



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 125 OF 2019

TELCOM (K) LTD.....PLAINTIFF

VERSUS

COAST TERMINAL EAT AFRICA LTD.....DEFENDANT

RULING

(Application for injunction; plaintiff seeking to have defendant enjoined from premises which plaintiff had offered to the defendant to lease; plaintiff arguing that the defendant did not abide by the terms of offer and that the offer was rescinded thus defendant having no right to be on the premises; defendant asserting that it did abide by the terms of offer and that there is now a lease between the parties; clear that defendant did not abide by the terms of offer which required defendant to pay a deposit at the time of acceptance of the offer; deposit being paid after communication has been made that the offer has been rescinded; plaintiff entitled to an order of injunction)

1. This suit was commenced through a plaint which was filed on 4 July 2019. The plaintiff avers that she is the registered proprietor of the land parcel Mombasa/Block XXI/430 commonly referred to as Mombasa Telephone House. It is pleaded that the property served as the plaintiff's landing station and the point at which undersea cables entered the country and thus was and continues to be a significant component of the plaintiff's business. In August 2018, the plaintiff offered to lease an undeveloped portion of the suit property to the defendant, and the offer was contained in a letter of offer dated 8 August 2018. It is said that the offer remained valid until 30 August 2018 after which it would be automatically rescinded and further that the offer was to be accepted with a fee of Kshs. 1,281,355.20/= as a security deposit. It is contended that the defendant failed to accept the offer by 30 August 2018 but purported to accept it around 9 February 2019, and further that the security deposit was not paid. The plaintiff avers that through a letter dated 23 May 2019, it wrote to the defendant notifying the defendant that the letter of offer stood rescinded. However on 12 June 2019, the defendant responded to the said letter explaining that the delay was occasioned by a long standing dispute between the County Government of Mombasa and the plaintiff, regarding rates payable, which hindered the defendant from obtaining the relevant approvals, and confirmed payment of the deposit. The plaintiff however contends that the cheque bounced. The plaintiff complains that despite there being no lease, the defendant purported to enter the suit property and commence construction works, which is claimed to be unlawful. It has stated that it is in the process of merging its business with Airtel Network Kenya Limited and one of the key components of the transaction is the suit property. It is mentioned that the continued occupation of the suit property by the defendant may jeopardise the successful completion of the merger transaction. In the suit, the plaintiff wishes to have orders that the defendant is not entitled to enter or use the suit property and further seeks orders to permanently restrain the defendant from the suit land.

2. Together with the plaint, the plaintiff filed an application seeking orders of injunction to have the defendant restrained from the suit land pending the hearing and determination of the suit. It is that application for injunction which is the subject of this ruling.

3. The application is supported by two affidavits sworn by Asienga Ebole Johnstone, the Director of Real Estate of the plaintiff. He has inter alia annexed copies of the title of the suit property, the letter of offer, correspondences exchanged, and the cheque deposited by the defendant, and more or less reiterated what is pleaded in the plaint.

4. The defendant has opposed the application through a replying affidavit sworn by Adan Ibrahim Issack, its Manager. He has deposed that the parties were involved in prolonged negotiations which they finalised in January 2019, and that even before the signing of the letter of offer, the defendant had already taken possession in August 2018. He has deposed that the letter of offer, though dated 8 August 2018, was actually signed by the plaintiff in January 2018 and by the defendant on 9 February 2019, and that the date of 8 August 2018 was adopted because the lease was to take effect from 1 September 2018. It is averred that the letter of offer was executed and sent back to the plaintiff and the same was accepted without any objection. It is averred that the period between 8 August 2018 to the date of signing and payment of the deposit was further dominated by discussions between the plaintiff and defendant over an outstanding rate charge of Kshs. 48,633,716/= owed by the plaintiff to the County Government of Mombasa in respect of the suit property. It is stated that this had potential to jeopardise the registration of the lease and any applications for approvals of developments. He has averred that the sum of Kshs. 1,261,355/= was paid on 7 June 2019 through RTGS to cover 3 months of rent and 3 months deposit. He contends that the plaintiff's claim that there was no valid agreement is misleading as the defendant was allowed to access and take possession of the suit property; the plaintiff approved the

demolition of an existing structure and that it is the defendant who applied for and secured approval for the demolition on 8 January 2019; that in February 2019, the defendant requested the plaintiff to intervene in securing approval from the Kenya Forest Service (KFS) to fell some trees to pave way for further construction and the plaintiff did seek permission through a letter dated 11 March 2019 and permission was granted by KFS; and that a sum of KShs. 1,281,366/= was paid on 13 July 2019 through a banker's cheque. The defendant contends that the plaintiff is using the court process under the ruse of the merger to try and avoid its contractual obligations.

5. Mr. Ebole responded by deposing in his supplementary affidavit that it is not true that the defendant signed the letter of offer in January 2019 as alleged and that he believes that the plaintiff signed the letter of offer on 8 August 2018. On the rates, he has stated that this had no bearing to the offer to lease the suit property and did not excuse the defendant from fulfilling the terms in the letter of offer, and that the letter of offer was not conditional upon the defendant obtaining approvals from the County Government of Mombasa. He has deposed that on 3 June 2019, the defendant purported to make payment through two cheques of KShs. 593,220/= and KShs. 688, 135/= as security deposit and advance rent but they bounced. The defendant then wrote to the plaintiff conceding that it had failed to make payment in accordance with the terms in the letter of offer and alleged to have made payment on 7 June 2019, which payment is not reflected in their accounts. It is on 10 July 2019 that an RTGS was made and Mr. Ebole points out that this is clear evidence that no payment was made on 7 June 2019 as alleged. He has asserted that the letter of offer stood rescinded on account of the defendant's failure to comply and for this reason the money paid by the defendant was returned. He has stated that the defendant's continued possession was subject to the defendant fulfilling the terms and conditions of the Letter of Offer. He has deposed that the approval to cut trees did not excuse the defendant from the terms in the Letter of Offer.

6. I directed counsel to file written submissions which they both did and I also allowed counsel to make oral submissions to highlight. I have taken note of these submissions before arriving at my decision.

7. Much of this dispute boils down to the interpretation of the Letter of Offer and whether or not a lease exists between the contestants. I have looked at the Letter of Offer which is dated 8 August 2018 and it is apparent that the property was being offered to the defendant for purposes of operating a retail business which would have entailed the construction of some structures. These were to be done at the cost of the defendant. The lettable area is provided and the term of the Lease is to be 10 years from 1 September 2018. The rent to be paid was KShs. 197,740/= per month subject to a 10% increment biennially. The Letter of Offer made it clear that it was subject to contract and that the offer is not binding until the lease agreement is executed and that it was the lease which would contain all the terms of contract. The letter of offer provided that if the defendant is agreeable to the terms indicated therein, then she should sign three copies of the Letter of Offer and return the same with the sum of KShs. 1, 281,355.20/= comprising of three months deposit (KShs. 593,220), three months advance rent (KShs. 593,220/=) and VAT (KShs. 94, 915.20/=). The offer was noted to be valid until 30 August 2018 after which the offer would automatically be rescinded.

8. Whereas the plaintiff contends that the offer lapsed on 30 August 2018 as provided in the letter, the defendant maintains that the Letter of Offer still remained alive as it was in fact signed on 9 February 2019. On my part, I think despite the Letter of Offer bearing the date 30 August 2018, the same was executed on the part of the defendant on 9 February 2019, and the plaintiff had no problem with this late execution of the Letter of Offer. If the plaintiff was aggrieved by this late execution of the same, it would have pointed this out to the defendant immediately the Letter of Offer was received by them or shortly thereafter. The plaintiff, given her conduct, is thus estopped from insisting on the date of 30 August 2018 as being the operative date.

9. Having said that, the plaintiff did inform the defendant, through its letter of 23 May 2019, that it cannot proceed with the transaction because the sum of KShs. 1, 281,355.20/= had not been paid within 30 days of signing the Letter of Offer and even then, no money had been received. The defendant wrote back on 12 June 2019 stating that it is fully committed to the transaction and stated that it had paid KShs. 1,281,355.20/= as required. It has emerged that no such payment was made for the actual payment was made on 13 July 2019.

10. In his submissions, counsel for the defendant argued that there was no provision that payment of the deposit needed to be paid with the Letter of Offer and there was no time limit to do so. On this, I do not agree. The Letter of Offer was clear that the defendant was to sign the Letter of Offer and return it with cheques amounting to KShs. 1,281,355.20. The clause is drawn as follows :-

“Kindly sign and return to us three copies of this Letter of Offer if the above mentioned terms and conditions are acceptable to yourself together with your cheques amounting to KShs. 1,281,355.20/= made up as follows (breakdown given)...”

11. It will be noted from the above that the Letter of Offer was to be sent *together with* the sum of KShs. 1, 281, 355.20/=. It cannot therefore be argued that there was no time limit for payment of the money. At this stage of the proceedings, subject to being convinced otherwise upon a full hearing of the case, I am persuaded that the plaintiff had every right to consider the Letter of Offer as having been rescinded owing to non-payment of the deposit by the defendant. It is apparent that the defendant proceeded to make payment after the Letter of Offer had already been rescinded. The plaintiff of course had the discretion to accept the late payment and proceed to draw the formal lease but it is clear that the plaintiff decided to opt out of the transaction, and from what is before me, I am unable to fault that move.

12. Counsel for the defendant further tried to argue that there was a Lease and that since the defendant is in possession, The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya. I am not persuaded, because the Letter of Offer was nothing more than an offer, and it was clear that the same was subject to contract. The defendant could thus only consider himself to be a tenant once the lease was executed, and no lease has been executed. It may be that the defendant was allowed to get into the premises so as to make it ready for the business that it intended to undertake on it, but that cannot be argued to be that the plaintiff already considered the defendant a lessee. At most, the defendant was a licensee, and such licence could be terminated at any time, especially given that no lease was ever drawn.

13. My view of the matter is that the plaintiff has established a prima facie case with a probability of success. I am further persuaded that the plaintiff stands to suffer irreparable loss if the injunction is not granted for no landlord-tenant relationship exists between the parties. The balance of convenience also tilts in favour of the plaintiff, again, mainly because there is no contract. The balance would probably have tilted in favour of the defendant if it had been shown that the defendant has constructed on the premises and is already doing business, and if the

money that it had paid had been retained, but this is not the case.

14. For the above reasons, I am persuaded to allow this application for injunction. I make the order that pending the hearing and determination of this suit, the defendant is hereby restrained from entering, using, erecting any structures, or in any other way interfering in any manner with the plaintiff's quiet possession of the suit property. The plaintiff shall also have the costs of this application.

15. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 31st day of October 2019.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF:

Ms Mukami holding brief for Ms Lubano for the plaintiff/applicant.

Mr Sitonik for the defendant/respondent.

Court assistant; Koitamet