



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 389 OF 2018

CO-OPERATIVE BANK OF KENYA LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

GOVERNMENT OF NAIROBI CITY COUNTY.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 12th September 2018 brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules Section 1A, 1B, 3A, 63 of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law.
2. It seeks order:-
 - (1) *Spent*
 - (2) *Spent*
 - (3) *Pending the hearing and determination of this suit, an order of injunction do issue restraining the defendant/respondent either by itself, its agents, servants, employees, and/or persons acting under their instructions from in any way evicting the plaintiff/applicant from the office premises located in land Parcel identified as LR NO. 209/5577 (also known as Cooperative Bank of Kenya Limited (City Hall Way Branch).*
 - (4) *That costs of this application be provided for.*
3. The grounds are on the face of the application and are set out in paragraphs a to x.
4. The application is supported by the affidavit of Samuel M. Kibugi, the Company Secretary of the plaintiff/applicant sworn on the 12th September 2018.
5. Upon being served with copies of the plaint and the notice of motion the defendant/respondent filed a notice of preliminary objection dated 21st September 2018. There is also a replying affidavit sworn by Isaac Nyoike Chief Valuer of the defendant/respondent, sworn on the 29th October 2018.
6. On the 24th September 2018, the court directed that the preliminary objection and the notice of motion be heard and determined together. It was further agreed by parties on 22nd October 2018 that they be canvassed by written submissions.
7. It is the plaintiff/applicant's submissions that it has been a regular rent paying tenant since December 2003, of the defendant/respondent having leased its office premises located on Land Parcel LR NO. 209/5577. That on 27th March 2014 during the pendency of a lease agreement the plaintiff/applicant sought from the respondent an extension of the lease for a further period of 12 years with effect from 1st October 2014. The respondent vide a letter dated 12th March 2015 granted to the applicant an extension of the lease for a term of 5 years and one month with effect from 1st October 2014 effectually meaning that the tenancy was to continue upto 1st November 2019. The applicant continued to pay rent quarterly. On 13th June 2018 the applicant was served with three (3) months termination notice. Order 19 rule 2 (2) (d) of the Civil Procedure Rules 2010 provides that no order of injunction can issue against the government.
8. There is no absolute bar prohibiting the court from granting orders of injunction against the county governments. The country government Act of 2012 does not have a single provision protecting the devolved government from orders of injunction. They have put

forward the cases of **Lawrence Ogaro Onyiego & Another vs Samuel Minika & Another [2017] eKLR**; **Nyandoche Ibere Co-operative Society vs County Government of Kisii & Another [2017] eKLR**; **James Muigai Thungu vs County Government of Trans-Nzoia & 2 Others [2015] eKLR**.

The protection accorded to the National Government against orders of injunction under Section 16 of the Government Proceedings, Act Cap 40 as read together with Order 29 Rule 2 (2) (d) of Civil Procedure Rules does not apply to county Governments. They pray that the preliminary objection be dismissed with costs.

9. The plaintiff/applicant has been a tenant of the defendant/respondent since 2003. It has established a prima facie case with good chances of success. It has also relied on the cases of **DL Koisagat Tea Estate Ltd vs Eritrea Othodox Tewhdo Church Ltd [2015] eKLR**. There is no dispute that there existed a lease and the same was to be renewed by the parties before the respondent issued a notice of termination. The plaintiff/applicant has demonstrated that it has for the last several years invested heavily to refurbish the rental premises to create ample space for its customers. The plaintiff/applicant is a commercial bank which if evicted it would affect its operations greatly and inconvenience its customers. It has also put forward the case of **Amir Suleiman vs Amboseli Resort Limited [2004] eKLR**. The plaintiff/applicant stands a higher risk if these orders are not granted. It has also put forward the case of **Said Majid Said vs James Titus Kisia [2015] eKLR**. The balance of convenience tilts in favour of the plaintiff/applicant continuing to operate its branch in the suit premises pending the hearing of the suit. It prays that the orders of injunction be granted with costs.

10. It is the defendant's/respondent's submissions that it is one of the 47 county governments established under Article 6 of the Constitution. Order 29 rule 2(2) (d) of the Civil Procedure Rules forbids injunctions to be issued against the government. It has relied on the case of **Republic vs Attorney General & Another Exparte Stephen Wanyee Roki; Club Limited vs the Governor, Kajiado County & Another HC Misc Application No 442 of 2011**. The defendant/respondent enjoys the same privileges and immunities as the National Government hence an injunction cannot be issued against it under Order 40 of the Civil Procedure Rules.

11. The plaintiff/applicant does not have a genuine or arguable case. There is no lease agreement between the plaintiff/applicant and the defendant/respondent as there are no minuted resolutions authorizing the renting of the suit premises to the plaintiff/applicant. The plaintiff/applicant has failed to establish a prima facie case. It has also relied on the case of **Risper Auma Okoth vs Matoba Petrol Station & 3 Others [2015] eKLR**. The plaintiff/applicant has failed to demonstrate that it will suffer loss incapable of being compensated by damages if these orders are not granted. The balance of inconvenience tilts heavily against the grant of injunction.

It prays that the preliminary objection be found to be meritorious and be upheld and the notice of motion dated 12th September 2018 be dismissed with costs to the defendant/respondent.

12. I have considered the preliminary objection dated 21st September 2018. I have considered the pleadings, the notice of motion dated 12th September 2018, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures. I have considered the written submissions of counsel and the authorities cited.

The issues for determination are:-

- (i) *Whether an injunction can be issued against the defendant/respondent.*
- (ii) *Whether the plaintiff/applicant's application meets the threshold for grant of an temporary injunction.*
- (iii) *Who should bear costs?*

13. The first issue for consideration is whether Order 29 Rule 2(2) (d) of the Civil Procedure Rules 2010, prohibits grant of injunction against county governments. I agree with the plaintiff/applicant's counsel submission that the County Government Act 2012, an Act which is specifically enacted to give effect to devolved government does not have any provision which protects the devolved government from orders of injunction.

14. In the case of **Lawrence Ogaro Onyiego & Another vs Samwel Minika & Another [2017] eKLR Mutungi J** held that Section 16 (2) of the Government Proceedings Act does not apply to county governments and so it would not bar, injunctive orders against county government. Also in **James Muigai Thungu vs County government of Trans Nzoia & 2 Others [2017] Obaga J** was of the same view when he stated:

“There is no provision in the County Government Act of 2012, which protects (county government) from injunctive orders. I do not think that it was the intention of the legislature that.... county governments were to enjoy the same status as the national government. If this was the intention then the Government Proceedings Act would have been amended expressly to include county governments. I therefore do not find that the county government can come under the umbrella of the Government Proceedings Act, when it comes to injunctions against them as well as their officers”

Going by the above decisions, I am inclined to hold that this court is not prohibited from issuing injunctive orders against the defendant/respondent herein. I find no merit in the preliminary objection herein and the same is dismissed with no orders as to costs.

15. The plaintiff/applicant herein seeks orders of injunction against the defendant/respondent pending the hearing and determination of the suit. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for interlocutory injunction the onus is in the applicant to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Limited vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above

authorities.

16. I have considered the rival submissions of counsel. It is however not in doubt that the plaintiff/applicant has been a tenant of the defendant/respondent since 2003. It is also not in doubt that there existed a lease and the same was to be renewed by the parties before the defendant/respondent issued a notice of termination.

17. I have gone through the correspondences between the plaintiff/applicant and the defendant/respondent and I find that there was nothing to indicate that the defendant/respondent was not going to renew the lease. The said correspondences are annexed to the application. The defendant/respondent continued accepting rent from the plaintiff/applicant. It can be said that the parties have all along conducted their transactions as per the terms of the lease agreement.

18. In paragraph 8 of his replying affidavit, Isaac Nyoike the Chief Valuer with the defendant/respondent states:-

“That the defendant/respondent has taken appropriate action against the persons alleged to have engaged in correspondences regarding the purported lease, some of which are exhibited herein and hopes that the plaintiff will do the same”.

I find that these are just mere averements. There is nothing to show that the said people did not have authority from the defendant/respondent to author the said letters.

19. In the case of **Njenga vs Njenga (1991) KLR 401 Bosire J** (as he then was) held that :-

“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles”.

I am persuaded by the facts presented by the plaintiff/applicant that it deserves the orders sought. I find that it has established a prima facie case with a probability of success at the trial.

20. In the case of **Kenleb Cons Ltd V New Gatitu Service Station Ltd & Another 1990 KLR 557 Bosire J as he then was** held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

21. The plaintiff/applicant has demonstrated that it has for the last several years invested heavily to refurbish the premises to create a good environment for its customers. The plaintiff/applicant is also a commercial bank which if evicted, its operations will be greatly affected resulting into losses. Its customers will also be inconvenienced a great deal. I find that the plaintiff/applicant has demonstrated that it will suffer irreparable loss which cannot be compensated by an award of damages if these orders are not granted. I rely on the cited case of **Said Majid Said vs James Titus Kisia [2015] eKLR**, Kasango J held that:

“The landlord did argue that the tenant has failed to meet the principles of Giella vs Cassman Brown [1973] EA 358. To the contrary bearing in mind my discussion above in this ruling, I do find that the tenant has shown prima facie with probability of success and in that view damages are not adequate to compensate the tenant. How can damages that the tenant incur be quantifiable when one cannot accurately state what increase of business the tenant would have enjoyed if he had continued running his business at those shops.”

22. I have considered the circumstances prevailing herein and I find that the balance of convenience tilts in favour of the plaintiff/applicant continuing to operate its branch in the suit premises pending the hearing and determination of the suit.

23. The upshot of the matter is that I find merit in this application and grant the orders sought namely:-

(a) That a temporary injunction be and is hereby issued restraining the defendant/respondent either by itself, its agents, servants, employees and/or persons acting under their instructions from evicting the plaintiff/applicant from the office premises located on land parcel identified as LR NO. 209/5577 (also known and identified as Cooperative Bank of Kenya Limited City Hall Way Branch) pending the hearing and determination of this suit.

(b) That the costs of the application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 7TH day of FEBRUARY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Wanga Advocate for the Plaintiff

Mr. Mokuu Advocate for the Defendant

Kajuju - Court Assistant