



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 52 OF 2018

TIHAN LIMITED.....PLAINTIFF

VERSUS

SOHAN SINGH JOSH & SONS LIMITED.....DEFENDANT

RULING

1. In the Notice of Motion dated 20th March, 2018, the Plaintiff is seeking for the following orders:

a. That pending the inter partes hearing of this suit the court be pleased to issue an order of injunction restraining the Defendant or its servants, employees, nominees, assigns, or agents and particularly Xfor guards stationed at the premises from barring access by the Plaintiff's employees, agents or customers to the demised premises being Go-down No A2 in Wing B road on Land Reference No. 12715/6242 or otherwise re-entering, taking away the Plaintiff's property on the demised premises or in any way interfering with the Plaintiff's quiet possession of the demised premises.

b. That the court be pleased to refer the matter to arbitration upon grant of interim relief.

c. That the cost of this Application be borne by the Defendants.

2. The Application is supported by the Affidavit of the Plaintiff's Director who deponed that by a Lease Agreement of 21st September, 2016, the Applicant leased Go-Down A2 in Wing B road on L.R. No. 12715/6242 (*the suit property*); that the Plaintiff installed an elaborate manufacturing plant on the premises and that when the Plaintiff entered into a Share Acquisition Agreement with a business partner, the Defendant accused the Plaintiff of breaching the Lease Agreement.

3. It is the Plaintiff's case that despite the Share Acquisition Agreement not going through, the Defendant has continually threatened to evict the Plaintiff from the premises; that the Plaintiff is entitled to peaceful and quiet enjoyment of the demised premises and that the orders being prayed for should be granted by the court.

4. In reply to the Affidavit, the Defendant's Director deponed that there is no real dispute arising from the Lease capable of being referred to Arbitration as sought in the Application; that the Plaintiff having filed this suit seeking final Judgment, he has waived any right it may have had to Arbitration and that the Plaintiff being a tenant has admitted default of payment of rent whose tenancy has consequently been terminated under the express terms of the Lease.

5. The Defendant's Director deponed that the Defendant's consent was required prior to the Plaintiff entering into the alleged arrangement with its business partner for the acquisition of shares in the Plaintiff's company; that the said business partner, one Farzana, has been operating from the suit premises and that prior to the filing of this suit, the Defendant had not informed the Plaintiff that the proposed share acquisition had been aborted.

6. The Defendant's Director further deponed that in October, 2017, the Kenya Revenue Authority sealed off the suit premises and effectively shut down the Plaintiff's production and operations, save for a cleaning team which visits the suit premises once in a while and that due to the Plaintiff's obvious financial difficulties and the shutdown of its operations by Kenya Revenue Authority, the Defendant felt that it was in the parties' best interest to terminate the Lease and engaged in discussions with the Plaintiff to that effect.

7. According to the Defendant, it is the Plaintiff who proposed to vacate the suit premises by 31st December, 2017, six (6) months later than he had proposed; that as the Plaintiff had not paid the rent for the quarter of March, April, and May, 2018, the Defendant terminated the Lease and that the Plaintiff has admitted for having deliberately withheld payment of rent since 1st March, 2018.

8. The Defendant's Director finally deponed that if the orders of injunction are to issue, then the Plaintiff should be directed to deposit the rental sum of Kshs. 2,174,434 per quarter for every quarter commencing from 1st March, 2018 into an interest earning account in the joint

names of the respective Advocates for the parties herein as security.

9. The Plaintiff's counsel submitted that the Plaintiff is the legal tenant of the Defendant on L.R. No. 12715/6242; that Clause 19 of the Lease provides for referral of any dispute between the parties to Arbitration and that the Applicant has properly invoked Section 7 of the Arbitration Act.

10. The Plaintiff's counsel submitted that the reasons propounded by the Respondent for purportedly terminating the Lease have no factual basis and that the subject matter is under threat as the Respondent has insisted on not recognizing the Applicant as a tenant. Counsel submitted that if no interim protective measures are put in place by the court pending arbitration, then the subject matter, including the monies expended in setting up the plant will be lost and the proposed arbitration will be reduced to an academic exercise.

11. The Defendant's advocate submitted that payment of the agreed rent was a fundamental obligation on the part of the Plaintiff; that the Plaintiff has admitted to withholding the rent for the second quarter of the year 2018 and that the Plaintiff has been defaulting in payment of rent previously.

12. The Defendant's advocate submitted that the matter should not be referred to arbitration because there is no real dispute between the parties arising from the Lease capable of being referred to arbitration and that there is no prayer for staying of this suit.

13. It is not in dispute that on 21st September, 2016, the Plaintiff and the Defendant entered into a Lease Agreement in respect of a parcel of land known as 12715/6242. It is also not in dispute that the Lease is in respect to a manufacturing warehouse known as Go-Down A2 in Wing B road. The Lease was to run for a term of five (5) years and three (3) months with effect from 1st March, 2016 until 31st May, 2021.

