



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC SUIT NO.93 OF 2019

THE ARTIQUE LIMITED.....PLAINTIFF

VERSUS

DAVITA MANAGEMENT LTD & 3 OTHERS.....DEFENDANTS

RULING

1. This is a ruling in respect of a Notice of Motion dated 14/3/2019 in which the plaintiff/applicant seeks the following orders;-

a) Spent

b) Spent

c) That a temporary injunction be and is hereby issued, to restrain the defendants , by themselves, their servants and or agents ,from disconnecting or in any other manner whatsoever ,interfering with the electricity power supply to the plaintiff's premises, i.e. the premises identified in the approved architectural drawings as Hall No.1E, on the 6th floor of Nexgen Commercial Centre, developed on land Reference Number 209/1848(original number 209/11368/2), Mombasa Road Nairobi pending hearing and final determination of the suit.

d) Spent

e) That a temporary injunction be and is hereby issued, to restrain the defendants, by themselves, their servants and or agents ,from interfering with the plaintiff's access ,construction and or development of its premises identified in the approved architectural drawings as Hall No.1E,on the 6th floor of Nexgen Commercial Centre, developed on land Reference Number 209/1848(original number 209/11368/2), Mombasa Road ,Nairobi, from interfering with the plaintiff's quiet possession and enjoyment of the said premises, once it has been developed , as intended by the plaintiff, pending the hearing and final determination of the suit.

f) That the defendants do pay the costs of this application.

2. The applicant purchased a business premises identified as Hall No. IE on the 6th floor of Nexgen Commercial Centre which is developed on LR No.209/18648 (original number 209/11368/2 along Mombasa Road. Purchased together with the said premises is a space measuring 1500ft on the rooftop (suit premises). The premises identified as Hall No.IE had a double height meaning that the applicant was at liberty to construct a mezzanine floor subject to approvals from the relevant authorities.

3. The applicant sought and obtained approval to construct a mezzanine floor on the premises which brought it to the same level as the suit premises which could only be accessed through the entrance to the premises up the stairs and then to the suit premises. The applicant contracted Steelers Limited who commenced construction on the suit premises where the applicant intended to put up a high end bar and restaurant with a view of Mombasa road and Nairobi National Park.

4. When construction started, the 1st defendant/respondent which is a managing agent of Nexgen Commercial Centre together with the 2nd, 3rd and 4th defendants /respondents switched off power from the basement which action disabled the steel fabrication which was going on. The respondents then wrote a letter addressed to M/s Nexgen Office Suites Limited who were the developers of the Nexgen Commercial Centre protesting that the suit premises was a common space area open to all the occupiers of various spaces at Nexgen Commercial Centre.

5. The respondents also wrote other protest letters to the County Government of Nairobi, NEMA and the National Construction Authority. The respondents also went ahead to weld the door leading to the suit premises from outside effectively locking in the contractor's

equipment's. The applicant moved to court and filed this suit and the application for injunctive reliefs. As no interim relief had been granted, the applicant through its lawyer pleaded with the court to allow the contractor remove its equipment from the suit premises. This plea was not opposed. The court granted the order and the contractor removed its equipment so that applicant could mitigate its losses.

6. The applicant contends that the suit premises is not a space common to all the occupiers of Nexgen Commercial Centre and that the agreement which it entered into with Nexgen Office Suits Limited included the suit premises which agreement provided for construction of a mezzanine which could enable it access the suit premises. The applicant argues that the only access to the suit premises is through its premises and there is no way the respondents can argue that the suit premises is an open space accessible to all the centres occupants.

7. The respondents opposed the applicant's application based on a replying affidavit sworn on 5/4/2019. The respondents contend that whereas the premises identified as Hall IE on the 6th Floor are properly identified, the suit premises which is the bone of contention is not clearly defined; that the purported approval by the Nairobi City County Urban Planning Division was in respect of LR No.52855 which is not the parcel number where Nexgen Commercial Centre is built; that prior to the approval which was granted to the applicant, the Nairobi City County had stopped the construction by the applicant; that there are similar cases such as ELC 446 of 2018 and ELC 314 2018 pending before Milimani Court and that the two suits and the present one be heard by the same judge to avoid a situation where conflicting decisions are likely to occur.

8. The respondents further argue that the National Construction Authority had stopped the construction by the applicant but that the applicant has still continued with the construction. The respondents further contend that the applicant had no access to the rooftop (suit premises) but that it constructed its own staircase to access the rooftop.

9. In a further replying affidavit, the applicant clarified the issue of a wrong parcel number being quoted in approvals from the relevant division of Nairobi City County and further clarified that National Construction Authority had never stopped the construction and that an application was made to the Authority which granted its approval to the construction. The applicant contends that the suit premises are a flat concrete slab and it is one among the two flat concrete slabs on the rooftop. The other concrete slab carries a water reservoir tank which has a clear access door to it unlike the suit premises which can only be accessed through the applicant's premises.

10. I have carefully considered the applicants application as well as the opposition to the same by the respondents. I have also considered the submissions by the parties. The only issue for determination is whether the applicant has demonstrated a prima facie case to warrant issuance of an injunction as prayed for. A prima facie case was described in the often quoted case of **Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125** as follows:-

“ A prima facie case is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

11. I must state at the outset that the parties herein agreed that the court visits the disputed area before a ruling is made. This visit was made on 27/6/2019. What the court observed is contained in the court record and I do not wish to reiterate the same in this ruling. I am alive to the fact that in determining whether there is a prima facie case, I am not expected to make final conclusions. In the case of **Nguruman Limited Vs Jan Bonde Nelson & 2 others Civil Appeal No 77 of 2012**, the Court of Appeal had this to say:-

“ The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained , the invasion of the right has to be material and substantive and there must be urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not examine the merits of the case closely. All that the court is to see that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case”.

12. On the strength of the **Mrao Ltd case and Nguruman Limited** cases (supra),I have considered the materials placed before me and have no doubt that the applicant has established a prima facie case. The disputed space which is the suit premises was part of what the applicant purchased. Whether it was wrong for Nexgen Office Suites Limited to sell it or whether it is a common space is an issue which is better left for the main hearing.

13. The applicant had entered into a contract with Steelers Limited which contract provided for a penalty clause. As at the time the court visited the suit premises, there was no construction going on. Already the applicant as per its pleadings had suffered a penalty of about five million shillings. This is not a small amount considering that fact that the premises together with the suit premises were purchased for a sum in the region of **18,000,000/=** if this were to continue , the applicant will no doubt suffer substantial loss leave alone what it would have earned were the construction to be completed and its intended business put in place.

14. Even on consideration of balance of convenience, the agreement vests the disputed space in the control of the applicant. I therefore find that this is a proper case for grant of injunction. I allow the applicant's Notice of Motion dated 14/3/2019 in terms of prayers (c) (e) and (f). Applicant to file a suitable undertaking as to damages in court within 14 days from today.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 26th day of September 2019.

E.O.OBAGA

JUDGE

In the presence of :-

Mr Migele for Defendants

Court Clerk : Hilda

E.O.OBAGA

JUDGE