



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 127 OF 2018

EQUATORIAL LAND HOLDINGS LIMITED.....1ST PLAINTIFF

KAREBE GOLD MINING LIMITED.....2ND PLAINTIFF

VERSUS

CHESERET ARAP KORIR.....DEFENDANT/RESPONDENT

RULING

Plaintiff's Case

Equatorial Land Holdings Limited and **Karebe Gold Mining Limited** have come to court against **Cheseret Arap Korir** by way of plaint accompanied with the notice of motion and supporting affidavit. The plaintiff prays for an order that pending the hearing, determination and final decision/award of the Arbitrator, as provided for in clauses 12.4 and 12.5 of the lease agreement between the parties this Honourable Court be pleased to issue a permanent injunction restraining the Defendant/Respondent, his relatives, family members, employees, servant, agents or any other person/entity affiliated associated with him or acting through or under his instructions from terminating the lease agreement between the 1st Plaintiff and Defendant evicting the 1st plaintiff company from parcels of land, Nandi/Chemase/974 and Nandi/Legeget/224, selling, demolishing, trespassing on, transferring, leasing, charging, wasting, alienating or in any other way interfering with or dealing with the properties, developments, improvements or construction on the parcels of Land Nandi/Chemase/974 and Nandi/Legemet/224 and that an order to be signed directing the defendant/Respondent to submit to and cooperate in the Arbitration as provided in the lease agreement dated 12.6.2009 entered into between the 1st Plaintiff and Defendant.

The application is based on grounds that the 1st Plaintiff and Defendant entered into a 10 years lease agreement dated 12.6.2009 commencing 21.1.2009 over land parcels Nandi/Chemase/974 and Nandi/Legemet/224, which provided the leasee with an option to renew for a further period of 10 years from date of expiry of the current term.

It is claimed that the 1st plaintiff has not breached any of the terms and condition of the lease agreement and has been religiously paying the Defendant the rent due in advance together with other gratuitous sums.

Moreover, that the lease agreement provides for the parties to negotiate, with the assistance of a mediator, in respect of any disputes arising under the lease, failing which the dispute be referred to a single arbitrator to be appointed by the Chairman of the Chartered Institute of Arbitrators.

The Defendant has refused to negotiate, refused to accept mediation with a mediator and refused to submit to and cooperate in the reference to arbitration.

The Defendant has informed the 1st Plaintiff that the lease will not be renewed upon its expiry and that the 1st Plaintiff should vacate the properties. The plaintiffs have invested huge sums in the development of the land parcels and improvements and the region and if evicted will suffer great loss not compensable by an award of damages.

The 1st Plaintiff employs hundreds of members of the community whose employment will be lost subjecting them to great hardship and suffering. Despite the 1st plaintiff's efforts to resolve the dispute on renewal of the lease, as provided for in the lease agreement, the Defendant has been and is being intransigent and has refused, neglected and/or otherwise failed to submit to the contractual avenues of resolution.

By his actions, the Defendant intends to ride rough shod over the provisions of the lease agreement which provides a procedure for renewal of the lease term and for resolution of disputes.

In view of the stand taken by the Defendant in refusing to renew the lease term, refusing to participate in negotiations, mediation and arbitration, and threatening to terminate the 1st Plaintiff's tenancy, the 1st Plaintiff is reasonably and understandably apprehensive that the Defendant intends by his actions to evict the 1st Plaintiff as a consequence of which the 1st Plaintiff and 2nd Plaintiff will suffer massive loss of their properties, investment and business.

The plaintiff contends that should the defendant persist in terminating the 1st Plaintiff's tenancy, the 1st Plaintiff and 2nd Plaintiff will suffer massive losses in economic terms and loss of its reputation in the mining industry nationally and globally, both the plaintiff company's businesses will collapse, the goodwill in the Plaintiff companies will evaporate and the companies will be unable to meet their contractual obligations and will be subject to a plethora of legal suits.

The Defendant was contractually and duty bound to submit himself to the process and procedure of negotiations, with or without a mediator and to arbitration as provided for in the lease agreement which he has blatantly and egregiously failed and/or refused to do and insists on the 1st plaintiff vacating the land parcels.

The 1st Plaintiff has taken the requisite steps for resolution of the dispute as provided for in the lease agreement.

The plaintiff contends that she has a prima facie case with a high probability of success. Unless the orders sought are granted, the plaintiffs will suffer irreparable loss and hardship that cannot be adequately compensated by an award of damages, the defendant will proceed and irreparably hurt the plaintiffs' businesses a fact that will render the substratum of this suit nugatory. It is in interests of justice that the orders sought be granted.

Defendant's Case

In the replying affidavit, the defendant states that it is true that he leased his property to the plaintiff for 10 years and the lease lapsed and therefore he cannot be coerced to renew the lease as he has the right to own the property and utilize it as he wishes subject to the provision of the Constitution. The lease has been determined. The defendant acknowledges the Charitable Acts of the plaintiff but states that they do not affect the lease. The defendant wants to enjoy his property. He states that the lease agreement does not oust the jurisdiction of the court. The defendant has given notice of 6 months that he would not renew the lease.