14. The Lease further provided the monthly rent payment which was to be paid quarterly in advance. According to the Lease, the monthly payable rent for the period between 1st March, 2018 to 28th February, 2019 was Kshs. 523,688, amounting to Kshs. 1,571,064 plus VAT. The Plaintiff was also required to pay a sum of Kshs. 25,000 every month towards service charge, payable quarterly in advance.

15. Clause 3(q) of the Lease prohibited the Plaintiff from transferring, subletting or parting with the possession of the said premises without the written consent of the Defendant. The Lease provided that in case the Plaintiff breaches the Clause, then the Defendant will have the right to re-enter the premises without notice and the Lease shall be terminated.

16. The Plaintiff's Director has deponed that although the Plaintiff entered into a Share Acquisition Agreement with a business partner, the Agreement aborted. The Plaintiff's Director annexed on his Affidavit copies of records from the Registrar of Companies to show that the shareholding of the Plaintiff has never changed. On the other hand, the Defendant's Director deponed that all along, the Defendant was made to believe that the shareholding of the Plaintiff had changed without the Defendant's consent. According to the Defendant, the Plaintiff's business partner, one Farzana, has been operating from the suit premises and had verbally informed them that the transfer of shares of the Plaintiff had been effected.

17. The Defendant's concern about the Plaintiff's "new Directors" was expressed in its email to the Plaintiff dated 19th March, 2018 as follows:

"On top of this you have brought in new Directors without the knowledge of the Landlord and we have no details who they are, their shareholdings etc... Please note that I have asked our security team at the gates of Josh Industrial Estate to bar entry to the premises to ALL Tihan personnel as this is the only way we can have dialogue."

18. The above email clearly shows that the Defendant had put in motion the enforcement of Clause 3 (q) of the Lease. Indeed, in the subsequent emails, the Defendant declined to allow the Plaintiff to extend its stay in the premises "until December, 2018."

19. Considering that the Defendant had accused the Plaintiff of not only being late in paying of the quarterly rent, but also of selling the shares in the Plaintiff's company without its consent, a dispute in respect of the Lease between the Plaintiff and the Defendant arose. The Lease Agreement provided as follows in respect of any dispute that arises between the parties.

"19. In case any dispute or difference shall arise between the Landlord and the Tenant, such dispute or difference shall be referred to an arbitrator to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Chapter). The Arbitrator shall have all the powers conferred on an arbitrator by the Arbitration Act..."

20. Consequently, it follows that the Lease between the Plaintiff and the Defendant provided for an arbitration agreement. The existence of any dispute between the Plaintiff and the Defendant arising from the Lease should therefore be referred to an arbitrator in pursuant to the existing arbitration agreement.

21. Section 7(1) of the Arbitration Act allows this court to grant to a party interim measures of protection. The said Section provides as follows:

"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."

22. As was held by the Court of Appeal in the case of *Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others (2010) eKLR*, the essentials which the court must take into account before issuing the interim orders of protection are the existence of an arbitration

agreement and whether the subject matter is under threat.

23. I have already found above that there exists an arbitration agreement between the Plaintiff and the Defendant. I have also found that there is a dispute as to whether the Plaintiff's Directorship has changed to warrant the recession of the Lease by the Defendant. Considering that the subject matter of arbitration in the Lease is in respect to the suit land, the subject matter will be under threat if the Plaintiff is evicted from the suit land. Indeed, the said eviction will render the arbitration proceedings nugatory.

24. It is for the reasons I have given above that I find that the Plaintiff has satisfied the principles required for an order of protection to issue pending the hearing of the dispute by an arbitrator. However, the said order will issue on condition that the Plaintiff pays to the Defendant the rent, which, in any event, is not in dispute.

25. For those reasons, I allow the Plaintiff's Application dated 20th March, 2018 as follows:

a. That pending the inter partes hearing of this suit and the arbitration, the court hereby issues an order of injunction restraining the Defendant or its servants, employees, nominees, assigns, or agents and particularly Xfor guards stationed at the premises from barring access the Plaintiff's employees, agents or customers to the demised premises being Go-down No A2 in Wing B road on Land Reference No. 12715/6242 or otherwise re-entering, taking away the Plaintiff's property on the demised premises or in any way interfering with the Plaintiff's quiet possession of the demised premises.

b. The matter be and is hereby referred to arbitration pursuant to the provisions of Clause 19 of the Lease dated 21st September, 2016 within sixty (60) days from the date of this Ruling.

c. Order No. 1 above is granted on condition that the Plaintiff pays the requisite rent and service charge to the Defendant upto and including 1st May, 2019 within sixty (60) days from the date of this Ruling.

d. Each party to bear its own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE