



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 105 OF 2019**

**MAVIC INVESTMENTS COMPANY LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**LITTLE SHEEP INVESTMENTS LIMITED.....DEFENDANT**

**RULING**

1. This is the notice of motion dated 20<sup>th</sup> March 2019 brought under section 3 and 3A of the Civil Procedure Act, Section 60 of the Land Act 2012, order 50 of the Civil Procedure Rules and all other enabling provisions of the law.

***(1) Spent.***

***(2) Spent.***

***(3) That pending the hearing and determination of this suit there be an order of injunction restraining the defendant/respondent by itself, servants, agents from undertaking any demolition, construction and/or development in the property known as Land Reference Number 209/407/2.***

***(4) That pending the hearing and determination of this suit the defendant/respondent to immediately grant the plaintiff/applicant or its agents, access to the property known as Land Reference Number 209/407/2 for inspecting purposes.***

***(5) That the officer commanding Kilimani Police Station to provide the plaintiff/applicant and its agents security to gain access to the property known as Land Reference Number 209/407/2 and stop any demolition and/or construction.***

***(6) That costs of this application be provided for.***

2. The grounds are on the face of the application and are set out in paragraph 1 to 6.

3. The application is supported by the affidavit of Professor Maria Nzomo, one of the directors of the plaintiff/application sworn on the 20<sup>th</sup> March 2019.

4. The application is opposed. There is replying affidavit sworn by Sam Gicheru Mburu a director of the defendant/respondent sworn on the 26<sup>th</sup> April 2015.

5. The application was canvassed by way of oral submissions.

6. It is the plaintiff's/applicant's case that the defendant/respondent is a tenant in the plaintiff's/applicant's premises. It was a condition in the lease it had a right to terminate the lease and repossess is the demised premises. It is also the plaintiff's/applicant's case that the lease was properly terminated because the defendant/respondent failed to pay rent when it was due.

7. Further that the plaintiff/applicant has established a prima facie case with probability of success at the trial. The defendant/respondent is going on with construction. The plaintiff/applicant will suffer loss that cannot be compensated by an award of damages. The balance of inconvenience tilts in favour of the plaintiff/applicant as there will be a remedy for trespass. It prays that the application be allowed.

8. It is the defendant's/respondent's submissions that the construction is complete hence the orders sought have been overtaken by events.

Further that the defendant/respondent is ready and willing to give access to the plaintiff as long as adequate notice is given.

9. It is also the defendant's/respondent's submission that the plaintiff/applicants has failed to demonstrate a prima facie case as the defendant/respondent is not in rent arrears. The defendant/respondent is still a tenant of the plaintiff/applicant hence there are no grounds to justify the prayers sought. Further that the balance of convenience tilts in favour of the defendant/respondent who has significantly invested in the suit property. It urges the court to dismiss the application.

10. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures, the oral submissions of counsel and the authorities cited. The issues for determination are:-

**(i) Whether or not the plaintiff's/applicant's application meets the threshold for grant of temporary injunction.**

**(ii) Who should bear costs?**

11. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for an injunction the onus is on the application to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358. In the case of Mrao Limited vs Frist American Bank of Kenya Limited & 2 others [2003] KLR 125** the Court of Appeal states what amounts to a prima facie case. I am guided by the above authorities.

12. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557** Bosire J (as he then was) held that:-

***“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”***

13. It is the plaintiff's/applicant's case that the defendant/respondent has defaulted in rent hence the notice issued on 1<sup>st</sup> March 2018 terminating the lease is proper.

14. The defendant/respondent on the other hand contends that it is not in rent arrears hence the notice to terminate lease was not proper.

15. I have gone through the lease agreement dated 1<sup>st</sup> August 2016. The same is for a period of eight (8) years. Under clause 2.2 (1) the defendant/respondent was to pay Kshs.300,000 on 1<sup>st</sup> August 2016 and Kshs.400,000 on 1<sup>st</sup> August 2020. I find that the plaintiff/applicant has failed to demonstrate that the defendant did not pay Kshs.300,000 on 1<sup>st</sup> August 2016 and that the same is still owing.

16. Clause 11 of the said lease agreement provides that the parties would resort to mediation and arbitration in case of any dispute. I am of the view that the plaintiff/applicant filed this suit without giving mediation a chance.

17. I find that the plaintiff/applicant has failed to demonstrate that it deserves this courts protection. It has failed to establish a prima facie case with probability of success at the trial. It has also failed to demonstrate that the it is likely to suffer irreparable injury which cannot be compensated by an award of damages. The balance of continence tilts in favour of the defendant/respondent who has significantly invested in the suit property.

18. I note from the defendant's/respondent's submission that it is willing to allow access to the plaintiff into the premises for purposes of inspection. Prayer 4 of the notice of motion is allowed on condition that the plaintiff gives adequate notice.

19. In conclusion, I find no merit in this application and the same is dismissed. The costs of the application do abide the outcome of the main suit.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 24<sup>TH</sup> day of JULY 2019.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant