



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO 375 OF 2017

ISMAIL RAHIMTULLA TRUSTEES REGISTERED.....1ST PLAINTIFF

SONY HOLDINGS LIMITED.....2ND PLAINTIFF

=VERSUS=

**THE JOINT ADMINISTRATORS - SPENCON KENYA LIMITED (UNDER
ADMINISTRATION).....1ST DEFENDANT**

PRAGNESH JITENDRA PATEL.....2ND DEFENDANT

ASHUTOSH SHARMA.....3RD DEFENDANT

RULING

1. The plaintiffs are the registered proprietors of Land Reference Number 209/11458 on which is erected a building comprising of offices, shops and related conveniences, known as Rahimtulla Tower (**the Building**). Through an instrument of lease dated 27/7/2011, the plaintiffs leased to Spencon Kenya Limited office space measuring approximately 6,000 square feet on the seventeenth floor of the Building for a term of six years commencing on 1/11/2010 (the leased office space shall hereinafter be referred to as "**the suit premises**").

2. In addition, on 2/6/2015 the plaintiffs entered into a car parking licence agreement with Spencon Holdings Limited, granting Spencon Holdings Limited the right to use the car parking facilities and specified parking bays within the Building for a period of one year and ten months commencing on 1/1/2015 and expiring on 31/10/2016.

3. Both the lease and the car parking licence determined by the effluxion of time on 31/10/2016. The plaintiffs contend that despite the expiry of both the lease and car parking licence, the 1st defendant continues to unlawfully and illegally occupy the suit premises and the car parking bays. Secondly, the plaintiffs contend that the 1st defendant is in rent arrears and licence fees arrears, both totaling Kshs 15,471,512.06 as at the time of filing this suit.

4. Through a plaint dated 7/6/2017, the plaintiffs initiated this suit seeking the following orders:-

a. An order that the 1st defendant delivers vacant possession of the leased premises and parking bays forthwith;

b. An order that the 2nd and 3rd defendants are jointly and severally liable to pay special damages in the sum of Kshs 15,471,512.06;

c. An order that the 2nd and 3rd defendants are jointly and severally liable for mesne profits for every month occupied after the expiry of the lease from 31/10/2016 until the date of handing over of the premises in vacant possession;

d. Interest at the rate stipulated under the Lease Agreements;

e. Costs;

f. Such other and/or further remedies as this Honourable Court deems fit.

5. Together with the plaint, the plaintiff brought a Notice of Motion dated 7/6/17 seeking mandatory injunctive orders compelling the 1st

defendant to vacate the suit premises and the parking bays. The prayers in the notice of motion were framed thus:

2. Pending the hearing and determination of this suit, this Honourable court be pleased to issue an order of mandatory injunction compelling the 1st defendant/respondent, its agents, employees and/or servants to deliver vacant possession of the leased premises to the plaintiff, the 17th floor of the building measuring approximately 6,000 ft and as more particularly delineated and described in the building plans registered in the Registry of Documents at Nairobi in Volume D1 Folio 200/4496 File Number MMX and thereon bordered red and marked 'Spenco' or otherwise handover the premises to the plaintiffs;

3. Pending the hearing and determination of this suit, this Honourable court be pleased to issue an order of mandatory injunction compelling the 1st defendant/respondent, its agents, employees and/or servants to deliver the vacant possession of the leased premises to the plaintiff, the car park facilities and more particularly parking bays: 203, 204, 205, 206, 207, 208, 409, 436, 437, 438, 439, 701, 702, 722, 732 and 733 ("parking bays") within the Rahimtulla Tower or otherwise handover the parking bays to the plaintiffs.

4. In the alternative and pending the hearing and determination of this suit, this Honourable court be pleased to issue an order of mandatory injunction permitting the plaintiffs to demolish all the partitions, construction and/or temporary developments in the premises or in any other manner restore the premises to its original state prior to the lease dated 27th July 2011.

5. Upon grant of the prayer 4 above, the Deputy Registrar of this Honourable Court do execute the surrender of Lease on behalf of the 1st defendant.

6. Costs of the application be in the cause.

6. Service of the suit papers and the present Notice of Motion was effected through a notice published in the Standard Newspaper on 18/10/2017 pursuant to leave granted by Gitumbi J on 21/9/2017. The 1st and 3rd Defendants neither entered appearance nor filed defence. The 2nd defendant entered appearance on 2/11/2017 through M/s Gikera & Vadgama Advocates but did not file a defence within 14 days as required under Order 7 rule 1 of the Civil Procedure Rules. Similarly, although the 2nd defendant attended the hearing of the application, he neither filed a response nor made submissions in opposition to the present application. The application is therefore unopposed and the suit is similarly undefended.

7. This court has been invited to issue mandatory injunctive orders at this interlocutory stage. The single question to be determined in the present application is whether the plaintiffs have satisfied the criteria for grant of mandatory injunctive orders.

8. The principle upon which the jurisdiction to grant a mandatory injunctive order is exercised was spelt out by **Mustil L J** in the case of **Locabail International Finance Ltd v Agroexport (1986) 1All ER 901** as follows:-

The matter before the court is not only an application for interlocutory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.

9. Kenya's Court of Appeal reaffirmed this principle in the case of **Kenya Breweries Ltd & Another v Washington O Okeyo (2002) eKLR** as follows:

A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial, it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction.

10. In the present suit, the lease pursuant to which Spenco Kenya Limited occupied the suit premises expired by the effluxion of time on 31/10/2016. There is no evidence of any other form of tenancy or lawful relationship subsisting between the parties herein, entitling the 1st defendant to continue to occupy the suit premises. In my view, in the absence of evidence of any tenancy or other lawful relationship entitling the 1st defendant to remain in the suit premises, the 1st defendant is a trespasser in the suit premises. Secondly, evidence has been presented to show that at the time of filing this suit, the 1st defendant owed the plaintiff rent and mesne profits in the sum of Kshs 15,471,512.06. Thirdly, none of the defendants has deemed it necessary to defend this suit or oppose the present application. The plaintiff's plea and evidence therefore remain uncontroverted. Taking all these factors into account, this court is satisfied that the circumstances of this case constitute a clear case that warrants the court's exercise of the rare jurisdiction to grant a mandatory injunctive order at this interlocutory stage. For reasons to be set out in the succeeding paragraph of this ruling, the mandatory injunctive order would be granted only in relation to the office space on the seventeenth floor.

11. In so far as parking bays are concerned, the court notes that the material car parking licence was between the plaintiffs and M/s Spenco Holdings Limited (not Spenco Kenya Limited). The said company, Spenco Holdings Limited, has not been enjoined as a defendant in this suit. The relationship between the 1st defendant and Spenco Holdings Limited is unclear at this point. I will therefore not grant the mandatory injunctive order sought in relation to the car parking bays.

12. Besides the mandatory injunctive orders, the plaintiffs seek an order directing the Deputy Registrar of this Court to execute a surrender of lease on behalf of the 1st defendant. Surrender of lease is a consensual reconveyance of the demised premises from the tenant back to the

landlord. It is available only when there is a subsisting lease. In the present suit, the lease expired by the effluxion of time 31/10/2016. There is therefore no lease to be surrendered or reconveyed to the plaintiffs. The court has stated that the 1st defendant's occupation of the suit premises is illegal and constitutes trespass. The prayer for surrender of lease would therefore not lie in the circumstances of this case.

13. Lastly, the applicants made an alternative prayer. From the wording of the prayer, it does appear the alternative prayer should have been an additional prayer on its own as opposed to it being an alternative prayer. Because it is framed as an alternative prayer and I have granted the main prayer, I will refrain from granting the alternative prayer.

14. In light of the above findings, I allow the plaintiffs' Notice of Motion dated 7/6/2017 in terms of prayer 2 of the Notice of Motion. The 1st defendant shall, within 15 days from today, vacate the suit premises and restore the premises to the state in which they were at the commencement of the lease. The restoration shall be effected within the same period of 15 days from today. In default, the plaintiffs shall be at liberty to take possession of the suit premises through eviction and shall similarly be at liberty to restore the premises to the state in which the premises were at the commencement of the lease. The Police Commander in Charge of Nairobi City County shall ensure law and order are maintained during the taking of possession of the suit premises by the plaintiffs. The plaintiffs shall have costs of this application. The rest of the plaintiffs' claim shall be set down for hearing/formal proof.

DATED SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF MARCH 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr Omoga holding brief for Mr Okoth instructed by M/S Oraro & Co. Advocates for the Plaintiffs.

Mr. Njenga instructed by M/S Gikera & Vadgama Advocates for the 2nd Defendant.

Ms Halima Abdi - Court Clerk