



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO 300 OF 2018**

**CANARIAN HOLDINGS LTD.....PLAINTIFF**

**VERSUS**

**MOHAMED SAID ABDULREHMAN.....DEFENDANT**

**RULING**

1. By a notice of motion dated 18<sup>th</sup> December, 2018 brought pursuant to Section 13(1), (2), (7) (a) & (i) and 19 of the Environment and Land Court Act, 2011, Section 73, 75 and 76 of the Land Act No.6 of 2012, Order 40 and 51 of the Civil procedure Rules, the Plaintiff/Applicant seeks the following orders:

**1. This Application be certified urgent and be heard Ex-parte in the first instance;**

**2. Pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to issue and hereby issues an order staying the purported notice of forfeiture dated 1<sup>st</sup> November 2018 and served on 22<sup>nd</sup> November, 2018, and further staying its implementation or any action thereunder other than its withdrawal either by the Defendant or any other person claiming interest through the Wakf of the late Sheikh Ali Al'Amin Bin Ali whether by themselves, his employees, servants, agents, or nominees.**

**3. Pending the hearing and determination of this Application inter parties, this Honourable Court be pleased to issue and hereby issues an order of temporary injunction restraining and/or barring the Defendant or any person claiming interest through the Wakf of the late Sheikh Ali Al'Amin Bin Ali whether by themselves, his employees, servants, agents, or nominees from forfeiting the Plaintiff's lease over, evicting and/or in any other manner whatsoever interfering with the Plaintiff's enjoyment of quiet possession of the land known as SUBDIVISION NUMBER 3071 (ORIGINAL NUMBER 2419/5) OF SECTION VI MOMBASA MAINLAND NORTH for the term of the lease, being 99 years from 1<sup>st</sup> July, 1963 subject only to the compliance with the conditions of the lease;**

**4. Pending the hearing and determination of this suit, this Honourable Court be pleased to and hereby issues an order of temporary injunction restraining and/or barring the Defendant or any person claiming interest through the Wakf of the late Sheikh Ali Al'Amin Bin Ali whether by themselves, his employees, servants, agents, or nominees, from forfeiting the Plaintiff's lease over, evicting and/or in any other manner whatsoever interfering with the Plaintiff's enjoyment of quiet possession of the land known as SUBDIVISION NUMBER 3017 (ORIGINAL NUMBER 2419/5) OF SECTION VI MOMBASA MAINLAND NORTH for the term of lease, being 99 years from 1<sup>st</sup> July, 1963 subject only to the compliance with the conditions of the lease;**

**5. Pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to issue and hereby issues an order staying the purported notice of forfeiture dated 1<sup>st</sup> November 2018 and served on 22<sup>nd</sup> November, 2018, and further staying its implementation or any action thereunder other than its withdrawal either by the Defendant or any other person claiming interest through the Wakf of the late Sheikh Ali Al'Amin Bin Ali whether by themselves, his employees, servants, agents, or nominees.**

**6. Costs of this Application.**

2. The Application is premised on the grounds on the face of the motion and is supported by the affidavit of VAISHALI MADAN HANDA, a director of the Plaintiff Company sworn on 18<sup>th</sup> December, 2018, and a further affidavit sworn on 4<sup>th</sup> February, 2019. Briefly, it is the Applicant's case that it is the registered proprietor as lessee from the Estate of the Late Sheikh Al-Amin Bin Ali of all that property comprised of that parcel of land known as SUBDIVISION NUMBER 3071 SECTION VI MOMBASA MAINLAND NORTH (BEING A

PORTION OF THE PREMISES COMPRISED IN A LEASE REGISTERED IN THE LAND TITLES REGISTRY AT MOMBASA AS NUMBER CR 13155/1(hereinafter “the suit property”) for a term of 99 years from 1<sup>st</sup> day of July 1963. That Sheikh Ali Al’Amin Bin Ali was registered as proprietor as Trustee of the Wakf of that piece or parcel of land containing eight point three (8.3) acres or thereabouts known as sub-division no.2419 (original part no.48) of Section VI Mainland north situate in Mombasa Municipality more particularly delineated and described on DEED PLAN NO.76612 and REGISTERED AS CR. 13097/1 by the Acting Registrar of Titles on 27<sup>th</sup> November, 1963. That on 30<sup>th</sup> December, 1978, SUB-DIVISION NO.2419 SECTION VI MAINLAND NORTH was further sub-divided into SUB-DIVISIONS NOS.3045, 3070 AND 3071 with other lands vide a certificate of sub-division dated 29<sup>th</sup> January, 1977 by the Municipal Council of Mombasa. That on 27<sup>th</sup> December, 1989 Sheikh Ali Al’Amin Bin Ali transferred SUB-DIVISION NUMBER 3071 (ORIGINAL NUMBER 2419/5) OF SECTION VI MOMBASA MAINLAND NORTH MEASURING 0.2764 HA (with other lands) to Bahali Mills Limited for Kshs.9,000,000.00.

3. The Applicant avers that by an Agreement dated 2<sup>nd</sup> January, 1977, the Applicant purchased the suit property from Bahali Mills Limited at the price of Kshs.3,750,000.00 and subsequently acquired the leasehold interest in the suit property from the lessor, the Wakf of the Late Sheikh Al’Amin Bin Ali pursuant to the transfer dated 27<sup>th</sup> February, 1997 and registered on 3<sup>rd</sup> April, 1997 as ENTRY NUMBER CR. NO. 29876/1 and the Instrument of Rectification and confirmation registered on 6<sup>th</sup> March, 1998 as CR No.29876/2. That it was a fundamental term of the Agreement between the Plaintiff and Bahali Mills Limited under Clause 9A that the Plaintiff acquired the property subject to the acts, conditions, covenants stipulations and restrictions under which the same was presently held by the vendor but free from any charges or similar encumbrances. The Applicant further avers that the Wakf of the Late Sheikh Al’Amin Bin Ali was at all material times an absent lessor but as at the time of the Applicants acquisition of the lease, it was being represented by its duly appointed attorney, Mr. Munir Mohamed Mazrui, and who consented in writing to the Plaintiff’s acquisition of the lease from Bahali Mills Ltd in accordance with the terms of the lease. That subject to the stand premium paid of Kshs.3,750,000.00 on acquisition, it was a term of the lease that the leasehold interest shall be held by the lessee for a term of 99 years commencing from 1<sup>st</sup> July, 1963 in consideration of net monthly rent of Kshs.530.00 payable monthly in advance for the term of the lease. Further, that it was a term of the lease that specific transactions such as the transfer, subletting, assigning or parting with the possession of the said premises or any part thereof by the lessee could only be with the written consent of the Lessor first had and obtained.

4. The Applicant states that pursuant to and in compliance with the terms of the lease, the Plaintiff leased the suit property to Kenya Oil Company Limited, for a term of twenty (20) years with effect from 1<sup>st</sup> May, 1999, which lease, according to Clause 4 of the Lease, was duly consented to by Mr. Munir Mohamed Mazrui who was at the time the duly appointed and authorized attorney of the Wakf of Sheikh Ali Al’Amin Bin Ali, and who was receiving rent due and owing under the lease from the Plaintiff, until 2012 when he refused to receive rent stating that he no longer had authority and not disclosing the person who had authority to receive the stipulated rent. The Plaintiff states that it was forced to withhold such rent until such time that the lessor would disclose its appointed trustees, attorney or agent for receipt of the rent from the Plaintiff. That on or about 23<sup>rd</sup> October 2018, the Defendant/Respondent informed the Applicant that the Wakf of Shiekh Ali Al’Amin Bin Mazrui had appointed him as its lawful attorney pursuant to an instrument of General Power of Attorney dated 11<sup>th</sup> July, 2018 and registered on 16<sup>th</sup> July, 2018 as PA no.19415. That following the Defendant’s appointment, the Applicant’s representatives together with the Defendant completed, calculated and verified the rent due as per the lease from 1<sup>st</sup> January, 2012 up to the date of the expiry of the term of the lease on 30<sup>th</sup> June 2062 and paid to the Defendant a sum of Kshs.371,863.90 which the Defendant allegedly accepted without reservation and acknowledged receipt of. The Applicant states that in bad faith, the Defendant has, in order to illegally, unlawfully and unconscionably impose rent other than as provided for in the lease, issued notice of forfeiture purporting to immediately forfeit the lease. The Plaintiff avers that the Defendant’s action is illegal and in breach of both the lease and the Land Act, and gravely prejudicial and harmful to the Plaintiff. It is the Applicant’s contention that the Respondent did not issue a notice to rectify any breach before exercising the right to forfeit the lease with immediate effect. The Applicant argues that the Defendant has breached and infringed the Plaintiff’s rights both under the lease and in law, and intend to continue with these acts, hence this Application.

5. In opposing the Application the Defendant/Respondent filed a replying affidavit sworn on 23<sup>rd</sup> January, 2019 in which the subject lease is admitted. The Defendant avers that the Applicant did not comply with the terms, conditions and covenants contained in the lease. The Defendant states that the Applicant failed to procure a written consent from the lawful attorneys prior to the lease to Kenya Oil Company Limited, and non-payment of rent since 2012. It is the Defendant’s contention that the Applicant ought to have sought a written consent from the Respondent or previous attorneys before charging of the suit property to Diamond Trust Bank of Kenya Limited. The Defendant avers that the acceptance of the sum of Kshs.371,863.90 being purported rent payments until 30<sup>th</sup> June 20162 after the notice dated 24<sup>th</sup> July 2018 did not waive the right to forfeiture as provided under Section 73(3) of the Land Act, adding that he returned the cheque for that amount after consulting the trustees of the estate. Further, that it was not plausible and equitable for the Applicant to continue making payment of Kshs.530.00 monthly for the suit property when it was receiving a significant sum of USD57,960 for the lease to Kenya Oil Company Limited. The Respondent states that his intention to cause forfeiture of SUBDIVISION NUMBER 3071 is not actuated by malice but the blatant breaches by the Applicant, adding that no such notices have been issued with respect to SUBDIVISION NUMBER 3045 and 3070. The Defendant urged the court to dismiss the Application with costs.

6. All the parties filed written submissions which were also ably highlighted by Mr. Oraro, SC for the Applicant and Mr. Kimani for the Respondent, and which submissions, I have read and I need not reproduce their contents herein. I have considered the Application, the affidavits in support and against and the rival submissions made as well as the authorities cited. The only issue for determination is whether the court should grant interim relief as sought pending the hearing and determination of the suit.

7. The principle to be applied when considering an Application for injunction such as this are well settled. In the case of **Giella –v- Cassman Brown & Co. Ltd (1973)EA 358**, the Plaintiff must show that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable damage which would not adequately be compensated by an award of damages; and thirdly, if the court is in doubt it will decide the matter on the balance of convenience. In the case of **Mrao Ltd –v- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, a *prima facie* case was said to be 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.

8. In this case, it is not in dispute that the Plaintiff herein is the registered proprietor as lessee of the suit property. The dispute concerns the action of the Defendant, as lessor, to forfeit the said lease. Whereas the Defendant rests his case on the fact that the Plaintiff is in blatant breach of the terms of the lease, and therefore was justified to cause the forfeiture, the Plaintiff on the other hand contends that it was never in breach of the terms of the said lease and maintain that the Defendant's act are intended to breach the terms of the lease. The question as to which party is in breach of the said lease has to be judicially considered. At this interlocutory stage it is not possible to resolve all the questions surrounding the said lease, yet they require judicial consideration. Considering the quite substantial documentation which each party has laid before this court, with lengthy written submissions I hold at this stage that this is a matter for a full hearing. Considering the date of the commencement of the said lease, that is 1963, the term of the lease (99 years) and having perused the terms and conditions of the said lease, it is the view of this court that the Plaintiff has established a prima facie case with a probability of success against the Defendant. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined. Moreover, it is clear that the Plaintiff has shown her right over the suit property. As regards irreparable damage, I take the view that should the notice of forfeiture be allowed to take effect before the suit is heard and determined, the suit property may be alienated and the substratum of the suit destroyed and therefore the Plaintiff will suffer irreparable loss which may not be quantified in damages. If the status quo is not preserved and the suit property is not preserved, the final orders would be rendered nugatory and the property especially the Applicant's right to occupation would have been jeopardized before the determination of the main suit. The balance of convenience would in my view, tilt in favour of the Plaintiff in order to safeguard the prevailing status quo pending hearing and determination of the main suit.

9. Arising from all the above, I find merit in the Application. Accordingly, I allow the notice of motion dated 18<sup>th</sup> December, 2018 in terms of prayer 4 thereof. Costs of the Application shall be in the cause. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 25<sup>th</sup> day of September 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Okoth holding brief for Oraro, senior Counsel for Plaintiff/Applicant

Muliro holding brief for Kimani for Defendant/Respondent

Yumna Court Assistant

**C.K. YANO**

**JUDGE**