



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC MISC APP NO.31 OF 2018

JANE WANJIRU NDERITU alias JANET NDIRITU.....1ST APPLICANT

LES CARMES LIMITED.....2ND APPLICANT

VERSUS

SHIMA PROPERTIES LIMITED.....1ST DEFENDANT

MUGEMA AUCTIONEERS2ND DEFENDANT

RULING

1. By this Notice of Motion application dated and filed herein on 18th December 2018, Jane Wanjiru Nderitu alias Janet Nderitu and Les Carmes Ltd(the Plaintiffs/Applicants) pray for Orders:-

a)

b)

c) *That this Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd Respondents whether by themselves, their agents and servants from alienating or causing to be alienated, attaching, selling, disposing and/or in any way whatsoever, dealing with all the items and/or equipment contained within the premises(known) as Fabian House containing ten rooms situate on Plot No. 664 Malindi and/or any other properties owned by the 1st Applicant pending the hearing of the suit.*

d)

e) *That this Honourable Court be pleased to issue an order directed against the Respondents restraining them from demanding the sum of Kshs 551,000 pending the interpartes hearing of the suit herein.*

f) *That the costs of the application be provided for.*

2. The Application which is supported by an Affidavit sworn by the 1st Plaintiff is premised on the grounds inter alia that:-

i) *On 16th February 2016, the 1st Applicant through the 2nd Applicant entered into a Management Contract with the 1st Defendant for the Management of the premises known as Fabian House containing ten Rooms situate on Plot No. 664 Malindi for purposes of operating a bed and breakfast business for a period of five years and one month with an option to renew;*

ii) *The 1st Respondent has without reason and notice to the Applicants instructed the 2nd Respondent to attach items on the said premises claiming that the 1st Applicant owed it rental arrears of Kshs 450,000/-*

iii) *On or around 11th December 2018, the 1st Respondent instructed the 2nd Respondent to levy distress for rent on the Applicant's goods including tools of trade that are still within the premises;*

iv) *There has never existed a tenancy agreement between the 1st Applicant and the 1st Respondent and the conduct of the 1st Respondent is unlawful and calculated as a collateral attack on the Applicants and is an attempt to frustrate the Management*

contract.

3. In a Replying Affidavit sworn by its Managing Director Fabio Muciarelli and filed herein on 20th February 2019, Shima Properties Ltd (the 1st Defendant/Respondent) admits that it contracted the 2nd Plaintiff to manage its property as a bed and breakfast establishment.

4. The 1st Defendant however avers that it was an express term of the agreement that the 2nd Plaintiff was to make payment to the 1st Defendant but the 2nd Plaintiff has never made any payment since the commencement of the contract.

5. The 1st Defendant asserts that due to the said breach, it issued a termination notice dated 27th September 2017 to the 2nd Plaintiff but the same went unheeded. In total disregard of the notice the 2nd Plaintiff allowed its agent and or servant the 1st Plaintiff to move into the 1st Defendant's property and set up residence as her home to the further detriment of the 1st Defendant.

6. I have perused and considered the Plaintiffs' application and the 1st Defendant's response thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties.

7. The power to grant an injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction such as the one sought herein, the Court must consider the following principles:-

i) Whether the Applicant has demonstrated a prima facie case with a probability of success;

ii) Whether the Applicant is likely to suffer irreparable harm if the injunction is not granted; and

iii) If in doubt the Court would consider where the balance of convenience tilts.

8. The existence of a prima facie case in favour of the Plaintiffs is thus necessary before a temporary injunction can be granted. The burden lies on the Plaintiff in such circumstances to satisfy the Court by leading evidence or otherwise as to the existence of a prima facie case.

9. In the matter before me, the Plaintiffs assert that they entered into a Management contract with the 1st Defendant on 16th February 2016. That contract allowed the 2nd Plaintiff Company to manage the 1st Defendant's property situated at Fabian House Malindi as a bed and breakfast establishment.

10. According to the Plaintiffs, the said agreement allowed them to run the business for a period of five years and one month with a renewal option. The Plaintiffs accuse the 1st Defendant of breaching the agreement by instructing Mugema Auctioneers (the 2nd Defendant) to attach their goods at the said premises on the purport that the Plaintiff owed rental arrears of Kshs 450,000/-. It is the Plaintiffs case that there never existed a tenancy agreement between themselves and the 1st Respondent and that there was therefore no basis for the proclamation made by the Auctioneers on 11th December 2018.

11. While admitting that they entered into the said contract, the 1st Defendant avers that contrary to the provisions of the said contract, the 2nd Plaintiff has never made any payments due from the time the contract was executed. It is their case that as a result of the said breach they proceeded to terminate the contract on 27th September 2017 but the Plaintiffs have since refused to vacate the premises.

12. I have perused and considered the contract executed by the parties on 16th February 2016 aforesaid. It is clear to me that the suit premises belong to the 1st Defendant who is described therein as the "Property Owner". As per Clause 2 thereof the Plaintiffs were meant to operate a bed and breakfast business on the property which consists of ten Rooms.

13. Clause 7 and 8 of the Contract provided as follows:-

"7. That Fabio Mucciarelli shall receive 25% out of the income/profit from Les Carmes Ltd and the remaining 75% shall be shared equally between Janet Nderitu and Siro Mucciarelli.

8. That if the contract is terminated or comes to an end the Management of the house shall go back to Shima Properties Ltd.

14. From the Contract as executed, it was apparent that there was some sort of relationship between the 2nd Plaintiff and the 1st Defendant. This is so because the contract was executed by Siro Muciarelli and Fabio Mucciarelli for the 1st Defendant. The same Siro Muciarelli and Janet Nderitu (the 1st Plaintiff) also executed the Agreement on behalf of and as Directors of 2nd Plaintiff Company.

15. Whatever the relationship, it is apparent that the disagreement arose due to the inability of the 2nd Defendant to make the payment envisaged at Clause 7 of the Contract. Responding to the accusation by the 1st Defendant that they failed to remit payments, the 1st Plaintiff avers at Paragraphs 3 and 4 of her Supplementary Affidavit filed herein on 6th March 2019 as follows:-

3. That I have read the contents of Paragraph 3 of the Affidavit and I am advised by my Advocate on record which advice I verily believe to be true that it was never an agreed term in the Management Agreement dated 16th February 2016 that payments will be

made immediately or at the commencement of the business and that the averments made therein of the Replying Affidavit are false and untrue.

4. That in further response to Paragraph 3 of the Affidavit I wish to state that Clause 7 expressly provides that what is to be shared is only the profit and the business to-date has yet to reach its break-even point since it is yet to make any profits.”

16. As at 6th March 2019 when the 1st Plaintiff swore the Supplementary Affidavit, their Agreement had been in existence for three years. Given her admission that she was yet to make any payments to the owners of the property in which she operates the business and resides, it was obvious to me that the balance of convenience tilts in favour of the 1st Defendant who is yet to earn a penny from the business deal.

17. As was stated in *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others(2014)eKLR:-*

“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 an urgent necessity to prevent the irreparable damage that may result from the invasion.”

18. In the matter before me, I did not see any right of the Plaintiffs which is about to be infringed. They have not for instance stated that they brought any items or resources into the said property which stand to be wasted or that could be damaged irreparably if the 1st Defendant is allowed to take back its property.

19. In the circumstances herein, I did not find any merit in the application before me. The same is dismissed with costs to the 1st Defendant.

Dated, signed and delivered at Malindi this 5th day of December, 2019

J.O. OLOLA

JUDGE