REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.282 OF 2016

KLAUS HOTEL LIMITED .....PLAINTIFF

VERSUS

KEDONG RANCH LIMITED.....DEFENDANT

RULING

(Application to discharge earlier orders of the court or vary the same; applicant having sued claiming that she can only pay pro-rated rent owing to destruction of part of the demised premises; applicant first filing an application for injunction to restrain the respondent from evicting her; court making a ruling on the application for injunction and making orders for the applicant to pay all rent arrears and utility bills up to the time that the property was destroyed and continue paying pro-rated rent thereafter; applicant paying the rent arrears but then transferring the controlling shares to another entity; lease having a clause stopping the transfer of majority shares; respondent terminating the lease based on the transfer of shares; applicant filing an application for contempt that the respondent has taken over premises in breach of the order of injunction; this application for contempt dismissed as the take over of the premises was not based on the injunction order but on the transfer of shares; applicant now asking for review to have refunded the rent arrears; application having no merit since the rent arrears and utility bills were those paid before the destruction of the premises; applicant having a duty to make this payment for it used the premises)

1. The application before me is that dated 20 May 2019 filed by the plaintiff. The application is said to be brought pursuant to the provisions of Order 40 Rule 7 and Order 45 Rule 1 of the Civil Procedure Rules and Section 3A, 80 and 63 (e) of the Civil Procedure Act, Cap 21, Laws of Kenya. The application seeks the following orders :-

(i) Spent (certification of urgency).

(ii) That the Honourable Court be pleased to vacate its orders issued on the 17th May 2017 and order the defendant/respondent to refund to the plaintiff/applicant all monies paid to it by the plaintiff in compliance of the said order.

(iii) That costs of this application be in the cause.

2. The application is based on the following grounds :-

(i) That this Honourable Court delivered a ruling on 17th May 2017 on the plaintiff/applicant's application dated 1/09/2016 whose effect was that the plaintiff/applicant would be allowed to continue being in use of the suit premises pending hearing and determination of the main suit, subject to the applicant paying unto (sic) the sum of Kes 2,300,000/=.

(ii) That the plaintiff/applicant has complied with the orders but the defendant/respondent advertently ignored and/or refused to obey the said orders leading to the plaintiff/applicant instituting contempt proceedings against the directors of the defendant/respondent.

(iii) That on the 12th March 2019, the court delivered its ruling in which it seems to vacate the order directed to the defendant to hand the possession of the suit premises to the plaintiff against the said payment.

(iv) That the effect of the later order is to excuse the defendant from liability of compliance with the former order while keeping the benefits thereof to the detriment is in the plaintiff (sic) who had already complied therewith.

(v) That there is therefore no justification or justice in the defendant retaining the benefit of an order that the defendant did not intend to comply with and has now been excused from complying with.

(vi) That the plaintiff/applicant continues to suffer prejudice as a result of the orders dated 17th May 2017 as now impacted with the order of the 12th March 2019.

(vii) That the Honourable Court has wide and unfettered discretion to vacate and or review its orders of 17th May 2017 and order a refund of the money paid by the plaintiff to the defendant.

3. The application is supported by the affidavit of Joseph Muya Njuru a director of the plaintiff/applicant and the motion is opposed. Before I go to the gist of these, I find it necessary to place matters into context.

4. This suit was commenced through a plaint which was filed on 28 July 2016. The plaintiff is a limited liability company and on 22 September 2010, it entered into a 15 year lease with the defendant over the land parcel Naivasha/Maraigushu Block 10/29. The premises demised consists of considerable land and a lodge and cottages. On 8 November 2015, a fire broke out which destroyed part of the main building, called Longonot House, as well as some property in the said building. The applicant contended that through Clause 2 (c) of their lease agreement, it was the obligation of the respondent to insure and reconstruct the premises if destroyed by fire. It further contended that under the lease agreement, the respondent was supposed to suspend rent or part of rent on the happening of such an event. It averred that despite this, the respondent has failed to suspend rent and has threatened the applicant with eviction and disconnected water and electricity. In the suit, the applicant wished to have the respondent stopped from evicting the applicant, general damages, and interest.

5. Together with the plaint, the applicant filed an application seeking to stop the respondent from interfering with its possession of the demised property pending the hearing and determination of the suit. That application was opposed, the main complaint of the respondent being that the applicant has not been paying rent as agreed.

6. I heard that application and delivered a ruling on 17 May 2017. Inter alia, it was my holding that it was a term of the lease agreement that in the event of fire, rent payable would be prorated to the percentage of what was usable of the premises. I made orders for the Government valuer to assess the premises and give his opinion on what could still be used. I also found that the applicant was in rent arrears and made orders directing the applicant to make good the arrears if it still intended to remain in the suit premises. In total I made the following orders :-

(i) That for the plaintiff to continue being in use of the suit premises pending hearing and determination of the suit it must :-

(a) pay all rent arrears in full as at November 2015 before the fire.

(b) Pay all utility bills including water and power up to date.

(c) Pay the percentage of rent as from November 2015 to date in the proportion that is declared usable by the Government valuer.

(ii) The rent arrears in (i) (a) above and the utility bills in (i) (b) above must be paid within 30 days of today. If these are not paid, then the plaintiff must vacate the premises and give vacant possession to the defendant and will have to stay away until this case is heard and determined.

(iii) The amount due to date as portion of rent, that is from November 2015, as may be determined by the valuer, to be paid within 30 days of such determination, and if the same is not paid, the plaintiff must vacate the premises and give vacant possession to the defendant.

(iv) If the plaintiff complies with the above, it must continue paying rent in the same proportion as may be determined by the valuer until this suit is finalized and if there is default which continues beyond 14 days of when the monies are due, then the defendant after giving notice may re-enter the premises and terminate the lease.

7. The Government valuer filed his report on 17 November 2017, and declared that 50% of the premises was usable and I thus directed rent prorated to 50%, while Longonot House, which had been destroyed, was being built.

8. The applicant subsequently filed an application dated 22 May 2018, complaining that despite the ruling of 17 May 2017, and paying Kshs.2,300,000/= in rent arrears, the respondent had refused to give the applicant access to the premises. The applicant thus sought to have the respondent held to be in contempt of court. The respondent replied to the motion, and admitted having taken over the premises. It however explained that it had taken over the premises for the reason that the applicant had breached another term of the lease agreement. The respondent pointed at clause 1 (bb) of the lease which barred the applicant from transferring a majority of its shareholding to a third party. It averred that the applicant had breached this clause by transferring to Africa Classic Limited a majority of its shares. It submitted that it had a right to consider the lease agreement terminated by such action, and for that reason, it had re-entered the premises and considered the lease as terminated.

9. I considered this application for contempt and delivered a ruling on 12 March 2019. I was not persuaded that there was any contempt by the respondent as the applicant had transferred 600 of its 1,000 shares to Africa Classic Limited which breached clause 1 (bb) of the lease agreement. The said clause provided as follows on the obligations of the applicant as lessee:-

Not to assign transfer sub-let or part with possession of the Premises or any part thereof and it is hereby declared that upon any breach by the Lessee of the terms of this sub-clause the Lessor may thereupon at any time re-enter upon the Premises and if the Lessor shall do so the terms hereby created shall terminate absolutely and, in the case of a corporate lessee (other than a public company quoted on the Nairobi Stock Exchange), any allotment or transfer of shares in the lessee whereby control of the lessee shall be altered shall, for the purposes of this sub-clause, constitute an assignment or transfer of this Lease.

10. It was apparent to me that pursuant to the above clause, any transfer of shares which would result in the control of the lessee being altered, would be considered an assignment or transfer of lease, for which the lessor had a right to re-enter the premises and consider the lease as terminated. I could not find that the respondent was in contempt for making good its right of re-entry. I indeed explained in my ruling that the context within which I made the ruling of 17 May 2017, was the fact that there had been a fire and the court needed to make orders on what was payable while the premises was being reconstructed, and this did not in any way suspend the other duties and obligations contained in the lease agreement. It is for these reasons that I dismissed the application for contempt.

11. In the supporting affidavit to this application, Mr. Njuru has deposed inter alia that the applicant, in compliance with the order of 17 May 2017, paid the respondent the sum of Kshs.2,300,000/= . He believes that my ruling of 12 March 2019, reviewed the orders of 17 May 2017, by excusing the respondent from complying with the terms thereof. He has deposed that the money paid is held by the respondent on the basis of a court order which has tacitly been vacated. He has averred that it is only fair that if this court has excused the respondent from its obligations under the orders of 17 May 2017, then the respondent should be ordered to restore the Kshs.2,300,000/= received from the applicant. He has contended that the effect of the order of 12 March is to dismiss the application dated 28 July 2016, yet still require the applicant to pay Kshs. 2,300,000/= in absence of any cross claim by the respondent. He has thus asked that this court vacates or varies the orders of 17 May 2017 and restore the parties to the same footing that they held before the issue of the said order, especially considering that the respondent has no counterclaim, and further considering that payment of the money was a condition of being put in possession of the demised premises pending the hearing and determination of this suit.

12. The respondent filed a notice of preliminary objection stating that the suit offends the provisions of Order 5 Rule 1 (1) , (2) and (5) of the Civil Procedure Rules, and that by dint of Order 5 Rule 1 (6), this suit has abated. In the replying affidavit sworn by Pascal Babu Wood, the managing director of the respondent, it is deposed inter alia that the applicant had rental arrears of Kshs. 2,229,487.84/= as at 16 May 2016 which had accumulated to Kshs.3,812,717.45/= by 31 January 2017. It is said that in addition, the applicant had outstanding utility bills of Kshs.1,900,000.50/= outstanding as at 17 May 2017 when the first ruling was made. He has referred to clause (i) of the order of 17 May 2017, which required the applicant to settle the rent arrears as at November 2015, and make good payments on the utility bills within 30 days alongside the prorated rent. It is deposed that on 13 June 2017, the applicant paid Kshs.2,300,000/= and in their letter it was advised that this was payment in respect of *"rent arrears and utility bills ordered to be paid in terms of clause (i) of the order"* while the Government valuer ascertained the usability of the premises. He has averred that the respondent cannot restore this money as it comprised of rent arrears and utility bills for services that the applicant had enjoyed but not paid for.

13. I directed that the application be disposed of through written submissions which counsel duly filed. I have taken note of these in arriving at my decision. Mr. Kisilah in his submissions, referred me to Order 40 Rule 7, which gives the court discretion to discharge, vary, or set aside an order of injunction. He also referred me to Order 45 Rule 1 which allows a party to seek review. He further pointed me at Section 63 (e) of the Civil Procedure Act, which allows the court to make interlocutory orders deemed just and convenient, and also to Section 80 of the same statute which permits a person to seek review. He also mentioned Rule 35 (2) of the Court of Appeal Rules, which allow the court to correct errors in a judgment. He submitted that if the respondent keeps the benefits of the initial orders this would be detrimental to the applicant. He submitted that the applicant was entitled to refund of the Kshs.2,300,000 paid as this was conditional to the applicant continuing to use the premises. He submitted that failure to refund would mean that the issue in contention has already been determined without the applicant being heard and the facts critically analysed. He also urged me to invoke the "oxygen principle" in Sections 1A, 1B, 3A, and 3B of the Civil Procedure Act with a view to attaining fairness.

14. Mr. Kibicho, learned counsel for the respondent, in his submissions, pressed the point that what was paid was as noted in the forwarding letter, which is rent arrears and utility bills, and that owing to the change in the ownership structure of the applicant, the respondent was entitled to re-enter the premises and terminate the lease. He referred me to Order 45 Rule 1 and submitted that there is no discovery of a new matter, nor mistake or error on the face of record. He further submitted that the applicant never settled the balance of pro-rated rent and thought that the applicant has not come to court with clean hands. He submitted that the proper avenue of the applicant is to appeal. He was also of the opinion that this application has been brought after unreasonable delay since the ruling was delivered on 17 May 2012, two years to the time that this motion was filed.

15. I take the following view of the matter :-

16. It is not denied that the applicant paid some Kshs. 2,300,000/= and the purpose of this payment is clear from the forwarding letter. The payment was in respect of *"the demanded rent arrears and utility bills ordered to be paid to your client (respondent) in terms of clause 1 of the order (dated 17 May 2017)."* It needs to be appreciated that this court made the orders of 17 May 2017, following the applicant's application for injunction pending suit. To expound on this, when the applicant came to court, she was facing eviction by the respondent for non-payment of rent. The applicant of course claimed that because of the fire, there needed to be suspension of rent. That was well and good, and I indeed did hold that according to the lease agreement of the parties, the rent needed to be pro-rated following what was usable of the premises. This certainly did not affect the obligation of the parties before the fire; in essence, up to the time that the fire broke out, the applicant was under a duty to pay rent in full alongside the utility bills. I was faced with an application for injunction where the applicant wished to stop the respondent from evicting her. I could not have issued an order of injunction to stop the respondent from evicting the applicant, if the respondent remained unpaid, for the respondent did have the right to evict the respondent for non-payment of rent. That is why in my ruling of 17 May 2017, I held that for the plaintiff to continue being in use of the premises, it needed to pay all rent arrears up to November 2015, before the fire, and also pay all utility bills up to that time. From November 2015, it needed to pay the pro-rated rent. I could not have ordered the applicant to remain in possession without pressing the point that the applicant needs to abide by the terms of the lease. Indeed, it would have been irresponsible of this court to order the applicant to stay in the premises, and not pay rent or utility bills, or not abide by the terms of the contract that the applicant had with the respondent.

