always opt for the lower rather than the higher risk of injustice..... ”

8. In the above case, the court granted an injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned.

9. In this case, there is no dispute that there are pending various suits before the BPRT between the parties herein. The applicant has exhibited orders in place that he states are restraining the respondent from interfering with the applicant’s tenancy. The respondent has not denied the existence of the said orders. It is also not in dispute that there are restraining orders against the new Chairman and members of the BPRT issued in Nairobi ELRC Petition Nos.100 and 99 of 2020 on 15th July 2020. This court takes judicial notice that the said petitions have been determined and the appointment of the new Chairman and members of the BPRT were nullified. The Tribunal is therefore not in session and it is not certain when it will be constituted. It would be unfair for the respondent to take advantage of the vacuum in the tribunal to interfere with the applicant.

10. Given the above position, I find that the only fair and just orders to make are orders that safeguard and maintain the status quo until the Tribunal is constituted for the parties herein to litigate their cases that are pending before that tribunal. Even if I was to consider the balance of convenience, the same tilts in favour of the applicant who is an occupation and possession of the suit premises and who already enjoys orders from the tribunal.

11. The upshot is that the notice of motion dated 20th July 2020 is allowed in terms of prayer 3 thereof. Parties to bear their costs.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 17th day of December 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE