



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 63 OF 2016

TOTAL KENYA LIMITED.....PLAINTIFF

VERSUS

KERUGOYA SERVICE STATION LTD.....1ST DEFENDANT

HIPPO AUCTIONEERS GENERAL MERCHANTS.....2ND DEFENDANT

RULING

The application before me is the Notice of Motion dated 12th October 2018 brought under *Section 3, 3A C.P.A and Order 51 Rule 1 C.P.R.* The applicant is seeking the following orders:

1. Spent.

2. That this Honourable Court be pleased to issue an order compelling the plaintiff/respondent to deposit into 1st defendant/respondent's Kenya Commercial Bank A/c No. 1103747657 the sum of Ksh. 28,462,572.65 within a period of fourteen (14) days hereof.

3. That this Honourable Court be pleased to issue an order compelling the plaintiff/respondent to deposit into the 1st defendant/respondent's Kenya Commercial Bank account number 1103747657 all outstanding rent arrears which have accrued to date within a period of fourteen (14) days hereof.

4. That this Honourable Court be pleased to issue an order that the plaintiff/respondent be compelled to disclose its sales records to the station and delivery notes for premium motor spirit (super) Regular motor spirit (Regular) Automotive Gasoline (Diesel) and Illuminating Kerosene from July 2005 to date within fourteen (14) days to enable the 1st defendant/applicant calculate the correct and accurate rent payable and owed to it by the plaintiff/respondent.

5. That this Honourable Court be pleased to issue an order that the plaintiff/respondent disclose its sales entries from July 2005 to date to enable the 1st defendant/applicant calculate the correct and accurate rent owed to it by the plaintiff/respondent.

6. That this Honourable Court be pleased to issue an order compelling the plaintiff/respondent to be sharing their monthly sales entries with the 1st defendant/applicant in order to enable it calculate and ascertain the rent payable on a monthly basis to avoid alterations and/or concealment of rent payable.

7. That the costs of this application be borne by the plaintiff/respondent.

The application is supported by the affidavit of Emmanuel Gichira Njamumo who is one of the directors of the 1st defendant Company. The application is further supported by grounds shown on the face of that application.

The application is also supported by a further affidavit sworn on 6th December 2018. Attached to that affidavit are numerous documents. The application is opposed with a replying affidavit sworn by Boniface Abala on 12th November 2018 and a supplementary affidavit sworn by the same person on 16th January 2019. Both affidavits are further supported by numerous documents.

APPLICANT'S POSITION

The applicant in his supporting affidavit stated that the plaintiff has failed and/or refused to pay rent to the 1st defendant/applicant since July 2014 to-date making it difficult and/or impossible for the 1st defendant/applicant to meet its obligations with respect to payment of taxes and

land rates. The applicant also deponed that despite numerous requests to the plaintiff/respondent by the 1st defendant for their sale entries, the plaintiff/respondent has refused to share the same making it difficult for the 1st defendant/applicant to calculate the rent owed to them. The applicant also stated that the plaintiff who is also a tenant of the 1st defendant/applicant has withheld important documents relating to the management of the 1st defendant making it impossible for the 1st defendant/applicant to conduct an audit to ascertain the money owed to them and rent payable since the same is premised on daily sales which remains undisclosed. In their further affidavit, the applicant stated that the computer generated papers which have been cooked and filed before this Court are not supported by any documents are only upto September 2016 and are yet to be verified. It is further submitted that the plaintiff has held the 1st defendant at ransom, paying piecemeal and very contemptuous to the 1st defendant's directors.

He stated that the filed computation by the plaintiff is subject to manipulation and therefore not reliable and conducive without supportive documents. The applicant contends that for several years now since the year 2005, it is the 4th variation since the mode of computation was changed and/or varied and no records have been availed for scrutiny despite numerous requests. The plaintiff has purposely withheld the said variation of lease agreement since it had been tabulated on how the rent was to be increased after every five years. In conclusion, the applicant stated that the claim for Ksh. 28,462,512.68 is well founded.

RESPONDENT'S POSITION

The respondents through his legal manager Boniface Abala deponed that at all material times, the plaintiff has faithfully and promptly discharged its obligations under the lease and has in particular paid the rent as and when it fell due. He stated that in early 2015, some directors and/or shareholders of the 1st defendant informed the plaintiff that there had arisen some internal dispute in the management and/or ownership of the defendant Company and that a suit had been filed at the High Court being H.C.C.C No. 13 of 2014 (Kerugoya). On 3rd June 2015, the 1st defendant wrote to the plaintiff informing it that the dispute was still persisting and requested it not to pay the rent to any party at all until the dispute is resolved. The 1st defendant gave notice that if it paid the rent to any party prior to the resolution of the dispute, the plaintiff would be sued by the 1st defendant. Following that warning, the plaintiff obliged and withheld payment of rent pending the resolution of the dispute over the management and/or ownership of the 1st defendant Company. The plaintiff thereafter received conflicting instructions from various parties and advocates all claiming to be shareholders and/or beneficiaries of the 1st defendant Company all requesting the plaintiff to pay the rent to them. The plaintiff out of abundant caution and good measure held out the rent due awaiting a final resolution of the dispute. On or about October 2017, the 1st defendant's advocate informed their advocates on record that the internal issues had been resolved and the sum of Ksh. 5,563,373.35 deposited by the plaintiff was released to the 1st defendant's advocates vide a consent filed in Court on 1st November 2017. On 24th April 2018, another consent was filed in Court releasing a further sum of Ksh. 1,974,114 held in Court to the 1st defendant's advocates.

On 9th December 2016, the plaintiff filed and served the computation of rent due to the 1st defendant upto the month of September 2016. As regards the sum of Ksh. 28,462,512.65 being sought, the plaintiff stated that the same is fictitious and unknown and that the plaintiff does not owe the 1st defendant such monies. In conclusion, the plaintiff stated that the application is premised on false factual grounds, speculations and not supported by any credible evidence or at all and the same ought to fail.

1ST DEFENDANT/APPLICANT'S SUBMISSIONS

The 1st defendant/applicant through the firm of Gori Ombongi & Co. Advocates submitted that it is a clause in the lease agreement between the plaintiff and the 1st defendant that the rent shall be paid subject to the rate of the cost per litre of super, regular and diesel as sold at the station pumps during the term of the lease. The cost shall be subject to variation as mutually agreed by the parties. The 1st defendant submitted that the plaintiff is in violation of that clause by failing to disclose its sales records to the station and delivery notes for premium motor spirit (Super) Regular motor spirit (Regular), Automotive Gasoline (Diesel) and Illuminating Kerosene from July 2005 making it intricate to calculate the correct and accurate rent payable and owed to it by the plaintiff. The 1st defendant further submitted that the plaintiff is in breach of the lease agreement by failing to disclose its sales entries to enable the 1st defendant to accurately calculate the rent owed by the plaintiff since July 2005. The computations purported to have been served upon the 1st defendant by the plaintiff are computer generated and are unverifiable. The request for the aforementioned documents are founded in the 1st lease at page 3 made on 13th April 1993 which was filed in Court on 9th May 2016 by the plaintiff in a supporting affidavit. The terms of the lease are captured in the variation of lease dated 9th May 2016 and a subsequent variation of lease dated 3rd July 1988 and another variation dated 29th December 1999, 31st December 2009, 12th March 2001 and 15th September 2014.

The learned counsel stated that all these lease agreements indicate the methodology to be used on how to calculate rent payable. The rent is to be calculated pegged on the volume of fuel sold and that cannot be bestowed upon the respondent alone. In conclusion, the learned counsel stated that for the avoidance of doubt on how rent is arrived at, the copies of the sales, order and delivery invoice must be availed for scrutiny and verification to avoid a scam where a lot of fuel is sold and the landlord is paid peanuts.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

The plaintiff/respondent through the firm of Waruhiu K'Owade & Nganga Advocates submitted that they are ready and willing to disclose and tender the computation of sales and rent due for the period it has not done so. They also submitted that the plaintiff in their replying affidavit pages 34 – 45 tendered its computation for sales and the rent due upto September 2016. The plaintiff has since paid rent due in the sum of Ksh. 7,537,487. The learned counsel further submitted that no basis has been laid either on the face of the motion or in the two supporting affidavits how the alleged rent arrears of Ksh. 26,462,512.65 is arrived at. They stated that it is now settled law that a Court will not usually grant a mandatory injunction unless in the clearest of cases. The applicant's prayer for deposit of Ksh. 28,463,512 is so blurred that it can certainly not be a clear case to warrant the grant of a mandatory injunction. The plaintiff's counsel further submitted that the test whether to grant a mandatory injunction or not is correctly stated in **Vol. 24 Halsbury's Laws of England 4th Edition Paragraph 948.**

The learned counsel cited the following cases:

(1) Lucy Wangui Gadava Vs Minudi Okemba Lore, Civil Appeal No. 4 of 105.

(2) Shepherd Homes Ltd Vs Sandalim (1971) 1 CH 34.

DISPOSITION

I have considered the application dated 12th October 2018 and the replying affidavit and documents attached thereto. I have also considered the submissions by counsel for the applicant and the rival submissions by counsels for the respondents. The applicant is seeking an order compelling the respondent to deposit a specific sum of Ksh. 28,462,572.65 to its Bank Account No. 1103747657. The applicant is also seeking an order compelling the plaintiff/respondent to deposit all outstanding rent arrears which have accrued to-date within 14 days. The applicant is also seeking an order directed to the respondent to disclose certain information necessary for calculating the correct and accurate rent payable and owed to it by the respondent.

From the pleadings particularly the statement of defence and counter-claim and the prayers being sought in this application, the defendant has not stated with certainty how much rent they agreed that the plaintiff will be paying per month. It is therefore not clear how the applicants arrived at the figure they are demanding in the sum of Ksh. 28,462,512.65. Parties are bound by their pleadings. Any order which a party is seeking in a case must evolve from the pleadings. A useful discussion on the importance of pleadings is found in **Bullen and Leaks and Jacob's precedents of pleadings, 12th Edition, London, Sweet & Maxwell (the Common Law Library No. 5)** where the learned authors stated as follows:

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which will have to meet before and at the trial, and at the same time informing the Court what are the issues between the parties which govern the interlocutory proceedings before the trial and which the Court will have to determine at the trial”.

In the case of **Independent Electoral and Boundaries Commission & Another Vs Stephen Mutinda & 3 others, C.A No. 219 of 2013** cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladefi (NIG) Limited Vs Nigeria Breweries PLC SC 91 (2002)** where **Pius Adereji, JSC** expressed himself thus on the importance and place of pleadings:

“It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded”.

The application is seeking orders which are not supported in the pleadings. The orders are in my view a fishing expedition which this Court cannot countenance. In the upshot, the application dated 12th October 2018 lack merit and the same is hereby dismissed. The costs shall abide the event.

READ and DELIVERED in open Court at Kerugoya this 22nd day of March, 2019.

E.C. CHERONO

ELC JUDGE

22ND MARCH, 2019

In the presence of:

1. Mr. Mwangi Maina holding brief for Waruhiu K'Owade & Nganga Advocates for the Respondent
2. Mr. Mwangi holding brief for Gori for Applicant
3. Mr. Asimwe holding brief for Ms Makworo for Interested party.