



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**CIVIL SUIT NO. 421 OF 2018 (O.S)**

**NORTHWEST HOLDINGS LTD.....PLAINTIFF**

**VERSUS**

**ROYALE HEALTH AND FITNESS LTD.....1<sup>ST</sup> DEFENDANT**

**LAVINGTON SECURITY GUARDS.....2<sup>ND</sup> DEFENDANT**

**JOAN CATHERINE KIPLAGAT**

**MOSES KIPLAGAT**

**(ALL SUED AS THE BENEFICIARIES/**

**ADMINISTRATORS OF THE ESTATE OF**

**ISAIAH FUNDI KIPLAGAT, (DECEASED).....3<sup>RD</sup> DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. The Plaintiff, Northwest Holdings Limited (The Company) entered into a lease agreement with Isiah Fundi Kiplagat (Deceased) on 31<sup>st</sup> December, 2013 in respect of premises on LR No 1160/997. (The premises). The lease was to last for ten (10) years with effect from 15<sup>th</sup> August, 2013.

2. The company and the deceased mutually agreed that rent in respect of the premises was to be paid through the account of Royal Health and Fitness Ltd (1<sup>st</sup> Defendant). On the 24<sup>th</sup> August 2016, the deceased passed on.

The deceased's widow Joan Catherine Kiplagat and his son Moses Kiplagat took out limited grant of letters of administration ad litem on 26<sup>th</sup> September, 2018 for purposes of filing a suit.

3. In or around 22<sup>nd</sup> September 2018, the goods of the company were distrained for rent by Icon Auctioneers on instructions of the estate of the deceased. This is what prompted the company to move to Court where it filed an Originating Summons on 28<sup>th</sup> September, 2018 in which it sought the following orders:-

**1. An injunction restraining the Defendants from, unlawfully levying distress for rent, interfering with the Plaintiff's quiet use and enjoyment of the property, harassing and/or evicting the Plaintiff or its clients from the suit premises.**

**2. An order directing where to pay rent and the determination of the rent due.**

**3. An order directing for urgent repairs to be done to the suit premises as per the lease obligations.**

4. The company also sought a determination of the Court of the following questions:-

- 1. Who is entitled to receive rent paid by the Plaintiff for occupation of the property known as Royale Health and Fitness Club on L R. No. 1160/997 Nairobi?**
- 2. Who should disburse the rent so received to the beneficiaries?**
- 3. Who should pay for the repairs and improvements on the leased premises as per the terms of the lease dated 31<sup>st</sup> December, 2013?**
- 4. Who should ensure access and security at the leased premises is provided for and maintained?**
- 5. What is the rent sum due?**
- 6. Who is entitled to levy for distress for rent?**
- 7. Who should pay the costs of this suit?**
- 8. Whether costs may be deducted from the rent due.**

#### **Plaintiff's Case**

5. The company contends that upon entry into the premises it emerged that the premises including some of the plant and equipment were in a deplorable state and there was need to carry out improvements that would make it more usable and suitable to the company's clientele. Due to the state of the premises, and equipment, the deceased revised the rent due from Kshs.650,000/= to Kshs.580,000/= and subsequently to Kshs.600,000/=.

6. The company with the consent of the Respondents made improvements to the premises to the value of Kshs.5,000,000/=.

In or around June 2018, the company received an invoice which purported to unilaterally increase rent from Kshs.600,000/= to Kshs.750,000/=. The company moved to the Business Premises Rent Tribunal where it filed a reference. The Tribunal directed that company withhold payment of rent until a determination was made as to who was to receive rent. However before a determination could be made by the Tribunal a Preliminary Objection was raised by the 1<sup>st</sup> Defendant on the ground that the Tribunal had no jurisdiction. The Tribunal held that it had no jurisdiction to entertain the reference.

7. Following the Tribunal ruling, the guards from the 2<sup>nd</sup> Defendant Company went to the premises and started harassing the company's clients and asked them to vacate. The company reported the harassment to Hardy Police Station in Karen. The 2<sup>nd</sup> Defendant's guards were told that they had no authority to ask the company to vacate the premises without a Court order.

8. Later on, Icon Auctioneers acting on instructions of the estate of the deceased purported to distress for rent. The company contends that its officials are aware that the deceased had other children apart from the beneficiaries named in this suit and that there is a tussle as to who between the 1<sup>st</sup> Defendant and the beneficiaries of the estate of the deceased should be paid rent. The company therefore contends that it is imperative for the Court to determine to whom the company should pay rent.

9. The company also seeks orders of the Court barring the 1<sup>st</sup> Respondent and the third Respondents from evicting it until the Originating Summons herein is determined. This is because, the company does not want to pay rent to strangers only for other people to come and levy distress over the same rent owing to the confusion as to who is to be paid rent.

