REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.282 OF 2016

KLAUS HOTEL LIMITED.....PLAINTIFF

VERSUS

KEDONG RANCH LIMITED.....DEFENDANT

RULING

(Application seeking orders to have respondent found guilty of contempt of court; applicant having sought injunction to restrain respondent from interfering with a lease and taking over possession of premises; dispute having been whether applicant was liable to pay full rent as premises had partly been destroyed by fire; court issuing orders on the application on payment of pro-rata rent; respondent proceeding to take over the premises hence this application; respondent explaining that it has taken over possession based on a clause in the lease which barred the applicant from transferring its shares; fact that court issued orders on payment of pro-rated rent did not suspend the other clauses of the lease; prima facie respondent was entitled to recover possession based on the transfer of shares; application dismissed)

1. The application before me is that dated 22 May 2018 filed by the plaintiff. The application is said to be brought pursuant to the provisions of Section 1A, 1B, 3A, and 63 (e) of the Civil Procedure Act, Cap 21, Laws of Kenya; Order 40 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules, 2010; and Sections 4 (1) (a), 5, 28 and 29 of the Contempt of Court Act, 2016 and all enabling provisions of the law. The principal order sought is that two persons, namely, Christine Cronchey and Pascal Wood, the Directors of Kedong Ranch, the defendant in this matter, be arrested and jailed for a period of 6 months, or such other period as the court may deem fit, for contempt of court. It is the position of the applicant that the respondent has disobeyed the court order issued on 17 May 2017 hence guilty of contempt.

2. To put matters into context, this suit was filed on 26 July 2016 through a plaint vide which the applicant averred that he entered into a lease agreement with the respondent over the land parcel Naivasha/Maraigushu Block 10/29 which lease was for 15 years and due to expire on 25 March 2025. This property is a large parcel of land and about 200 acres of it is what was leased to the applicant for use as a safari lodge. The premises had a main house and some cottages that could accommodate about 60 people. On 8 November 2015, a fire broke out at the lodge and destroyed the main house and other property. The applicant argued that it was a clause within the lease agreement that the respondent would insure the building as well as reconstruct it in case of damage caused by fire, and further, that the respondent was to suspend rent or part of rent on the happening of such event. The applicant complained that the respondent had not suspended rent or part of it and had threatened to evict the applicant. The applicant also averred that the respondent had denied guests entry into the lodge on account of unpaid rent, and had also disconnected electricity and water. The applicant thus wanted the respondent restrained by way of a permanent injunction from interfering with the premises, general damages, interest and costs.

3. Together with the plaint, the applicant filed an application for an injunction to restrain the respondent from evicting or interfering with their quiet use of the premises pending the hearing and determination of the case. The application was opposed, inter alia, on the grounds that the applicant had persistently defaulted on rent, was in significant rent arrears, and that the respondent had a right to re-enter and take possession of the premises. I heard the application and delivered a ruling on it on 17 May 2017. In my ruling, I did hold inter alia that I was persuaded prima facie, that under the lease, it was the obligation of the lessor to insure the premises, or repair it, in the event of fire, and that there was to be a proportionate abatement of rent in such event. The said fire occurred in November 2015. I also did find that the applicant was in rent arrears but the respondent had accommodated the applicant and had not issued notice to terminate the lease. I also found that the applicant had a right to expect a proportionate reduction of rent owing to the fact that part of the premises was destroyed. I did not have the facts on what proportion of the premises was affected and I thus ordered a valuation by the Government valuer. I made the following orders on the application :-

i. That for the plaintiff to continue being in use of the suit premises pending hearing and determination of the suit it must :-

a. pay all rent arrears in full as at November 2015 before the fire.

b. Pay all utility bills including water and power up to date.

c. Pay the percentage of rent as from November 2015 to date in the proportion that is declared usable by the Government valuer.

ii. The rent arrears in (i) (a) above and the utility bills in (i)(b) above must be paid within 30 days of today. If these are not paid, then the plaintiff must vacate the premises and give vacant possession to the defendant and will have to stay away until this case is heard and determined.

iii. The amount due to date as portion of rent, that is from November 2015, as may be determined by the valuer, to be paid within 30 days of such determination, and if the same is not paid, the plaintiff must vacate the premises and give vacant possession to the defendant.

iv. If the plaintiff complies with the above, it must continue paying rent in the same proportion as may be determined by the valuer until this suit is finalized and if there is default which continues beyond 14 days of when the monies are due, then the defendant after giving notice may re-enter the premises and terminate the lease.

