



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO 377 OF 2017

TECNO HOLDINGS LTD.....1ST PLAINTIFF

MAHBOOB ABDUL

AZIZ t/a SEKAI CAR SALES LTD.....2ND PLAINTIFF

LE MISBAH CAFÉ.....3RD PLAINTIFF

BAIG & SONS TRADING COMPANY LTD.....4TH PLAINTIFF

DAKANE SHEIKH MOHAMED.....5TH PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY

FUND BOARD OF TRUSTEES.....DEFENDANT

RULING

1. This is the Notice of Motion dated 17th October, 2017. It is brought under Section 3A, 1A 1B and 63(c) and (e) of the Civil Procedure Act, Chapter 21 Laws of Kenya, Order 40 Rule of the Civil Procedure Rules and all other relevant and applicable provisions of the law.

2. It seeks orders that;

1. Spent.

2. Spent.

3. Pending the hearing and determination of the suit, this Honourable Court be pleased to issue an order restraining the Defendant whether by itself, its servants and/or agents and/or any representatives or any person authorized by or claiming under the Defendant from levying distress against the 1st, 2nd, 3rd 4th & 5th Plaintiffs, from doing any acts pertaining to levying distress against the 1st, 2nd, 3rd 4th & 5th Plaintiffs from doing or from interfering with the 1st, 2nd, 3rd 4th & 5th Plaintiffs quiet possession of parcel of land L.R No. Mombasa/Block XX/328 and 329.

4. Costs of this application be provided for.

3. The grounds are on the face of the application and are listed as in paragraph 1 to 23. I do not need to reproduce them here.

4. The application is supported by the affidavit of Omar Mohammed Abdile, the 1st Plaintiff/Applicant herein sworn on the 17th October, 2017 and a further affidavit sworn on the 18th October, 2017.

There are also supporting affidavits by Dakane Sheikh Mohammed, Igbal Syed Javed, Mahboob Abdul Azeez, all sworn on the 17th October, 2017.

5. The application is opposed. There are grounds of opposition by the Defendant, dated 10th November, 2017 and filed in court on the same day. There is also a replying affidavit sworn by Silas Ngiela, the property management officer of the Defendant sworn on the 14th November, 2017.

6. On the 6th December, 2017 it was agreed that the Notice of Motion be canvassed by way of written submissions. A date for highlighting was taken. On the 23rd January, 2018 counsels informed the court that they did not wish to highlight. A date for ruling was given.

7. THE PLAINTIFF'S/APPLICANT'S SUBMISSIONS

The lease between the 1st Plaintiff and the Defendant provided for a grace period of two years whereby the 1st Plaintiff was allowed not to pay rent for purposes of allowing the 1st Plaintiff to refurbish and renovate the suit premises.

That the 1st Plaintiff was to start paying rent as from January 2017. The rent was to be paid on a quarterly basis.

8. That despite these circumstances, vide an invoice dated 27th February, 2017, the Defendant claimed Kshs.7,830,000/= being the rent for the quarter ending March 2017. The 1st Plaintiff disputed the amount and informed the Defendant accordingly. The Defendant did not respond but instead instructed auctioneers to levy distress against the 1st Plaintiff and in the process also proclaimed goods belonging to the 2nd to 5th Plaintiffs.

9. They have relied on the case of *Sargo Ngetich And Company Advocates –versus- Sedeo Consultants Limited (2015) eKLR*. It is their further submissions that they have established a prima facie case as the issue of whether the intended levy of distress by the Defendant is legitimate in the circumstances. Also whether the Defendant can proclaim good of the 2nd, 3rd, 4th & 5th Plaintiff in the course of its intended levy of distress.

10. The dispute on the interpretation of the lease agreement interms of the rent payable is an issue which needs to be addressed vide the mechanisms provided for in the lease. They have also relied on the case of *Martin M. Odhiambo t/a Express Insurance Services –versus- Marshalls E.A Limited And Another (2005) eKLR*.

11. The Defendant was aware of the subletting and never raised any issues on the same. The 2nd, 3rd, 4th & 5th Plaintiffs will suffer irreparable loss if these orders are not granted. If the levy of distress is allowed, it would amount to shutting down their businesses.

12. That the 1st Plaintiff continues to pay rent and has approached the court with clean hands. The balance of convenience tilts in favour of the Plaintiffs who stand to suffer more should the orders not be granted.

13. THE DEFENDANTS SUBMISSIONS

The suit filed by the 1st to 4th Plaintiffs is materially defective for failure to comply with order 4 Rule 4 of the Civil Procedure Rules. The 1st, 2nd, 3rd & 4th Plaintiffs described as limited liability companies have not provided authorities to swear affidavits authorizing any person to swear affidavits in the matter. Therefore the capacity of the persons who have sworn affidavits in support of the application for the respective corporations cannot be ascertained.

14. They have relied on the case of *Affordable Homes Africa Limited –versus- Ian Henderson And 2 Others HCCC No. 524 of 2004*. That the suit is therefore a non-starter and ought to be dismissed.

15. The 2nd, 3rd, 4th & 5th Plaintiffs have no standing based on the doctrine of privity of contract. The Defendant entered into a lease agreement with the Plaintiff on 30th July, 2010 for a term of ten (10) years beginning 1st August, 2010. The 2nd to 5th Plaintiffs are not parties to the agreement. They relied on the case of *Agricultural Finance Corporation –versus- Lengitia Limited (1985) KLR 765* where it was held, inter alia that;

“As general rule a contract affects only the parties to it and it cannot be enforced by or against a person not a party even if the contract is made for his benefit and purports to give the right to sue or to make him liable upon it.”

16. They have also relied on the case of *Kenindia Assurance Co. Ltd –versus- Otiende (1991) KLR 38* where the Court of Appeal held that;

“A third party cannot sue or be sued in a contract if he is not a party to it.”

The 2nd, 3rd, 4th & 5th Plaintiff are not privy to the contract between the 1st Plaintiff and the Defendant hence cannot sue on the same.

17. That clause 11 of the lease agreement between the 1st Plaintiff and the Defendant expressly prohibits sub-letting. The subleases between the 1st and the 2nd, 3rd, 4th & 5th Plaintiffs are in breach of clause 11 hence illegal and unenforceable.

18. Under clause 2 (vi) of the lease agreement the rent payable is Kshs.27,000,000/= per year. The rent remittance would commence on 1st May, 2016. The rent due as per the lease is Kshs.23,490,800/=. Further that the lease was voluntarily executed by the parties and therefore binding. They have relied on the case of *Securicor (k) Limited –versus- Benson David Onyango And Another (2008) eKLR* which quoted

the House of Lords decision in L'. Estrange –versus- F. Graucob Limited (1934) 2KB 294.

19. The parties having entered into a contract prescribing how rent should be paid the same ought to be enforced by this Honorable Court. Under Clause 3 of the lease agreement, the 1st Plaintiff is under a duty to pay rent quarterly. The 1st Plaintiff fell into rent arrears as evidence by the letters dated 28th March, 2017 and 29th June, 2017 from the Defendant. The 1st Plaintiff has not attached any evidence of payment of rent. Orders cannot be issued against a landlord who is trying to enforce its right under the lease.

They have relied on the cases of;

1. Julius MOgaka Gekonde t/a Eastmart Technical College –versus- Ouru Power Limited And Another (2016) eKLR.

2. Samuel Kipkorir Ngeno And Another –versus- Local Authorities Pension Trust (Registered Trustees) And Another (2013) eKLR.

That the 1st Plaintiff is in breach of the lease agreement by purporting to sub-let the premises to the 2nd, 3rd 4th & 5th Plaintiffs without first obtaining prior written consent of the Defendant. The 2nd, 3rd 4th & 5th Plaintiffs are trespassers with no justifiable cause of action against the Defendant.

That the 2nd, 3rd 4th & 5th Plaintiffs can only approach the court by way of objection. They have also relied on the cases of;

Farkhandas N. Abdulkader –versus- Mohammed Hasham Bakarani And Another (2014) eKLR.

Also the case of **Standard Chartered Bank (k) Limited –versus- Intercom Services Limited And 4 Others Civil Appeal No. 37 of 2003.**

Heptula –versus- Noormohamed (1984) eKLR where it was held that;

“No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.

20. It is the Defendant’s further submissions that the 1st Plaintiff has come to court with unclean hands and the court should frown against such unconscionable conduct and deny the Plaintiffs the reliefs sought. The 1st Plaintiff has failed to establish that it has complied with the conditions of the lease and that the distress for rent is being exercised wrongly. They have relied on the case of **Kenya Commercial Finance Ltd –versus- Afraha Educational Society (2001) IEA86.**

21. The Plaintiffs have failed to demonstrate that they will suffer a harm that cannot be quantified in monetary terms or which cannot be cured. The 1st Plaintiff has sub-let the demised premises to the 2nd to 5th Plaintiffs collected rent from them but has not remitted to the Defendant. The Kenyan retirees whose livelihood and survival in their sunset years depend on the Defendants investments income stand to suffer.

That the Defendant has a right to levy distress on the Plaintiffs’ goods for recovery of rent.

22. The balance of convenience and public interest leans heavily in favour of the Defendant. The Defendant is a public body that is a custodian of the Kenya workers funds and as a public pension manager of Retirees Fund against the private interests of the Plaintiffs whose sole aim in these proceedings is to make a profit at the public expense.

23. I have considered the notice of motion, the affidavits in support and the annexures. I have considered the grounds of opposition and the replying affidavit together with the annexures. I have considered the written submissions of counsels and the authorities cited.

The issues for determination are;

i. Whether the Plaintiffs/Applicants application meets the threshold for the grant of temporary injunctions.

ii. Who should bear costs?

24. At this juncture it is necessary for this court to briefly examine the legal principles governing the applications of this nature. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.

In the celebrated case of **Giella –versus- Cassman Brown And Co. Limited (1973) EA385** the court set out the principles for grant of temporary injunctions as follows.

i) The Plaintiff must establish that he has a prima facie case with high chances of success.

ii) The Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.

iii) If the court is in doubt it will decide on a balance of convenience.

25. In the case of Mrao Limited –versus- First American Bank of Kenya And 2 Others (2003) KLR 125 the Court of Appeal in determining what amounts to a prima facie case stated ;

“A prima facie case in a civil application included but not confined to a “genuine and arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

I am guided by the above authorities.

26. There is no doubt that the 1st Plaintiff entered into a lease agreement with the Defendant on 30th July, 2010 for a term of 10 years beginning 1st August, 2010. I have gone through the lease agreement under clause 2(vi) the rent payable is Kshs.27,000,000/= per year. The rent remittance was to commence on 1st May, 2016. There is no doubt that the 1st Plaintiff is in arrears of rent. The rent due is Kshs.23,490,800/=. The lease was voluntarily executed by the parties hence it is binding.

27. Under clause 3 of the lease, the Plaintiff is under a duty to pay rent quarterly. As evidenced by the letters dated 28th March, 2017 and 29th June, 2017 from the Defendant the 1st Plaintiff fell into arrears. The 1st Plaintiff has not proved in any way that he has remitted any rent as per the lease agreement. In the case of Samuel Kipkorir Ngeno And Another –versus- Local Authorities Pension Trust (Registered Trustees) And Another (2013) eKLR it was held that;

“A tenant first and main obligation is to pay rent as and when it becomes due for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent?

The temporary injunction sought in the present application is an equitable remedy at the court’s discretion. He who comes to equity must come with clean hands. A tenant who in in huge arrears is underserving of the courts discretion. The court cannot be the refuge of a tenant who fails to meet his principal obligations of paying rent as and when it becomes due.”

28. I am guided by the above authority in finding that the 1st Plaintiff is not deserving of this court’s protection since it has failed to remit the rent due.

I find that it has failed to establish that it has a prima facie case with high chances of success.

29. Another issue to be determined is whether there is privity of contract between the 2nd to 5th Plaintiffs and the Defendant. There is no evidence adduced by the Plaintiffs that the Defendant was aware of the sub-tenancies of the 2nd to 5th Plaintiff.

The 2nd to the 5th Plaintiffs have not exhibited any evidence to show that the Defendant was aware of the sub-tenancies or that the Defendant and consented to the 1st Plaintiff to sublet the premises to them.

30. The 1st Plaintiff in breach of the lease agreement purported to sublet the premises to the 2nd to 5th Plaintiffs without first obtaining prior written consent and/or permissions from the Defendant. This is a clear breach of clause 11 of the lease agreement.

There is therefore no privity of contract between the 2nd, 3rd 4th & 5th Plaintiffs and the Defendant. They are in illegal occupation of the said premises.

31. I agree with the Defendants submissions that the 2nd, 3rd 4th & 5th Plaintiffs are trespasses without a justifiable cause of action against the Defendant. In the case of;

Farkhandas N. Abulkader –versus- Mohammed Hasham Bakarani And Another (2014) eKLR the Court of Appeal held as follows;

“The landlord and tenant Act requires the tenant to obtain consent of the landlord before subletting, parting with possession of, or transferring the premises or any part thereof. No consent was sought and/or obtained by Githinji. No tenancy by him was in existence and the appellants were not tenants but trespassers.”

I have considered the facts in the present case and I am guided by the above authority. I find that the Plaintiffs have failed to establish prima facie case with a probability of success at the trial.

32. I also find that the Plaintiffs have failed to demonstrate that they will suffer irreparable injury that cannot be compensated by an award of damages if these orders are not granted.

The 1st Plaintiff has sub-let the demised premises to the 2nd to 5th Plaintiffs without consent from the Defendant. It has collected rent from the 2nd to 5th Plaintiffs yet it has not remitted any rent to the Defendant.

The Plaintiffs do not deserve this court’s protection. It was held by Bosire J. in Njenga –versus Njenga that, **“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.”**

33. I am not persuaded by the facts presented by the Plaintiffs that they deserve the orders sought. In the case of *Kenleb Cons Limited – versus- New Gatitu Service Station Limited And Another* it was held that;

“to succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable which requires protection by injunction.”

None of the Plaintiffs herein deserve this kind of protection.

34. In the case of *Paul Gitonga Wanjau –verssu- Gathuti Tea Factory Co. Ltd And 2 Others (2016) eKLR* Mativo J. held;

“The court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the one hand would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant on the other hand might sustain if the injunction was refused and he should ultimately turn out to be right.

The burden of proof that the inconvenience which the Applicant will suffer if the injunction is refused is greater than that which the Respondent will suffer if it is granted lies on the applicant.”

I am of the view that in the present case the Plaintiffs/Applicants have failed to discharge this burden to the required standard.

I find that the balance of convenience tilts in favour of the Defendant as the Kenyan retirees whose livelihood and survival in their sunset years is dependent on the Defendants investments.

I find that the Defendant has a right to levy distress for the recovery of rent. All in all I find that this application lacks merit and the same is dismissed with costs to the Defendant/Respondent.

It is ordered.

Dated, Signed and Delivered at Mombasa on the 10th day of April 2018.

L. KOMINGOI

JUDGE

10/4/2018.

Ms. Ali : I seek leave to appeal against the ruling. I also seek 14 days stay pending the filing of an application in the Court of Appeal.

L. KOMINGOI

JUDGE

10/4/2018.

Mr. Wafula: The application for stay is res judicata. This is like an appeal from the ruling.

L. KOMINGOI

JUDGE

10/4/2018.

Court: Leave to appeal is granted. The application for stay pending appeal is denied.

L. KOMINGOI

JUDGE

10/4/2018.