



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 354 OF 2017**

**STEPHEN NJOROGE MURITU.....PLAINTIFF**

**VERSUS**

**DOMINIC WAROGA MWANGI.....1<sup>ST</sup> DEFENDANT**

**KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> DEFENDANT**

**RULING**

***(An application for injunction to restrain the defendants***

***from levying distress over the suit property and***

***from interfering with the suit property;***

***no prima facie case established;***

***application dismissed)***

1. By Notice of Motion dated 19<sup>th</sup> September 2017 brought under Order 40 Rule 1 (a) of the Civil Procedure Rules, the plaintiff sought the following orders:

***1. Spent.***

***2. Spent.***

***3. Spent.***

***4. That the 1<sup>st</sup> defendant, their agents or servants be restrained from unlawfully levying distress over the suit property known as reference WR/NSA STNG/001 a Godown at the 2<sup>nd</sup> defendant's premises situate in Naivasha pending the hearing and determination of this suit.***

***5. That this honourable court be pleased to issue a temporary injunction restraining the defendants herein by themselves, their employees, servants, agents and/or any other person claiming through them from interfering with quiet and peaceful possession and occupation, entering, trespassing, or in any way whatsoever from dealing with the suit property known as WR/NSA STNG/001 a Godown, situate in Naivasha pending hearing and determination of this***

*suit.*

**6. That the costs of this application be provided for.**

2. The application is supported by an affidavit sworn by the plaintiff. The plaintiff states in the affidavit that pursuant to lease dated 20<sup>th</sup> August 2015, he leased a Godown known as WR/NSA STNG/001 located at Railway premises at Naivasha from the 1<sup>st</sup> defendant. By a further agreement dated 14<sup>th</sup> October 2015, the 1<sup>st</sup> defendant agreed to sell his rights over the Godown to the plaintiff at an agreed consideration of KShs. 300,000/= out of which the plaintiff paid KShs. 100,000/= on execution of the agreement.

3. The plaintiff states that he paid the balance of KShs. 200,000/= but the 1<sup>st</sup> defendant, contrary to a transfer agreement dated 10<sup>th</sup> November 2015 declined to transfer his rights over the Godown to the plaintiff. Instead, by letter dated 13<sup>th</sup> September 2017, the 1<sup>st</sup> defendant through his advocates demanded KShs. 585,000/= from the plaintiff being alleged rent arrears. The plaintiff thus seeks the orders sought in the application.

4. The 1<sup>st</sup> defendant opposed the application through a replying affidavit sworn by himself. He confirmed having entered into the lease agreement dated 20<sup>th</sup> August 2015 as well as the agreement dated 14<sup>th</sup> October 2015. He accused the plaintiff of failing to pay the balance of KShs.200, 000/= as required by the later agreement. He admitted signing the transfer agreement dated 10<sup>th</sup> November 2015 but stated that he did so with the understanding that the balance of KShs. 200,000/= would be paid by 13<sup>th</sup> January 2016. The plaintiff never made the payment. As far as the 1<sup>st</sup> defendant is concerned, owing to the default, the plaintiff's obligations reverted to those that existed in the agreement dated 20<sup>th</sup> August 2015 with effect from mid-January 2016.

5. The 1<sup>st</sup> defendant stated that though the plaintiff has been paying rent to the 2<sup>nd</sup> defendant under the 1<sup>st</sup> defendant's name, the plaintiff has failed to pay the 1<sup>st</sup> defendant the agreed KShs. 30,000/= per month for 26 months as at the date of filing the affidavit. He stated further that the plaintiff can be compensated by damages and therefore there would be no prejudice if the injunction sought is not granted. Accordingly, the 1<sup>st</sup> defendant urged the court to dismiss the application.

6. The 2<sup>nd</sup> defendant also opposed the application by filing a replying affidavit sworn by Kennedy Mbulo, its Estate Officer for Nakuru Area. He stated that the 2<sup>nd</sup> defendant leased the Godown known as WR/NSA STNG/001 to the 1<sup>st</sup> defendant with effect from 16<sup>th</sup> December 2005 and that the lease has been renewed severally with the latest renewal being on 1<sup>st</sup> April 2017, pursuant to 2<sup>nd</sup> defendant's letter dated 3<sup>rd</sup> April 2017. The 1<sup>st</sup> defendant has been paying rent promptly.

7. He further stated that the 2<sup>nd</sup> defendant was surprised by the plaintiff's claims since the 2<sup>nd</sup> defendant was never consulted about subleasing the Godown or selling the 1<sup>st</sup> defendant's rights. Consequently, the 2<sup>nd</sup> defendant intends to take action against the 1<sup>st</sup> defendant for his actions. He added that the plaintiff did not serve the 2<sup>nd</sup> defendant with any notice as is required by Section 87 of the Kenya Railways Corporation Act. Accordingly, he urged the court to dismiss the application.

8. By a supplementary affidavit filed on 4<sup>th</sup> December 2017, the plaintiff stated that the balance of KShs. 200,000/= had been paid in full and that the 1<sup>st</sup> defendant has no reason for failing to effect transfer as agreed. The plaintiff also stated that the 2<sup>nd</sup> defendant was served with notice of intention to file suit.

9. The application was argued by written submissions. The plaintiff/ applicant's submissions were filed on 4<sup>th</sup> December 2017, the 1<sup>st</sup> defendant's submissions were filed on 19<sup>th</sup> December 2017, while the 2<sup>nd</sup> defendant's submissions were filed on 20<sup>th</sup> December 2017. I have considered the application, the

affidavits and the submissions.