4. The Government valuer took a while before presenting his report but it was eventually filed on 17 November 2017. The valuer thought that the premises could be used up to the extent of 50% thus rent to be prorated downwards to 50% while Longonot House was being rebuilt.

5. Despite the above orders and valuation, the applicant complained through his counsel that she has been denied access to the premises despite complying with court orders and I directed that a formal application may be filed. This application was then filed.

6. The application is supported by the affidavit of Margaret Hopf Schroeder a director of the plaintiff. She has deposed inter alia that the applicant complied with the orders of 17 May 2017 and paid the sum of Kshs. 2,300,000/=(as rent arrears). Her counsel then wrote the letters dated 19 June 2017, and 27 September 2017, to counsel for the respondent, requesting to be handed over the premises, but the letters did not elicit any response. A notice to institute contempt proceedings was then sent on 16 April 2016, and it is then that counsel for the respondent penned a response seeking to justify why they have denied the respondent access to the premises. She has further averred that in the meantime, the respondent has moved into the premises and destroyed the cottages on it thus attempting to defeat the course of justice.

7. The respondent has responded to the application through the supporting affidavit of Christine Cronchey, the Chairperson of the Board of Directors of the respondent. She has deposed inter alia that the application is seeking to commit to jail individuals who are not parties to the suit. She has denied that the respondent has deliberately breached the orders of court but has averred that their action has been driven by the applicant's blatant breach of the lease agreement. She has pointed at Clause 1 (bb) of the Lease as having been breached i.e that the applicant transferred the majority of its shareholding to a third party, Africa Classic Limited, and because of this, the lease is terminated and that the respondent has exercised its right of re-entry. She has averred that owing to this breach of lease, the substratum of the suit has been spent and contempt cannot arise therefrom. There are also some technical issues raised, that the applicant has never sought orders of injunction thus the provisions of Order 40 Rule 3 cannot come to its aid; that the application violates Section 34 of the Contempt of Court Act and is time barred; and that the affidavit offends the provisions of the Oaths and Statutory Declarations act, Cap 15, hence the motion stands unsupported.

8. I invited both counsel for the applicant and the respondent to file written submissions which they did. Mr. Kisilah, learned counsel for the applicant pointed me to Section 63 (e) of the Civil Procedure Act, and Order 40 Rule 3 of the Civil Procedure Rules, which provide that the court may punish a person who refuses to adhere to an order of injunction. He also submitted that in case of disobedience by a company, it is the directors who are liable and referred me to Section 194(2) of the Companies Act, 2015, and to several authorities where directors were held liable for acts of contempt attributed to their companies. He thought that this was a clear case of disobedience hence the application should be allowed.

9. On the other hand, Mr. Kibicho for the respondent submitted inter alia that the persons sought to be cited for contempt were not parties to the suit and that the respondent is a separate legal entity distinct from the individuals mentioned. He urged that for directors to be held liable, the corporate veil must first be pierced. He further submitted that under Section 34 of the Contempt of Court Act, contempt proceedings are not supposed to be initiated after expiry of 6 months from the date the contempt is alleged to have been committed. He submitted that the order in issue was made on 17 May 2017 while this application was filed on 22 May 2018 beyond the 6 months period. He submitted that there is no proof of service of the order upon the respondent and that it will be a fallacy for the applicant to allege that the respondent was aware of the orders of the court. He further submitted that the applicant disregarded the terms of the lease pursuant to which the respondent exercised its right to terminate the lease and re-entered the premises. According to the respondent, the lease of 22 September 2010 stands terminated. He submitted that the applicant transferred the majority of its shares to Africa Classic Limited and thus the status of the applicant to prosecute the suit has changed and requires a fresh authority to continue this case. He also relied on several decisions to support his arguments, all of which I have considered.