#### **1<sup>st</sup> and 3<sup>rd</sup> Defendant's case**

10. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants opposed the company's Originating Summons based on a replying affidavit sworn on 21<sup>st</sup> November, 2018. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants deny the contents of the affidavit in support of the Originating Summons. They contend that the company entered the premises after being satisfied that repairs had been done to the company's satisfaction and that when issues of repair arose, there was a meeting held with the company whereby it was mutually agreed that rent was to be revised downwards for a specific period and that the same was to be increased to an agreed sum.

11. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants further contend that there is a lease governing the relationship between the company and the administrators of the estate of the deceased and that there is an agreement that the company pays rent to the account of the 1<sup>st</sup> Defendant and therefore the issue of where rent is to be paid does not arise. On the issue of the guards from the 2<sup>nd</sup> Defendant being stationed at the premises, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants contend that this was necessitated after the company lost the case at the Tribunal and that the guards from the 2<sup>nd</sup> Defendant are not interfering with the premises as alleged by the company.

#### **2<sup>nd</sup> Defendant's Case**

12. The 2<sup>nd</sup> Defendant opposed the company's Originating Summons through a replying affidavit sworn on 3<sup>rd</sup> December, 2018. The 2<sup>nd</sup> Defendant denies the contents of the affidavit in support of the Originating Summons and states that its guards were stationed at the premises pursuant to a contract entered into in 2017 contrary to the allegations by the company that they were stationed there in 2018. The 2<sup>nd</sup> Defendant denies that its guards are interfering in the business of the company at the premises. The 2<sup>nd</sup> Defendant denies any allegations of

harassment and contends that it has been wrongly sued as there is no prayer in the Originating Summons which can be enforced against it. The 2<sup>nd</sup> Defendant further states that it has nothing to do with the lease between the company and the deceased.

### **Analysis**

13. I have considered the Originating Summons by the company as well as the opposition to the same by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. I have also considered the submissions by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. Directions as to the filing of written submissions were given on 10<sup>th</sup> December, 2018. As at 12<sup>th</sup> March 2019, it is only the 1<sup>st</sup> and 3<sup>rd</sup> Defendants who had filed their submissions. On the 12<sup>th</sup> March, 2019 when the date of judgment was given, the company was granted seven days within which to file its submissions and a further affidavit. The company only filed a further affidavit on 30<sup>th</sup> May, 2019 without submissions.

14. The major issue which prompted the filing of this Originating Summons is as to whom the company was to pay rent to.

The 1<sup>st</sup> and 3<sup>rd</sup> Defendants in their replying affidavit had indicated that it had been agreed that rent be paid in the account of the 1<sup>st</sup> Defendant or alternatively, it be deposited in the client account of their lawyer. On 10<sup>th</sup> December 2018, the Court directed the company to be paying rent into the account of the 1<sup>st</sup> Defendant. This order effectively resolved the issue as to where the company was to pay rent. This issue does not therefore fall for determination.

15. The only issue which falls for determination is whether the company is entitled to an injunction. I have already stated hereinabove that the major issue which led the company to file this suit has been sorted out. The company was expected to continue paying rent into the account of the 1<sup>st</sup> Defendant as was the case before. The lease was between the company and the deceased. There are administrators of the estate of the deceased. They have the power to direct as to where and to whom rent is to be paid. As at the time this suit was filed, there were already limited grant of letters of administration which had been issued to two of the three Defendants who have been sued herein.

16. The company has not been paying rent even after the Court directed that rent be paid into the account of the 1<sup>st</sup> Defendant. There is even an application for contempt which had been filed seeking to cite the directors of the company for contempt. The terms of the lease are very clear. The obligations of the landlord and those of the tenant are set out therein. The Court cannot be asked to state what rent should be paid or who should undertake the repairs or who is to pay for guard services. If the Court were to do any of these acts, it will be tantamount to the Court re-writing a contract for the parties which is not allowed in law.

17. The company is complaining that the Defendants have filed a case in the Lower Court in which they are seeking eviction orders. Though the company named the said suit which is by way of miscellaneous application, the pleadings were not annexed to the further affidavit filed on 25<sup>th</sup> March, 2019 or even the one filed on 30<sup>th</sup> May, 2019. What was annexed to the further affidavit are pleadings from the Business Premises Rent Tribunal. This Court cannot seek to protect the company from proceedings which are not before it.

### **Conclusion**

18. It is clear that the company is not paying rent and there is no basis upon which injunctive orders can be given to protect such a litigant. The issue of repairs which have been carried out by the company must have been carried out in accordance with the lease agreement. If there are any repairs which the landlord ought to carry out, those repairs should be carried out in accordance with the terms of the lease. The Originating Summons was meant to address the issue on who is to be paid rent and not on what rent is due or what the company has done or which beneficiary is to get what from the rent. I therefore find no merit in the Originating Summons which is hereby dismissed with costs to the Defendants/Respondents.

**Dated, Signed and delivered at Nairobi on this 13<sup>th</sup> day of June, 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of M/s Nafula for Mr. Enonda for Plaintiff and Mr. Kaburu for 1<sup>st</sup> and 3<sup>rd</sup> Defendant.

Court Assistant Hilda