10. In an application for an interlocutory injunction, for the application to succeed the applicant must establish a prima facie case with a probability of success. If no prima facie case is established the application fails. Beyond establishing a prima facie case, the applicant must show that he will suffer irreparable damage if an injunction is not granted. Lastly, if the court is in doubt as to whether there will be irreparable damage then the court should determine the application on a balance of convenience. These principles set down in the well-known case of **Giella v. Cassman Brown & Co. Ltd [1973] EA 358** and were recently restated by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**.

11. The phrase *prima facie* case was defined by Bosire JA in the Court of Appeal case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** as follows:

***So what is a prima facie case? I would say that in civil cases it 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.***

***..... a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.***

12. The plaintiff herein is sub-lessee of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant as head-lessor has denied that any consent was sought or obtained prior to the sub-lease or even the purported transfer between the plaintiff and the 1<sup>st</sup> defendant. Though I have not seen any condition forbidding subleasing in both the 2<sup>nd</sup> defendant's letters to the 1<sup>st</sup> defendant dated 16<sup>th</sup> December 2005 and 3<sup>rd</sup> April 2017, it would have been prudent for the plaintiff to ensure that the 2<sup>nd</sup> defendant's consent was obtained prior to entering into the sub-lease and transfer arrangements with the 1<sup>st</sup> defendant. Considering that the plaintiff always paid rent to the 2<sup>nd</sup> defendant using the 1<sup>st</sup> defendant's name, I draw the inference that the sub-lease was a private affair between the plaintiff and the 1<sup>st</sup> defendant. I therefore do not see any *prima facie* case as between the plaintiff and the 2<sup>nd</sup> defendant.

13. Further, the 2<sup>nd</sup> defendant has stated that no notice was issued to it as is required by **Section 87 of Kenya Railways Corporation Act**. The said section provides:

**87. Limitation**

***Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—***

***(a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent; and***

***(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.***

14. Though the plaintiff has stated in his supplementary affidavit that a notice was issued, no copy has been exhibited. This suit having been filed on 20<sup>th</sup> September 2017, the latest such a notice could have

been issued was on 20<sup>th</sup> August 2017. I have perused the documents exhibited by the plaintiff and the only letter from the plaintiff to the 2<sup>nd</sup> defendant which I have seen is the plaintiff's advocates' letter dated 5<sup>th</sup> September 2017 which is included in the plaintiff's List and Bundle of Documents. I have read it and it does not give any notice of intention to file suit against the 2<sup>nd</sup> defendant. Even if it did, it would not be a valid notice as required under Section 87 since the suit was filed about 15 days after the said letter. In such a scenario, the 2<sup>nd</sup> defendant would not have had the 30 days' notice contemplated under **Section 87** of the Act. For this reason, I again find that no *prima facie* case is disclosed as against the 2<sup>nd</sup> defendant.

15. As against the 1<sup>st</sup> defendant, the plaintiff's position is that in view of sale agreement dated 14<sup>th</sup> October 2015 and the transfer agreement dated 10<sup>th</sup> November 2015, he bought the 1<sup>st</sup> defendant's interest and that he is therefore not liable to pay any rent as is demanded. Though the plaintiff states that he paid the balance of KShs. 200,000/=, there are inconsistencies in his account of the said payment. At paragraph 7 of his supporting affidavit he stated that the payment was made and acknowledged by the 1<sup>st</sup> defendant on 12<sup>th</sup> February 2010. I find this improbable since the payment was pursuant to an agreement made on 14<sup>th</sup> October 2015. There is no way it would have been made on 12<sup>th</sup> February 2010, some 5 (five) years prior to the agreement.

16. An attempt at clarifying the issue of the payment was made at paragraph 3 of the plaintiff's supplementary affidavit but it only created more confusion since the plaintiff now claimed to have paid KShs. 150,000/= on an undisclosed date subsequent to the date of execution of the agreement dated 14<sup>th</sup> October 2015. Further, he stated that a balance of Kshs.50, 000/= was left which was paid in instalments of KShs. 20,000/= until payment in full. Apart from the fact that no payment dates or evidence of receipt of payment was given, it is not easy to understand how KShs. 50,000/= would be arithmetically paid in "instalments of KShs. 20,000/=". In the circumstances, I am not persuaded that the balance of KShs. 200,000/= was paid.

17. Even assuming that the balance of KShs. 200,000/= was paid, all parties are in agreement that the "transfer" was not completed as contemplated in the agreement dated 10<sup>th</sup> November 2015. The 2<sup>nd</sup> defendant has disowned the transaction between the plaintiff and the 1<sup>st</sup> defendant. That in essence means that the "transfer" was not effected and is not likely to be effected. As such, the lessee of the Godown remains the 1<sup>st</sup> defendant. I am not persuaded that the plaintiff has established any *prima facie* case against the 1<sup>st</sup> defendant.

18. In the end, Notice of Motion dated 19<sup>th</sup> September 2017 is dismissed with costs to the defendants.

**Dated, signed and delivered in open court at Nakuru this 31<sup>st</sup> day of January 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Towet holding brief for Ms. Atsieno for the plaintiff/applicant

No appearance for the 1<sup>st</sup> defendant/respondent

Mr. Bore holding brief for Mr. Keya for the 2<sup>nd</sup> defendant/respondent

Court Assistant: Gichaba