



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 116 OF 2018

RISING STAR COMMODITIES LIMITED.....PLAINTIFF

-VERSUS-

KENYA RAILWAYS CORPORATION.....1ST DEFENDANT

KINYUA & CO. AUCTIONEERS.....2ND DEFENDANT

RULING

1. By notice of motion dated 17th May 2018, the plaintiff/applicant sought injunctive reliefs in the following terms:

1. Spent

2. Spent

3. That the 1st and 2nd defendant be restrained whether by itself or through its employees, servants, agents and/or levying or continuing to demand and persist with the wrongful and illegal distress levied to recover alleged arrears of rent in the sum of Kenya Shillings nine hundred thousand only plus ninety thousand (Ksh 900,000 + 90,000/) unlawfully demanded by the defendants and not payable by the plaintiff, pending the hearing and determination of this suit.

4. That the defendant be ordered forthwith to vacate, withdraw the illegal distress levied.

5. That the costs of this application be awarded to the plaintiff.

2.The application is supported by the affidavit sworn on 17th May 2018 and the supplementary affidavit sworn on 18th September 2018. The applicant avers that the distress is illegal and unlawful because he lodged an objection to rental increment and agreed to pay the new rent only on condition that the charge is approved and a true valuation being done on the suit property. The applicant denied the averment put forth by the 1st Defendant/Respondent that the valuation had already been done. The applicant also denied being in occupation stating that the same is in possession of a 3rd party under instructions from the 1st Respondent. He urged the Court to grant the orders sought. In support of this motion, he relies on the case of **Jay Raj Enterprises Ltd vs Lucky Distributors & 3 others (2012) eKLR** and **Said Majid vs James Titus Kisia (2015) eKLR**.

3.The 1st Respondent in opposing the application filed a replying affidavit on 2nd August 2018. The 1st Respondent urged the Court to discharge the temporary orders because the plaintiff deliberately misled the Court that;

i) The 1st defendant unilaterally reviewed the annual rent yet there were numerous letters exchanged between them.

ii) That the applicant indeed paid the reviewed rent for the years 2014 and 2015 as shown in his statement of account.

iii) That the applicant has paid all the rents due yet it has paid nothing for the years 2016, 2017 and 2018.

4. The 1st Respondent further avers that the application and the entire suit is an attempt by the applicant to get the Court re – write the contract between a landlord and a tenant. Further that the applicant has not pointed to any law that stops the 1st defendant from increasing the rent payable and that the certificate of lease provides that the annual rent is revisable. The 1st defendant denies violating the provisions of section 4 and 16 of the Distress for Rent Act. He urged the Court to dismiss the application placing reliance on the import of the following case law cited in support of their submissions:

a) **Bahadutiali Shamji vs Al Noor Jamal & 2 others (1998) eKLR.**

b) **John Mburu vs Dickson Mwenda & 2 others (2014) eKLR.**

c) **Kenya Breweries Ltd & Another vs Washington O. Okeyo (2002) eKLR.**

5. The law on temporary injunctions is established under Order 40 of the Civil Procedures Rules and the renowned case of **Giella vs Cassman Brown (1968) E. A** which set the 3 principles to be considered. The Court while considering the 3 is not obligated to establish whether a party has demonstrated all the three. As long as either of the principles is established, the Court can issue an order of injunction.

6. In the present case, the dispute is quite simple i.e. whether the increment of annual rent by the 1st defendant from Kshs 14900 to Kshs 300000 was justified. And if not whether the 1st defendant is entitled to levy distress for the arrest of the rent. The applicant has submitted that the increment was not justified thus the distress levied was unlawful. To get to know whether the increment was justified or not is a question that can only be answered after the suit is heard and determined on its merits.

7. Can this form a basis for granting an order of injunction? The 1st defendant submits that the plaintiff having paid the disputed amount for the years 2014 and 2015 is now estopped from back – tracking on the payment. The applicant on his part submits that it paid the said amount to enable him/it get consent of the 1st defendant to charge the property. That it was thus arm-twisted into making the payment. Injunction order is an equitable relief which applies equitable doctrines. One such doctrine is that equity aids the vigilant not the indolent and he who comes to equity must come with clean hands.

8. The applicant was aware of the demand for the new rent in January 2014. He registered his complaint by his letter of 22nd January 2014 (annexture “**ZM – 2**” in the supplementary affidavit) but proceeded to pay the revised rent for 2014 and 2015. He did not file any suit against the 1st defendant in 2014 or 2015 after failing to receive a response to his complaint contained in the letter dated 22.1.2014. The duration taken to challenge the new rent through this suit is over 3 years which in my view shows a party who is indolent. Secondly the applicant says he paid the new rent because he wanted the 1st defendant to give it consent to get a loan using the suit property as security from the bank but stopped payment immediately after obtaining the consent to charge thus a clear demonstration of acting with unclean hands.

9. Be that as it may, is the loss to be suffered if the orders are not granted irreparable? The amount of rent demanded is given at Kshs 300,000= . The applicant submits the revision ought only to be done after a valuation of the suit property has been undertaken. If after the valuation the revised rent is lower than Kshs 300,000=, the applicant can always be given a refund/credit in excess of the new set rent if at all lower than the current rent payable. The loss therefore is not irreparable but is quantifiable.

10. On whose favour does the balance of convenience tilt? The applicant already paid the disputed rent for years 2014 and 2015. He is in default for 2016, 2017 and 2018. The balance of convenience in my opinion and I so hold tilts in favour of the 1st Respondent because the applicant other than complaining the revision is high did not explain to the Court the reason for the default. He only came to Court after distress was levied. In light of the analysis herein, I do not find the applicant deserving of the orders sought. I find the application as unmerited and hereby proceed to dismiss it with costs. The earlier orders of injunction given are hereby discharged.

Dated, signed & delivered at Mombasa this 7th March 2019

A. OMOLLO

JUDGE