10. There are many issues raised in this application, but to me, if I decide whether or not the respondent had a right of re-entry separate from the issues in this suit, then it may not be necessary to interrogate the other issues, and I opt to start with this point.

11. The argument of the respondent is that the applicant company has now introduced a new shareholder, Africa Classic Limited, and a copy of the applicant's list of shareholders and directors from the Registrar of Companies (CR12) is annexed. The same shows that out of 1000 shares, Africa Classic Limited now holds 600 shares of the applicant company hence the majority shareholder. Clause 1 of the lease in issue lays down the obligations of the lessee and the respondent has pointed to Clause 1 (bb) as having been breach. Under the lease the said clause provides for the lessee :-

Not to assign transfer sub-let or part with possession of the Premises or any part thereof and it is hereby declared that upon any breach by the Lessee of the terms of this sub-clause the Lessor may thereupon at any time re-enter upon the Premises and if the Lessor shall do so the terms hereby created shall terminate absolutely and, in the case of a corporate lessee (other than a public company quoted on the Nairobi Stock Exchange), any allotment or transfer of shares in the lessee whereby control of the lessee

shall be altered shall, for the purposes of this sub-clause, constitute an assignment or transfer of this Lease.

12. From the above clause, it is apparent to me that the applicant had an obligation under the lease, not to allot or transfer shares through which its control would be altred, and it if did so, this would, under the lease, be constituted as an assignment or transfer of the lease, which the applicant was not permitted to do. I have seen from the Lease that the same was signed by Klaus Schroder and Margaret Hopf Schroder and it is not denied by the applicant that there has been a transfer of shares to Africa Classic Limited and that at the moment, it is Africa Classic Limited, which is the majority shareholder of the applicant company. It therefore seems to me that there has been an allotment, transfer or assignment of shares, which contravenes the provisions of Clause 1 (bb) of the lease. The respondent has stated that it has re-entered the premises pursuant to this breach by the applicant.

13. Now, in as much as I issued orders on 17 May 2017, on the manner in which the premises should be maintained pending hearing of the main suit, the context under which the applicant came to court was that there was a fire that destroyed part of the demised premises, and under the lease, rent was to be suspended or pro-rated for the duration that the premises remained unrepaired. That was the background vide which I made the orders of 17 May 2017. The orders that were made were principally made to address the clauses within the lease that have a bearing on what the parties ought to do when there was a fire or partial destruction of the premises. My orders of 17 May 2017, did not in any way extend to the interpretation of the other clauses of the lease and neither did the said orders suspend the other duties and/or obligations whether imposed upon the lessor or the lessee under the lease.

14. In this instance, the lessor has explained that it re-entered the premises, not because of any orders that the court made on 17 May 2017, but because of a right that it has under the lease. That right, as I have expounded above, was not suspended by my orders of 17 May 2017.

15. In my view, if the applicant feels that the respondent had no right to terminate the lease or re-enter the premises because of the change of shareholding, then that would be a separate cause of action, different from the matters in this case. The case herein relates to the suspension of rent owing to destruction of part of the premises by fire. It follows that if the applicant feels that the respondent ought not to have terminated the lease and retaken possession because of the change of her ownership structure, then the avenue of the applicant is to present a separate case on this issue, which can then be decided on merits, but not to allege that the respondent has been in contempt of the order of 17 May 2017. In other words, the applicant cannot use the order of 17 May 2017 to suspend its obligations under the lease, other than the relief, to pay pro-rated rent based on the extent of damage to the premises. On my part, prima facie, for the purposes of this application, but subject to a full determination on merits in the event that such issue is brought to court through a fresh suit by the applicant, my view is that the applicant breached clause 1 (bb) of the lease and the respondent therefore had a right to exercise her right of re-entry. Having held that the respondent re-entered the premises on her interpretation of Clause 1 (bb), and not because it was violating the order of 17 May 2017, I am not persuaded that this application ought to succeed and it is hereby dismissed with costs.

16. Following my above holding, in order to save on judicial time, I find it unnecessary to address the other technical issues that arose in this application.

17. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 12th day of March 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In Presence of : -

Mr. Kisilah for the applicant.

Ms. Rahab Muthoni holding brief for Mr. Kibicho for the respondent.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU