



IN THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 292 OF 2017

UREMBO CENTRE LIMITED.....PLAINTIFF

=VERSUS=

DOMINIC THUITA SAMSON GATHEGE.....1ST DEFENDANT

G.N. MBURU T/A HAKI TRADERS AUCTIONEERS.....2ND DEFENDANT

RULING

1. The plaintiff/applicant filed a notice of motion dated 28th April 2017 in Which it sought the following orders:

i. *Spent*

ii. *Spent*

iii. *That this Honourable Court be pleased to issue an interim order restraining the Defendants/Respondents by themselves, their servants or agents from illegally evicting or in any other manner whatsoever interfering with the Plaintiff quiet possession of the business trading as UREMBO CENTRE LIMITED in the business premises known as KARACHI HOUSE L.R. NO. 209/7968 and the property therein pending the hearing and determination of this suit.*

iv. *That this Honourable Court be pleased to issue an interim order restraining the 1st Defendant/Respondent by himself, his servants or agents from terminating the Plaintiff Lease of the business premises known as KARACHI HOUSE L.R. NO. 209/7968 pending the hearing and determination of this Application and Suit.*

v. *That this Honourable Court be pleased to grant an Order declaring the Amended Order issued on 25th March 2017 to levy distress is illegal.*

vi. *That the costs of this Application to be borne by the Defendant/Respondent.*

2. The applicant had entered into a lease agreement with the 1st Respondent for a portion of L.R. No. 209/7968. The lease was for a period of 5 years and 3 months with effect from 27th January 2009. When the lease expired in 2014, a new lease was entered into with effect from 20th May 2014. The lease was for a period of 5 years and 3 months.

3. The applicant defaulted in payment of rent forcing the 1st Respondent to ask the 2nd Respondent to levy distress for rent. The 2nd Respondent moved to the suit premises and found it closed. A proclamation attaching the goods inside was left affixed on the door to the suit premises. The 2nd Respondent later went to the suit premises after 14 days and found the premises still closed. The 2nd Respondent went to the Chief Magistrate at Milimani where he obtained break in orders and Police assistance. The orders were granted and the 2nd Respondent in company of a Police Officer from Central Police Station proceeded to the suit premises where they broke into the same and found that there was nothing attachable as the applicant had long abandoned the suit premises which were dusty and had been invested by rodents.
4. The applicant now contends that the 1st Respondent instructed the 2nd Respondent to levy distress for rent against it when the 1st Respondent knew that there was an agreement where a third party was to come in and carry on business and that it was to be repaid back goodwill of Kshs. 2,000,000/- and further that pending completion of those negotiations the applicant was not supposed to pay rent.
5. The applicant contends that the proceedings in Milimani Chief Magistrates Court in Misc. Application No. 171 of 2017 were not served upon him and that the 1st Respondent is intent on illegally evicting it from the suit premises. It is on this basis that the applicant is seeking the orders herein above.
6. The 1st Respondent opposed the applicant's application through a replying affidavit sworn on 15th May 2017. The 1st Respondent contends that the applicant started defaulting in paying rent from September 2016. The last payment made by the applicant was in August 2016. Prior to this, the applicant had written to the 1st Respondent indicating its desire to surrender the lease due to harsh economic times. This was acceptable as long as it was put in writing. The applicant did not surrender the lease in writing but instead later wrote seeking consent to reassign the lease which was not accepted.
7. The 1st Respondent denies the allegations of the applicant as to negotiations with a third party and payment of goodwill. The 1st Respondent maintains that the levy for distress for rent was lawfully carried out and that no injunction order should be granted in the circumstances.
8. The 2nd Respondent filed a replying affidavit on 6th September 2017 in which he stated that he acted legally and there was nothing wrong which he did to warrant issuance of injunction.
9. I have considered the applicant's application as well as the opposition to the same by the Respondents. The applicant had entered into a lease with the 1st Respondent on 20th May 2014. The rent payable was clearly indicated. The increase of rent was also indicated. The applicant extended the lease which is now governing the relationship between the parties. The only issue for determination herein is whether the applicant has demonstrated that he has a prima facie case to warrant issuance of an injunction.
10. The applicant has not demonstrated that it has been paying rent due as per the lease agreement. The 1st Respondent has indicated that the applicant last paid rent in August 2016. It was upon the applicant to demonstrate that indeed it had paid rent or that there was an arrangement that rent was not to be paid during the negotiations which the applicant alleges were ongoing.
11. The distress for rent was done in accordance with the lease. The proceedings before Milimani Chief Magistrate were ex-parte proceedings which did not require that the applicant be involved. The auctioneer had gone for a break in order and Police assistance which was granted.
12. The applicant seems to be complaining that rent was exorbitantly increased. The applicant signed the lease and understood its terms. It cannot now complain that the rent was exorbitant and that it is what strained its business. I do not see any prima facie case which the applicant has. Prima facie the applicant seems to be in breach of the agreement. In the case of ***Ripples Ltd vs Kamau Mucuha*** it was held as follows:

“It is trite law that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of the covenant by the other party as that will be inequitable.”

13. The process of levying distress is a lawful process which cannot be stopped unless it is shown that prima facie it is being levied when there are no grounds for doing so. The applicant had been given leave to file a further affidavit in response to the issues raised by the respondent. It did not file any. I therefore find that on the material before me the plaintiff has not demonstrated that it has a prima facie case. I find that the applicant’s application lacks merit. The same is dismissed with costs to the respondents.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* this 17th day of *January*, 2018.

E.O .OBAGA

JUDGE

In the presence of ;-

Mr Thimba for Defendant/Respondents

Court Assistant: Hilda

E.O .OBAGA

JUDGE