



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELCSUIT NO. 73 OF 2018**

**PAMPA GRILL LIMITED.....1<sup>ST</sup> PLAINTIFF**

**PAMPA CHURRASCARIA (UNDER ADMINISTRATION)**

**LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NORTH LAKE LIMITED.....1<sup>ST</sup> DEFENDANT**

**BUENA BIZZ LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

The 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant entered into a lease agreement for a term of five (5) years and three (3) months commencing on 1<sup>st</sup> September, 2012 and terminating on 30<sup>th</sup> November, 2017 in respect of all that parcel of land known as Land Reference Number 330/352, Nairobi (hereinafter referred to as “the suit property”). The 1<sup>st</sup> defendant leased out the suit property to the 1<sup>st</sup> plaintiff for the purposes of carrying out the business of a restaurant which was being run by the 2<sup>nd</sup> plaintiff. In their plaint dated 19<sup>th</sup> February, 2018, the plaintiffs have averred that by a letter dated 18<sup>th</sup> September, 2017, the 1<sup>st</sup> defendant notified the 1<sup>st</sup> plaintiff that it did not intend to renew the 1<sup>st</sup> plaintiff’s lease in respect of the suit property upon its expiry on 30<sup>th</sup> November, 2017. The plaintiffs have averred that despite this notice, the 1<sup>st</sup> plaintiff paid to 1<sup>st</sup> defendant a sum of Kshs. 430,691/- on account of rent for the month of December, 2017 which payment was accepted by the 1<sup>st</sup> defendant. The plaintiffs have averred that in a letter dated 7<sup>th</sup> December, 2017, the 2<sup>nd</sup> defendant through the firm of Munyalo Muli & Company Advocates notified the 1<sup>st</sup> plaintiff that it had entered into a contract with the 1<sup>st</sup> defendant to lease the suit property and had paid rent to the 1<sup>st</sup> defendant for the premises. The plaintiffs have averred that the 2<sup>nd</sup> defendant through the said letter from its advocates demanded possession of the suit property from the plaintiffs. The plaintiffs have averred that on or about 4<sup>th</sup> January, 2018, the 1<sup>st</sup> plaintiff paid to the 1<sup>st</sup> defendant a further security deposit equivalent to three (3) months’ rent in the sum of Kshs. 1,292,073/- in the expectation that the 1<sup>st</sup> defendant would renew its lease in respect of the suit property.

The plaintiffs have averred that on 15<sup>th</sup> January, 2018, the 2<sup>nd</sup> plaintiff moved to the Business Premises Rent Tribunal and obtained an order restraining the 1<sup>st</sup> defendant from interfering with its quiet possession of the suit property pending the inter partes hearing of an application for injunction that it had filed at the said tribunal. The plaintiffs have averred that on the same date of 15<sup>th</sup> January, 2018, the 1<sup>st</sup> defendant moved to the Chief Magistrate’s Court at Nairobi and irregularly obtained an order ex parte for the eviction of the 1<sup>st</sup> plaintiff from the suit property pending the hearing inter partes of an eviction application that the 1<sup>st</sup> defendant had filed before that court. The plaintiffs have averred that on 18<sup>th</sup> January, 2018, Siuma Auctioneers acting under the instructions of the 1<sup>st</sup> defendant executed the said irregular order from the Chief Magistrate’s Court by forcefully evicting the plaintiffs from the suit property. The plaintiffs have averred that during the said forcible eviction, some of the plaintiffs’ properties were stolen while others were seriously destroyed. The plaintiffs have estimated the value of the goods that were destroyed at Kshs. 10,000,000/-. The plaintiffs have averred that their forcible eviction from the suit property was illegal for various reasons among them that as at the time of the eviction, there was an existing order issued by the Business Premises Rent Tribunal restraining the 1<sup>st</sup> defendant from interfering with the 2<sup>nd</sup> plaintiff’s occupation of the suit property and that the 1<sup>st</sup> defendant had accepted the rent for the month of December, 2017 and a further security deposit in the sum of Kshs. 1,292,073/-. The plaintiffs have averred further that as at the time of their eviction, the 1<sup>st</sup> defendant had not refunded to the 1<sup>st</sup> plaintiff a sum of Kshs. 25,000,000/- that it had incurred in repairing and renovating the suit property at the commencement of its tenancy and a sum of Kshs. 9,000,000/- that the 1<sup>st</sup> plaintiff had paid as security deposit under the lease that expired. The plaintiffs have averred further that the said eviction orders were obtained by the 1<sup>st</sup> defendant through misrepresentation and concealment of material facts.

The plaintiffs have averred that after their unlawful eviction from the suit property using the said orders that the 1<sup>st</sup> defendant had obtained irregularly from the Chief Magistrate’s Court, the 1<sup>st</sup> defendant mischievously and fraudulently withdrew the said Chief Magistrate’s Court

case without serving upon the 1<sup>st</sup> plaintiff the application pursuant to which the said orders were made to enable it defend itself. The plaintiffs have averred that the said suit was withdrawn by the 1<sup>st</sup> defendant so as to conceal the illegal and irregular manner in which the said eviction orders were obtained.

The plaintiffs have averred that the 2<sup>nd</sup> defendant had not taken actual possession of the suit property but had placed security guards at the entrance of the suit property to prevent the plaintiffs from accessing the same. The plaintiffs have averred that during their forceful eviction from the suit property, some items such as CCTV cameras, safe, generator, power back up, Brazilian Grill and hoods in steel water tanks remained in the suit property. The plaintiffs have sought judgment against the defendants for among others; an order compelling the 1<sup>st</sup> defendant to renew the 1<sup>st</sup> plaintiff's lease in respect of the suit property, an order compelling the 2<sup>nd</sup> defendant to remove its security guards from the suit property so as to allow the plaintiffs quiet possession of the property and a permanent injunction restraining the defendants from trespassing, entering, or in any manner whatsoever interfering with the plaintiffs' quiet possession and/or occupation of the suit property. The plaintiffs have also sought several reliefs in the alternative.

Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 19<sup>th</sup> February, 2018 seeking the following orders:

1. That the court be pleased to grant an order directing the defendants to allow the plaintiffs access and quiet possession and/or occupation of the premises known as LR No. 330/352 ("the suit property") pending the hearing and determination of this suit.
2. That in the alternative, the plaintiff be granted access to the suit property for the purposes of taking an inventory of or assessing the extent of damage occasioned by the forceful eviction and taking possession of the goods belonging to the plaintiffs including but not limited to the CCTV cameras, safe, generator, power back up, Brazilian Grill, the hoods in steel water tanks all which were left within the suit property during the illegal eviction pending the hearing and determination of this suit.
3. That the Officer Commanding Muthangari Police Station does provide security during the enforcement of the orders.
4. Cost of the application.

The application was supported by the affidavit of the plaintiffs' director, Edwardo Debastiani sworn on 19<sup>th</sup> February 2018 in which he reiterated the contents of the plaint that I have highlighted herein earlier in detail. The application was opposed by the defendants through grounds of opposition dated 28<sup>th</sup> February, 2018. The defendants have contended that the plaintiffs' application was filed after unreasonable delay which has not been explained. The defendants have averred further that the eviction of the plaintiffs from the suit property was carried out pursuant to the orders that were issued by a court of competent jurisdiction. The defendants have averred that it is the said court that should hear any application seeking to disturb the eviction orders in question.

The defendants have averred that since this suit is not an appeal against the orders that were issued in Nairobi CMCC No. 9414 of 2017, the court lacks the requisite jurisdiction to grant the orders sought. In the alternative, the defendants have contended that this court does not have supervisory powers over subordinate courts which is donated to the High Court by Article 165(6) and (7) of the Constitution.

The defendants have averred further that the lease between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant having expired on 31<sup>st</sup> November, 2017, the plaintiffs were trespassers on the suit property at the time of their eviction and as such they lack the requisite *locus standi* to institute or maintain these proceedings. The defendants have averred that the 1<sup>st</sup> defendant had rejected the plaintiffs' attempt to pay rent for December 2017 and that the 1<sup>st</sup> plaintiff's cheque dated 7<sup>th</sup> December 2017 for Kshs. 430, 691/- was not banked or cashed. The defendants have averred further that the plaintiffs' attempt to pay Kshs. 1,292,073/- as security through RTGS was another futile attempt by the plaintiffs to extend a non-existent lease. The defendants have averred that the said payment was not accepted by the 1<sup>st</sup> defendant. The defendants have averred that the 1<sup>st</sup> plaintiff had no right to claim a refund of the expenses that it incurred in renovating and repairing the suit property since it had been given a moratorium on rent for 5 months by the 1<sup>st</sup> defendant in accordance to clause 2 of the lease agreement between them. The defendants have averred further that the suit property had been taken over by an innocent third party and that the plaintiffs have not satisfied the conditions for grant of a mandatory injunction.

The application was argued before me on 1<sup>st</sup> March, 2018. I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition that was filed by the defendants and the submissions by the advocates for the parties. What is before me is an application for interlocutory injunction. The plaintiffs have sought a restorative injunction which is a positive injunction as explained by the Court of Appeal in the case of New Ocean Transport Limited & another vs. Anwar Mohamed Bayusuf Limited CA 16 of 2014 as follows:

*"We appreciate that an injunction is an order of the Court directing a party to the proceedings to do something or refrain from doing a specified act. It is granted in cases in which monetary compensation affords an inadequate remedy to an injured party. See Harlburys Laws of England 3<sup>rd</sup> edition, vol.21 at pg. 343. Basically there are 2 types of injunctions; positive and negative. The positive injunction would direct a party to do something whereas a negative one will restrain such a person from doing something. Among the positive injunctions will be mandatory injunction. This injunction orders some act to be done. Part of this family is the restorative injunction being sought by the applicants in the instant application. This type of injunction requires the person against whom it is directed to undo a wrongful act, to restore the status quo ante so that the damage does not continue. Then there is the mandatory injunction per se which compels a party to carry out some positive act to remedy a wrongful omission."*

The principles upon which this court exercises its discretion in applications for a temporary injunction are well settled. In the case of Giella vs. Cassman Brown and Co. Ltd. (1973) E.A 358, it was held that an applicant for a temporary injunction must establish:

(i) A prima facie case with a probability of success.

(ii) That if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages.

In the case of Mrao Limited vs. First American Bank Limited & 2 Others (2003) KLR 125, the court defined a prima facie case as:

*“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.”*

In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 and went further to state as follows:

*“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. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”*

Unlike a prohibitory injunction, an applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court apply in applications for interlocutory mandatory injunction were set out in the case of Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901, where the court stated that:

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

In the case of Shepherd Homes Ltd. –vs.–Shandahu [1971] 1 Ch.304, Meggarty J. stated as follows;

*“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.*

On the material before me, I am satisfied that the plaintiffs have met the threshold for grant of the orders sought. The plaintiffs have established a prima facie case against the defendants for unlawful eviction. The plaintiffs have also demonstrated that there exist special circumstances that warrant the grant of the mandatory injunction sought. The plaintiffs’ complaint is that their eviction from the suit property by the 1<sup>st</sup> defendant was illegal. According to the lease dated 1<sup>st</sup> November, 2012 annexed to the affidavit in support of the plaintiffs’ application, 1<sup>st</sup> plaintiff entered into a lease with the 1<sup>st</sup> defendant in respect of the suit property for a term of 5 years and 3 months with effect from 1<sup>st</sup> September, 2012. It is not disputed that the said lease was to expire on 30<sup>th</sup> November, 2017. The 1<sup>st</sup> plaintiff has contended that although the 1<sup>st</sup> defendant had notified it that it would not renew its lease, the 1<sup>st</sup> defendant did not refund the security deposit that it had paid to the 1<sup>st</sup> defendant at the commencement of the tenancy on the expiry of the lease on 30<sup>th</sup> November, 2017. The 1<sup>st</sup> plaintiff has contended that on 7<sup>th</sup> December, 2017, it paid to the 1<sup>st</sup> defendant the rent for December, 2017 which was accepted by the 1<sup>st</sup> defendant. The 1<sup>st</sup> plaintiff has contended that the conduct of the 1<sup>st</sup> defendant created a legitimate expectation that the said lease would be renewed. The 1<sup>st</sup> plaintiff has contended that acting on that expectation, it paid to the 1<sup>st</sup> defendant a further sum of Kshs.1,292,073/- as additional security deposit which was also accepted by the 1<sup>st</sup> defendant. The 1<sup>st</sup> plaintiff has contended that when they were threatened with eviction, the 2<sup>nd</sup> Plaintiff filed a suit against the 1<sup>st</sup> defendant at the Business Premises Rent Tribunal and obtained an order on 15<sup>th</sup> January, 2018 restraining the defendants from interfering with the 2<sup>nd</sup> plaintiff’s quiet possession of the suit property. The plaintiffs have contended that in breach of their legitimate expectation and the said order from the Business Premises Rent Tribunal, the 1<sup>st</sup> defendant moved to the Chief Magistrate’s Court at Milimani Commercial Court and irregularly and illegally obtained orders on 29<sup>th</sup> December, 2017 and 15<sup>th</sup> January, 2018 for their forceful eviction from the suit property which orders were executed by Siama Auctioneers on 18<sup>th</sup> January, 2018. The plaintiffs have termed the orders that were obtained by the 1<sup>st</sup> defendant in the Chief Magistrates Court aforesaid as illegal and irregular on account of none service of the pleadings and concealment of material facts.

It is not disputed that the orders that were issued by the Chief Magistrate’s Court aforesaid were temporary in nature. The said orders were on the following terms:

*“1. THAT an eviction order is hereby issued compelling the Defendant by themselves, servants, agents and or legal representatives to move out of the Plaintiff’s properties known as L.R. No. 330/352 situated in the City of Nairobi pending the hearing and*

*determination of this suit.*

*2. THAT Siuma Auctioneers to evict the Defendants as per the orders above.”*

It is also not disputed that the 1<sup>st</sup> defendant's suit in the Chief Magistrate's Court was not heard because the same was withdrawn through a Notice of Withdrawal dated 19<sup>th</sup> January, 2018 filed in court on 25<sup>th</sup> January, 2018. The suit was withdrawn after the plaintiffs' forceful eviction from the suit property on 18<sup>th</sup> January, 2018. I am of the considered view that after the 1<sup>st</sup> defendant's suit in the Chief Magistrates Court was withdrawn on 25<sup>th</sup> January, 2018 the temporary orders that had been issued by the Chief Magistrate's Court on 29<sup>th</sup> December, 2017 and 15<sup>th</sup> January, 2018 requiring the 1<sup>st</sup> plaintiff to vacate the suit property stood discharged and the plaintiffs who were forcefully evicted from the suit property pursuant to the said orders had a right to resume possession of the said property. Unless the plaintiffs voluntarily vacated the suit property or were removed through another order from a court or a tribunal of competent jurisdiction, the defendants had no right to prevent the plaintiffs from accessing the suit property. In the case of Gusii Mwalimu Investment Co. Ltd & 2 Others vs. Mwalimu Hotel Kisii Ltd, Court of Appeal at Kisumu, Civil Appeal No.160 of 1995, the court stated that:

*“it is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain possession.”*

I am in agreement with the defendants' advocate that the plaintiffs were evicted from the suit property pursuant to a court order. I am not sitting on appeal against the order that were issued by the Chief Magistrate's Court. I have also not been called upon to review the same. I wish to state for the avoidance of doubt however that nothing can stop this court from interrogating the validity of an order given by a Magistrate's Court on a matter falling within its jurisdiction. For the matter before me, my view which I have made clear above is that the orders that were made by the Chief Magistrate's Court were temporary in nature and are not in existence following the withdrawal of the suit in which they were issued. The said orders were given on condition that the suit would be heard and the court would either confirm or discharge the same. The suit having been withdrawn without a hearing, the said withdrawal automatically discharged the said temporary orders. With the discharge of the said orders, the parties must revert to the position in which they were prior to the date of the said orders. In the circumstances, the defendants cannot use the said orders from the Chief Magistrates Court which are no longer in existence as a shield against the mandatory injunction sought in the present application.

I am of the view that the discharge of the said temporary eviction order through the withdrawal of the suit as aforesaid is a prima facie evidence that the orders were wrongly or erroneously given. A party who has suffered loss or damage as a result of a temporary order wrongfully obtained and which is ultimately discharged is entitled to compensation the nature and extent of which can only be determined at the trial. On the evidence before me, the plaintiffs have established on a prima facie basis that they were wrongfully evicted from the suit property. In the circumstances of this case, I am of the view that it would be inequitable to allow the defendants to remain on the suit property because they can pay compensation or damages.

The defendants' advocate had argued that this is not the proper forum to challenge the eviction orders that were given by the Chief Magistrate's Court aforesaid. The defendants' advocates had argued that the plaintiffs should have gone back to the Chief Magistrate's Court or should have moved this court by way of judicial review. I find no merit in this argument. The 1<sup>st</sup> plaintiff has averred that it was not served with the pleadings in the Chief Magistrate's Court and that it was not given an opportunity to defend itself. The 1<sup>st</sup> defendant obtained temporary eviction orders ex parte, executed the same and withdrew the suit. The defendants did not file a replying affidavit in response to the present application. The plaintiffs' contention that the 1<sup>st</sup> plaintiff was not served with the summons and the application for eviction orders has not been controverted. I am unable to see how the plaintiffs could have gone to the Chief Magistrate's Court to challenge their eviction after the suit had been withdrawn by the 1<sup>st</sup> defendant. I am of the view that the 1<sup>st</sup> defendant who had withdrawn the suit in the Chief Magistrate's Court so as to prevent the plaintiffs from defending themselves are estopped from alleging that the plaintiffs should have gone to the lower court to complain against their eviction. By withdrawing the suit, the 1<sup>st</sup> defendant also denied the 1<sup>st</sup> plaintiff an opportunity to challenge the said ex parte eviction orders through an appeal process since no appeal could be preferred after the withdrawal of the suit. I am of the view that an author of a wrong cannot be allowed to take advantage of his own wrong. From the facts before me, I am satisfied that the plaintiffs are properly before this court.

The defendants had also argued that the 1<sup>st</sup> plaintiff's lease had expired and as such the plaintiffs had no right to remain in possession of the suit property. As I have stated earlier, it is not disputed that the 1<sup>st</sup> plaintiff's lease in respect of the suit property had expired as at the time of the plaintiffs' forceful eviction. I am also in agreement with the defendants that in view of the provisions of section 60(2) of the Land Act, 2012, the payments on account of rent that the plaintiffs claim to have made after the expiry of the lease could not be taken to have created a new lease in favour of the plaintiffs. Where I differ with the defendants is the process through which the plaintiffs were evicted from the suit property. Even if the plaintiffs were trespassers on the suit property after the expiry of the lease as claimed by the defendants, the defendants had to follow the due process in obtaining possession of the suit property from the plaintiffs. From the allegations that have been made against the defendants concerning the manner in which they repossessed the suit property from the plaintiffs which allegations have not been controverted, I am not satisfied that due process was followed in the eviction of the plaintiffs from the suit property.

The other ground put forward by the defendants in opposition to the plaintiffs' application was that the application was brought after inordinate delay. The suit and the application herein were brought 30 days after the plaintiffs' forceful eviction from the suit property. I am not convinced that this suit was brought after inordinate delay in view of the circumstances of the case.

The other issue that was raised by the defendants in opposition to the application was that the suit property has since been taken over by an innocent third party and as such cannot be handed over to the plaintiffs. The defendants did not place any evidence before the court showing when and under what terms the 2<sup>nd</sup> plaintiff took over possession of the suit property. There is no evidence that the 2<sup>nd</sup> plaintiff took possession of the suit property in good faith without notice of the dispute that the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant had over the property and particularly the manner in which the 1<sup>st</sup> defendant obtained possession of the property from the 1<sup>st</sup> plaintiff.

In the case of Gusii Mwalimu Investment Co. Ltd & 2 others vs. Mwalimu Hotel Kisii Ltd (supra) Shah J.A stated as follows:-

*“.....it is fallacious for a person who forcibly and riotously enters premises to maintain that his occupation of these premises is the status quo which must be maintained. In this case if I were to allow the appeal, I would be giving my assent to occupation of the premises by a third party and assist the landlord to perpetuate what it did illegally. My equity conscience does not allow that.”*

I am entirely in agreement with the foregoing statement. In the final analysis, it is my finding that the application dated 19<sup>th</sup> February, 2018 is well founded. The application is allowed on the following terms:

1. Prayer 3 of the application is granted as prayed on condition that the 1<sup>st</sup> plaintiff deposits in a joint interest earning account in the names of the advocates on record for the parties a sum of Kshs. 10,000,000/- as security within fourteen (14) days from the date hereof.
2. Upon depositing the said sum of Kshs. 10,000,000/- as aforesaid, the defendants shall vacate and hand over L. R. No. 330/352, Nairobi(the suit property) to the 1<sup>st</sup> plaintiff.
3. Upon obtaining possession of the suit property, the 1<sup>st</sup> plaintiff shall continue to pay to the 1<sup>st</sup> defendant on account of rent a sum of Kshs. 430,691/- per month on the first day of each month pending the hearing and determination of the suit.
4. The plaintiffs shall have the costs of the application.

**Delivered and Dated at Nairobi this 12<sup>th</sup> day of April 2018**

**S. OKONG'O**

**JUDGE**

Ruling read in open court in the presence of:

Mr. Mutua for the Plaintiffs

Ms. Motabori h/b for Nyangau for the Defendants

Catherine

Court Assistant