



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 171 OF 2018

NAKUMATT HOLDINGS LIMITED..... PLAINTIFF

VERSUS

SOUTH COAST HOLDINGS LTDDEFENDANT

RULING

1. The plaintiff filed the application dated 23rd July 2018 which is premised under Section 1A, 1B 3A, and 63(e) of the Civil Procedure Act as well as Order 40 rule 1, 2 & 4 and Order 51 of the Civil Procedure Rules. The plaintiff/applicant sought the court to grant the following orders;

(a) Spent;

(b) Spent;

(c) That an order of mandatory injunction do issue compelling the defendant whether by herself, her agents, servants, employees and/or representatives or anyone claiming through her, to immediately hand over to the plaintiff's representatives and/or persons/entities designated by the plaintiff, all the fixtures, fittings, furniture and equipment currently in situ on the suit property reference title number Kwale/Diani Beach Block/818 together with the building erected and being thereon and known as Centerpoint, comprising part of the ground floor and mezzanine floor of said building, more particularly delineated as "supermarket ground floor" and "supermarket mezzanine floor" respectively;

(d) That an order do issue directing the OCS, Diani police station, so supervise the execution of this order, provide security, ensure no public disturbance ensues, and maintain law and order throughout and after the execution of this order.

(e) That costs of this application be provided for.

2. The application is supported by the grounds listed on its face and the supporting affidavit sworn by Ankoor Shah on same date (23rd July 2018). The grounds include but not limited to the following;

(a) That the defendant welded shut all doors leading into and out of the suit premises on account of unspecified rental arrears thereby effectively evicting the plaintiff.

(b) That on 5th January 2018, the defendant gained access into the suit property and commenced trading therein fully initialisation the fixtures, fittings, furniture and equipment belonging to the plaintiff and disclosed third parties.

(c) That pursuant to the orders issued on 29th January 2018 in Insolvency Cause no 10 of 2017; Re Nakumatt Holdings Ltd (under administration), only rents falling after the administration order are legally payable to the land lord as is".

(d) By reason of the defendant's acts/omissions the plaintiff has suffered substantial irreversible loss, injury and damage as particularised in paragraph 9 of the grounds on the face of the motion.

3. The defendant opposed the application by relying on the affidavit of Sultan Khimji sworn on 10th November 2018 and filed in court on 12th November 2018. Mr Khimji deposed that by a letter dated 18th May 2018, the plaintiffs administrator wrote to the defendant that he had dispatched Mr. Festus Kimotho to oversee the process of collection of goods and safes from the suit premises. That Mr. Komotho indeed went to the suit premises and together with his team collected all the stock leaving only the safe to be collected later. That the defendant

wrote to Mr Kahi on 22nd May 2018 confirming this position. The defendant thus deny the claim of stock still remaining on the suit premises.

4. Further, the defendant referred to the audit report prepared by PKF dated 10th March 2018 which disclosed that there was theft of stock valued at Kshs18 billion as at December 2017 (“annex SK 2”). This report was prepared on instructions of the plaintiff and this was before the defendant re-entered the premises. That the plaintiff cannot ask for release of stock stolen and or claims made without specifying the bar code of the stock alleged to be remaining on the suit premises.

5. On fixtures and fittings, the defendant deposed that the same cannot be removed without defacing or damaging the building. That the lease provided that the plaintiff will be responsible for restoration/reinstatement of the building on termination of the lease. Mr Khimji deposed further that such exercise would cost the defendant Kshs14,628,500/= and they had communicated this to the plaintiff (annex SK3).

6. The defendant avers that it recovered the suit premises lawfully and has subsequently leased the same to another tenant who is in possession. That any law that allows the plaintiff to remain in the suit premises without paying any rent is inconsistent with the provisions of article 40 of the constitution.

7. The defendant pleaded that the suit is incompetent as the administrator was not authorised in the Insolvency Cause No. 10 of 2017 to delegate his powers to anyone including Mr. Ankoor Shah who swore the supporting and verifying affidavits in this case. It is the defendant’s case that this suit is also subjudice other proceedings in the high court. In summary the defendant urges the court to dismiss the application.

8. The applicant filed a list of authorities dated 13th February 2019 in support of his application. The authorities cited are;

(a) **Civil Procedure Act;**

(b) **Constitution of Kenya;**

(c) **Giella –versus- Cassman Brown (1973) EA 358;**

(d) **Haveys Bar & Restaurant & Fernando Vischo (2002) eKLR;**

(e) **Gusii Mwalimu Investments Co. Ltd & Anor –versus- Mwalimu Hotel Kisii LTD (1995 – 1998) 2 EA 100.**

9. The applicant herein is essentially seeking orders of mandatory injunction. In the case of **Locaball International Finance Ltd –versus- Agro Export & Others (1986) 1ALL E.R 901** quoted by the Judge in the **Harvey Bar & Restaurant Case Supra**, it was held that;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which can easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover before granting the order, the court ought to feel a high decree of assurance that at the trial it would appear that the injunction had rightly been granted that being the difference and higher standard than was required for prohibitory order.”

10. The issue of mandatory injunction has been determined in several cases in our courts. For instance, in the case of **Malindi Air Services & Another –versus- Abdinnoor Hassan Nairobi C.A No. 202 of 1998**, it was held that a mandatory injunction at an interlocutory stage is rarely granted, only when the plaintiffs case is clear and incontrovertible.

11. Does the application before me meet the principles set in case law cited above? It is not in dispute that the fittings and fixtures on the suit premises was placed by the applicant. What is disputed and which I do not find as forming part of the orders sought in this application is whether there are any stock belonging to the plaintiff that remained in the suit premises that ought to be released as the interlocutory stage. Since parties are bound by their pleadings and the mandatory orders sought by the applicant does not mention stock in prayer 3 of the motion, I shall not digress in to the matter of stock. The court will thus restrict itself to the release of fittings, furniture and equipment.

12. Between the parties is a lease agreement dated 14th September 2010 duly executed. The lease created the relationship between the plaintiff and the defendant and were thus bound by its terms. It is not clear how the lease was terminated but the plaintiff has made a prayer for general damages for unlawful eviction. Besides the prayer for damages for eviction, the applicant has prayed for judgment on the value of the fittings, furniture and equipment at Kshs120,000,000/= together with a prayer for compensation for loss of use of these items from 17th November 2017 until the suit is determined/payment is made.

13. The defendant on its part has pleaded that the applicant owes her rents arrears. Further the defendant pleaded that as per the lease agreement, the applicant was under obligation to restore the premises after removing her equipment (fixtures and fittings). That the applicant should not use the court to defraud the defendant by being allowed to walk away from her part of the bargain. The defendant also pleaded that from the documents annexed by the applicant, it appears that the fittings or fixtures belong to third parties and until they receive undertakings in regard to liabilities from such parties, the court should not direct them to release the fittings and the fixtures to the applicant.

14. The lease agreement was annexed by the plaintiff in support of the application. However, the applicant did not make reference to the same in so far as it relates to termination and or surrender of the premises. In any event, the issue of surrender of the premises is what forms part of the questions for determination in the main suit in particular on the prayer for claim for loss of income and unlawful eviction. The

defendant in his replying affidavit stated that the plaintiff must meet the cost of restoring the premises (to its original status) before it with the furnitures and fittings that are now demanded to be released.

15. The defendant went ahead to give estimate costs of such restoration and or reinstatement. The plaintiff did not file any document to make a rebuttal on this allegation. The plaintiff also did not deny its indebttness to the defendant except to refer the court to the orders made in the insolvency cause no 10 of 2017. It is my considered opinion and I so hold that although it is apparent the fixtures and furniture were introduced to the premises by the plaintiff, their mode of removal and or release from the suit premises is not clear and simple. The issue of whether or not the plaintiff is to restore the premises has to be resolved. Similarly the issues on the outstanding rent arrears whether pre or post administration order also has to be resolved.

16. The plaintiff argued that in the defendant's retaining the fittings and furnitures amount to stealing a match. However the plaintiff still has remedy as she has prayed in her plaint the value of those fittings and furnitures as well as damages for loss incurred for not being able to use them.

17. In conclusion, I find that the plaintiff's case is not one which is simple or clear that can be determined summarily. Accordingly I find the motion dated 23rd July 2018 to be without merit and hereby decline to grant the orders sought. It is dismissed with costs to the defendant.

Dated, Signed and Delivered at Mombasa this 11th day of June 2019.

A. OMOLLO

JUDGE.