Mr. Mitch Meneses and Mr. Magenge, learned counsel for the plaintiff citing several authorities submit that there is a lease agreement that has an arbitration clause which provided for a dispute resolution mechanism. Moreover, the parties agreed to apply for an injunctive remedy in a court of law pending the final decision of the court or a mediator.

They argue further that whether to renew the lease or not is a dispute that should be determined by the Arbitrator. The defendant has refused to submit to the arbitrator. The plaintiff therefore, argues that he has a prima facie case with a likelihood of success as the lease had a provision for renewal.

On nugatory aspect or irreparable harm, the plaintiffs submit that the company has heavily invested in infrastructure necessary for their operation and their eviction will subject them to a platter of suits, they will suffer loss of reputation and business goodwill. The plaintiffs submit that they have explosion on site for which they will need permits to relocate.

On whether the plaintiff has demonstrated that there exists a prima facie case with a probability of success, the defendant submits that the term of the lease was 10 years from 21.1.2009 and came to an end on 21.1.2019 by effluxion of time. The defendant made it clear by notice that he had no intention of receiving the lease beyond 21.1.2019 in line with section 56 of the Land Act No. 6 of 2012. The lessee must yield up the property. The applicant cannot dictate what respondent will do with his land. The defendant relies on the decision of the **Court of Appeal. In Kasturi Ltd Vs Nyeri Wholesalers Ltd (2014) eKLR**, where it was held that a tenant has no triable issues in a counterclaim for vacant possession. It is the duty of the courts to ensure that no individual is prevented from taking possession or enjoying their property. A tenant cannot impose or force himself on the landlord.

Mr. Kimani advocate for the defendants submits that no loss will be suffered by the respondent as he will remove his items from the property. Moreover, that the applicant has other lands that are rich in gold. On balance of convenience, the defendant submits that the same tilts in favour of the respondent who wants to assert his inalienable right to property.

Analysis and determination

I have considered the application before court and the replying affidavit by the respondent and submissions by counsel. The plaintiff argues that the lease agreement provided for a dispute resolution mechanism at Clause 12.1 thus,

“Any dispute whatsoever or howsoever arising out of or in connection with the lease, same as specifically provided herein, shall be referred for final determination to a single arbitrator to be appointed by agreement between the parties hereto or in default of any such agreement within seven (7) days of notification of any dispute by either party, by the chairman for the time being of the Kenya branch of Chartered Institute of Arbitration.”

According to the agreement, the lessee had the option to extend the term by notice in writing given to the lesser six (6) calendar months prior to the end of the term for a further period of ten years on the same terms and conditions. The defendant has refused to negotiate or accept. The plaintiffs came to this court by virtue of Clause 12.4 of the lease agreement which provides that;

“Nothing in this clause shall restrict either parties' freedom to commence legal proceedings of any nature for the purposes of

seeking preliminary injunctive relief or interim or conservatory means from any court of competent jurisdiction pending the final decision of award of any mediator.”

The question is, is there a dispute between the Petitioner herein? This court finds that the answer is to the affirmative and that the dispute revolves on the renewal of the lease. The defendant was the first to write to the plaintiff informing him that he would not renew the lease, the defendant wrote back and requested for the renewal of the lease. I do find that this is a dispute envisaged under Clause 12.1 of the lease agreement.

Section 7(1) and (2) of the Arbitration Act provides that;

Interim measures by court

(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

This court finds that the plaintiff has established a prima facie case with a likelihood of success that there is an arbitration clause in the lease agreement and that the subject matter under arbitration is under threat. Under our system of the law on arbitration, the essentials which the court must take into account before issuing interim orders of protection are that; there exists an arbitration agreement, and that, the subject matter under arbitration agreement is and lastly the appropriate circumstances to grant the reliefs. However, whichever order the court grants must not prejudice the outcome of the arbitration. On the issue, as to whether the plaintiff stands to suffer irreparably if injunction is not granted, I do find that this is a special circumstance where by the arbitral proceedings need to be protected by an order of injunction. However, the plaintiff is hereby ordered to deposit security for costs of Kshs. 2,000,000/= (Two million) only, in an interest earning account in a reputable bank in the names of the 2 firms of advocates on record.

The parties herein are given two months to engage in arbitration in compliance with clause 12.1 of the lease agreement thus they agree to the appointment of an arbitrator and do submit to the process of arbitration. Defendant is restrained from evicting the 1st plaintiff company from parcels of land, Nandi/Chemase/974 and Nandi/Legeget/224, selling or demolishing structures on the parcels of Land Nandi/Chemase/974 and Nandi/Legemet/224 pending arbitral proceedings which should be conducted within a period of 2 months from the date of appointment of the arbitrator and that the defendant/Respondent to submit to and cooperate in the Arbitration as provided in the lease agreement dated 12.6.2009 entered into between the 1st Plaintiff and Defendant. The plaintiff is also restrained from carrying on any activity on the suit parcels of land pending the outcome of the arbitration. There be liberty to apply. Orders accordingly.

Dated and delivered at Eldoret this 1st day of March, 2019.

A. OMBWAYO

JUDGE