17. If I am getting the applicant right, the applicant is complaining that it paid the rent arrears, but is deriving no benefit from it. That cannot be true, because the applicant had already derived benefit for the period up to 2015 when the rent arrears were due. I wonder why the applicant believes that there is no justice in the respondent retaining this amount of money yet the applicant already got the benefit of it. There was no compulsion for the applicant to pay rent arrears. The applicant of course had the option not to pay the rent arrears and risk being kicked out of the premises, but if it wanted to remain in the premises for the duration of the case, it needed to keep up on its payments and abide by the other terms of the lease. What made the respondent re-enter the premises and terminate the lease is the fact, which is not denied, that the applicant transferred a majority of its shareholding to a third party, which was in apparent breach of the conditions of the

lease agreement. I did not, as I emphasized in my ruling of 23 March 2019, suspend the terms of the lease and it was upon each party to ensure that it abided by its terms for the duration of this suit.

18. I do not know where the applicant gets the idea that the ruling of 12 March 2019 vacated the ruling of 17 May 2017. It did not. The ruling of 12 March 2019 only held that the respondent could not be held to be in contempt for pursuing its rights under the lease on other clauses that were not before court. At the risk of sounding repetitive, I reiterate that the dispute that came before court was on payment of rent for the duration that the property would not have been reconstructed, not on the other clauses of the lease. Those other clauses were never suspended on the ground that the court has given orders of how pro-rated rent and rent arrears need to be paid. The applicant is clearly labouring under a very misguided interpretation of the two rulings.

19. What I see from this application is an attempt by the applicant to escape payment of rent arrears for the duration of time that it used the premises and further escape payment of utility bills that it consumed. The applicant is clearly coming to court with unclean hands and this court cannot assist such a party.

20. Coming to the law, the application is brought inter alia pursuant to Order 40 Rule 7 and Order 45 Rule 1 of the Civil Procedure Rules. Order 40 Rule 7 is drawn as follows :-

> *Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.*

21. I ask myself, what is it that the applicant is dissatisfied with the order of 17 May 2017? Is it the order to pay rent arrears? is it the order to pay accumulated utility bills ? Is it the order to pay pro-rated rent for the duration that the suit would subsist ? I am clearly at a loss, for the applicant has not said what it is about this order that it is dissatisfied with. In any event, if there was dissatisfaction, you would expect the applicant to come to court shortly after delivery of the ruling and say, look, I am dissatisfied with this or that issue in the order. Nothing of that nature came before me.

22. Turning to Order 45 Rule 1, the same is drawn as follows :-

1 (1) Any person considering himself aggrieved –

> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or from any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

23. I have painstakingly gone through the application and nowhere does the applicant claim that there is discovery of new and important evidence which could not be availed at the time that the order sought to be reviewed was made. Nowhere in this application does it allege that there is an error on the face of the record. If the applicant wishes to come under the umbrella of other sufficient reason, I regret that there is not a sufficient reason for this court to review its order for the reasons that the applicant has paid rent arrears but has failed to abide by its other obligations in the lease and has suffered as a result thereof. This court cannot allow a party to benefit from a breach that it has itself caused.

24. Moreover, as pointed out by Mr. Kibicho in his submissions, the application herein is coming too late in the day, about 2 years since it was made, and to me, that is an unreasonable period.

25. In my ruling of 12 March 2019, I held that if the applicant feels that the respondent ought not to have re-possessed the premises on the argument that the shareholding has changed, the applicant has the avenue of filing suit to contest that. I regret that this is not the forum to contest that.

26. Whichever way I look at it, I see no reason to review any of the orders of this court. I see no merit in this application and it is hereby dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 30th day of September 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Kimani holding brief for Mr. Kisila for plaintiff/applicant.

Mr. Tanga holding brief for Mr. Kibicho for the respondent.

Court Assistant :Nancy Bor/ Alfred Cherono

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU