



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MILIMANI

ELC. CASE NO. 248 OF 2018

JITIHADADA FURNITURE LIMITED.....1 ST PLAINTIFF

JITIHADADA SHOPPING COMPLEX LIMITED.....2 ND PLAINTIFF

ALLY I. MWANGI.....3 RD PLAINTIFF

VERSUS

ASAD ANWAR.....DEFENDANT

RULING

1. Through a notice of motion dated 25/5/2018, the plaintiffs sought the following orders against the defendant:

a) That pending the hearing and determination of this application, the defendant be restrained by way of temporary injunction from in any way interfering with the 1st plaintiffs' quiet enjoyment, occupation and/or management of the storey building erected on the parcel of land known as Land Reference No 209/289/8 otherwise known as the "J F Centre" situated at Ralph Bunche Road/ Argwings Kodhek Road Junction within the Upper Hill Area of the Nairobi City County.

b) Pending the hearing and determination of the suit herein, the defendant be restrained by way of temporary injunction from in any way interfering with the 1st plaintiff's quiet enjoyment, occupation and/or management of the storey building erected on the parcel of land known as L.R No. 209/289/8 otherwise known as the "J.F Centre" situated at Ralph Bunche Road/ Argwings Kodhek Road Junction within the Upper Hill Area of the Nairobi City Council.

c) This honorable court be pleased to issue any orders and/ or directions as would preserve and maintain the status quo obtaining herein pending the hearing and determination of the application.

d) This honorable court be pleased to issue any orders and/ or directions as would preserve and maintain the status quo obtaining herein pending the hearing and determination of the suit.

e) This honorable court be pleased to grant any other relief as would ensure that the plaintiffs are protected against any attempts by the defendant to enter into the premises known as J F CENTRE erected on Land Reference No 209/289/8 situated at the Ralph Bunche Road/ Argwings Kodhek Junction in the Upper Hill Area of Nairobi City Council pending the hearing of this application and/or suit herein.

f) The costs of this application be provided for.

2. The application was supported by an affidavit sworn by Ally I. Mwangi, Managing Director of the 1st and 2nd plaintiffs. The case of the plaintiffs was that the 1st plaintiff entered into a lease agreement with the defendant on 1/8/2008 in respect of the land known as Land Reference No 209/289/8 (**the suit property**). The lease was for a period of 10 years and was renewable for a further term of 10 years. The 1st plaintiff went ahead to erect a permanent structure and building known as J F Centre with the defendant's approval. They enjoyed use, occupation and management of the building in the suit property until January 2017 when the 1st plaintiff approached the defendant and notified him of its intention to seek an extension of the lease. After subsequent requests through writing and telephone conversation, the defendant offered to extend the lease by a period of two years only, contrary to the terms of the lease. Further, the defendant demanded rent of Kshs. 2,000,000 per month. Aggrieved, the plaintiffs brought this suit.

3. The defendant opposed the plaintiffs' application through grounds of opposition which contained a preliminary objection on the court's jurisdiction to hear this matter. Further, the respondent opposed the application through a replying affidavit sworn on 5/7/2018. His case was that the plaintiffs were not parties to the material lease hence they could not purport to seek a renewal of the lease. Secondly, he contended that the lease only allowed the lessee to put up semi-permanent structures. Thirdly, he stated that under the expired lease, in the absence of an agreement on market rent, the same was to be determined by an independent valuer. Fourthly, he contended that the agreed forum for dispute

resolution was arbitration.

4. It was subsequently agreed that the preliminary objection dated 21/6/2018 would be canvassed as one of the grounds of opposition to the notice of motion under consideration.

5. The application was canvassed through written submissions. The applicants submitted that where a contract has an arbitration agreement, either of the parties to the contract is at liberty to institute court proceedings and the remedy available to the party seeking to invoke the arbitration agreement is to bring an application under Section 6 of the Arbitration Act. They added that in the present suit, the subject lease has already expired and therefore the arbitration agreement is inoperative. They further submitted that the remedy they seek is an equitable and interim one.

6. The defendant filed his submissions on 23/10/2018. He submitted that Jitihada Furniture Centre Limited is a separate entity from the plaintiffs in this suit. Reliance was placed on **Kolaba Enterprises Ltd v Shamsudin Husssein Varvani & another (2014) eKLR** where it was held that a company is a different person from its subscribers and directors and that separate legal personality of a company can never be departed from except when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. He submitted that there was no privity of contract between the plaintiffs and the defendant. He relied on the case of **Lucy Nungari & 4 others v National Bank of Kenya Ltd & another [2015] eKLR** where it was held that the doctrine of privity of contract, a contract could not confer rights or impose obligations on persons who were not parties to it.

7. He further submitted that the lease agreement stated that in case of a dispute, parties were to refer the dispute to an arbitrator. He submitted that this honorable court therefore lacked jurisdiction and the dispute should be referred to arbitration. Reliance was placed on **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where it was held that where the court lacks jurisdiction, there would be no basis for continuation of the proceedings pending other evidence.

8. He added that the plaintiffs had not met the threshold established in **Giella v Cassman Brown** and contended that the plaintiffs had not made out a prima facie case with a probability of success and had failed to demonstrate their legal right or interest in the suit property. He further submitted that the plaintiffs did not produce any certificate of incorporation to prove that they were the rightful parties to institute the present proceedings. Reliance was placed on **Mrao v First American Bank of Kenya Limited & 2 others (2003) e KLR** where it was held that a prima facie case is not confined to a genuine and arguable case but one where on materials presented to the court, it could be concluded that there existed a right that had been infringed by the other party. On irreparable damages, reliance was placed **Nguruman Limited v Jan Bonde Nielsen & 2 others** where it was held that one ought to demonstrate the nature and extent of the irreparable injury.

9. I have considered the said application together with the materials placed before the court in support of the application. I have also considered the preliminary objection dated 21/6/2018 and the respondent's replying affidavit. Similarly, I have considered the relevant statutory framework and jurisprudence on the key issues in the application. The broad issue to be determined in the application is whether the applicant has satisfied the criteria for grant of an interlocutory injunction. Within that broad issue, there are three questions to be answered: (a) whether the 2nd and 3rd plaintiffs have a cause of action against the defendant; (b) whether this court is the right forum for adjudication of the subject dispute; and (c) whether a basis has been laid for an interim relief.

10. Before I make findings on the three questions, I will make a brief pronouncements on the issue relating to the name of the 1st plaintiff. In the plaint filed in this suit, the name of the 1st plaintiff is captured as **Jitihada Furniture Limited**. In the lease exhibited in the suit, the name of the lessee is captured as **Jitihada Furniture Centre Limited**. None of the parties to this suit has at this point exhibited a copy of the certificate of incorporation to which reference would be made to dispel the view that inclusion or non-inclusion of the word "Centre" is a typographical error which does not go to the substance of the dispute herein. The fact of the matter is that there was a lease which has now expired and the 1st plaintiff was the lessee while the defendant was the lessor. The dispute in this suit relates to the renewal of the said lessee. Indeed the existing consent conservatory order attests to that. I will therefore proceed from the premise that the 1st plaintiff is the lessee in the material lease and the defendant is the lessor.

11. The 1st plaintiff and the defendant entered into a ten year lease in respect of a portion of the suit property. The renewal clause of the lease granted the 1st plaintiff the right of renewal subject to delivery of written notice to the defendant, expressing intention to seek renewal. In the absence of preceding breach of any of the terms of the lease, the 1st plaintiff was to be entitled to a renewal for a further ten years upon a rental to be mutually agreed on. In the absence of a mutual agreement on rent, the applicable market rent was to be assessed by an independent valuer.

12. It does appear from the materials presented to the court that the defendant acceded to the 1st plaintiff's request for renewal. He however proposed a renewal for a term of only 2 years and a rent of Kshs 2,000,000 per month. The 1st plaintiff was not agreeable to that and felt that the reduction of the period from 10 years to 2 years and the demand for rent of Kshs 2,000,000 per month was a scheme to deny him a renewal yet he had invested in the suit property heavily. That is what triggered this suit. Having summarized the gist of the dispute, I now turn to the specific questions that fell for determination in this application.

13. The first question is whether the 2nd and 3rd plaintiffs have any cause of action against the defendant. The dispute in this suit is about renewal of a lease between the 1st plaintiff and the defendant. The 2nd and 3rd plaintiffs were not and are not privy to that lease. In my view, the 2nd and 3rd defendants cannot enforce the renewal clause of the lease because they are not privy to it. The 1st plaintiff is a limited liability company and a distinct legal entity with capacity to litigate in its own name and enforce contracts. There is therefore no basis upon which the 2nd and 3rd plaintiffs can purport to enforce the renewal clause against the defendant. Consequently, my finding on this issue is that the 2nd and 3rd plaintiffs are strangers to the lease and have no cause of action against the defendant.

14. The second issue is whether this court is the right forum for adjudication of the subject dispute. The material lease contains the following arbitration agreement:

"(g) Any dispute arising in connection with any matter relating to this agreement shall be referred to a single arbitrator to be

appointed in default of agreement by the Chairman for the time being of the law society of Kenya.”

15. The position of the defendant on this issue is that the above arbitration agreement is binding to the parties and therefore this court is not the right forum for adjudication of the present dispute. He wants the suit herein struck out. The position of the plaintiffs is that the subject lease agreement has already expired and hence the arbitration clause is inoperative and as such, a party cannot seek to invoke the arbitration clause. I do not agree with the view held by the plaintiffs. In my view, an arbitration agreement in a contract does not expire with the expiry of the term of the contract. Even if the term of the contract expires, the arbitration agreement which is contained in the arbitral clause remains in force and binds the parties to the contract and all future disputes are to be determined in accordance with the arbitration agreement.

16. In my view, the arbitration agreement in the lease is binding to the parties. Under it, the dispute resolution forum which the parties consensually agreed on is a single arbitrator either mutually agreed upon or appointed by the Chairman (President) of the Law Society of Kenya. It is however noted that the defendant has not brought a formal application under Section 6 of the Arbitration Act. He has instead brought a formal notice of preliminary objection through which he seeks an order striking out the suit. The view I take is that Article 159(2) (c) enjoins this court to promote arbitration and other alternative dispute resolution mechanisms. Guided by that constitutional underpinning, this court is properly empowered, upon an application or on its own motion, to refer a dispute to arbitration.

17. In the present suit, the parties consensually agreed on arbitration as their resolution forum. The defendant has therefore rightly pointed out that the agreed dispute resolution forum is arbitration. The defendant’s preliminary objection was raised before filing of a memorandum of appearance. In the circumstances, I will not strike out the suit as sought by the defendant. I will instead refer the dispute to arbitration as between the parties to the material lease.

18. The last question is whether there is a basis for an interim relief. The 1st plaintiff contends that it has made substantial developments on the suit property, valued at hundreds of millions of shillings. The reason why it sought an injunctive interim order was that it was apprehensive about the injury it was exposed to. At the moment, there is a consent preservative order. In the interest of justice, I will maintain the existing consent preservative order for a period of six months during which time the parties to the lease are expected to procure and conclude arbitration.

Disposal Orders

19. Consequently, the Notice of Motion dated 25/5/2018 and the Preliminary Objection contained in the Grounds of Opposition dated 21/6/2018 are disposed in the following terms:

a) The claims by the 2nd and 3rd plaintiffs are struck out on the ground that they are not privy to the lease giving rise to the dispute herein.

b) The dispute between the parties to the subject lease is hereby referred to arbitration in accordance with the arbitration agreement which is contained in the lease. The two parties shall agree on a single arbitrator within seven days from today.

In default, either party shall move the Chairman (President) of the Law Society of Kenya to appoint an arbitrator.

c) The existing preservative consent orders recorded on 25/6/2018 relating to the tenancy of the 1st plaintiff and payment of rent to the defendant shall remain in force for a period of six (6) months during which time the 1st plaintiff and the defendant are expected to procure and conclude the arbitration proceedings.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2019

B M EBOSO

JUDGE

In the presence of:-

Muimi holdig brief for Mr Nyamu for the plaintiff/applicant

Athman holding brief for Mr. Khan for the defendant/respondent

June Nafula - Court Clerk