REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE NO. 8 OF 2018

MUSA SHEIKH ADEN.....1ST PLAINTIFF

MUHUMED MAALIM MOHAMED.....2ND PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF GARISSA.....1ST DEFENDANT

THE CHIEF OFFICE, DIRECTORATE OF LIVESTOCK DEVELOPMENT

GARISSA COUNTY.....2ND DEFENDANT

RULING

BACKGROUND

This suit was filed by the plaintiff on 1st February, 2018. Also filed simultaneously with this suit was a Notice of Motion brought under Order 40 Rule 1, 2 (1) and (2) CPR and Section 3A CPA. The plaintiffs were seeking the following orders;

1. Spent

2. Spent

3. THAT pending hearing and determination of this application and during the pendency of the lease farm, the 1st and 2nd defendants/respondents whether by themselves, their agents, their employees and/or servants be restrained by way of temporary injunction from evicting the plaintiff/applicants from the slaughter house situated in Garissa Industrial Area Sankuri Road.

4. THAT pending hearing and determination of the main suit and during the pendency of the lease the 1st and 2nd defendant/respondents whether by themselves, their agents, their employees and/or servants be restrained by way of a temporary injunction from evicting the plaintiff/applicants from the slaughter House situated in Garissa Industrial Area, Sankuri Road.

In reply to that application, the defendants/respondents filed a replying affidavit sworn by Mulki Salat Onle together with the affidavits annexed to the further affidavit sworn by Jackson Kinyua and Fatuma Omar.

FACTS IN SUPPORT OF THE APPLICATION

From the supporting affidavit sworn by Musa Sheikh Aden on 1st February, 2018, the plaintiffs herein entered into a lease agreement with the then Municipal Council of Garissa with regard to a slaughter house situate at Garissa Industrial Area, Sankuri Road. The lease was for a term of five (5) at an agreed rent of Kshs.50,000 per month. It was a further term of the said lease that it was renewable on terms and conditions to be agreed upon by the parties.

On 17th January 2017, the plaintiffs and the first defendant entered into a lease agreement for a further term of five (5) years at an increased rent of Kshs.100,000/= per month. The terms of that subsequent lease agreement are as follows;

(a) The term of the lease was agreed at fine (5) years with effect from 1st November, 2017 (future)

(b) Monthly rent was agreed at Kshs.100,000/=

On 9th January 2018 the 2nd respondent issued a letter to the 2nd plaintiff/applicant purporting to terminate the lease dated 1st October, 2012. The plaintiffs/applicants wrote to the 2nd defendant/respondent on 22/01/2018 disputing the purported termination of an expired lease. On 29/01/2018 the 2nd defendant/respondent wrote them another letter insisting that they should cease/stop all operations in the slaughter house by midnight of 31st August 2018.

In a replying affidavit sworn by Musa Sheikh Aden who is the 1st applicant herein on 21/02/2018, the applicants further stated that they were in the process of having the lease registered but could not have managed to annex it since the same has to be sent to Nairobi for processing.

The 1st respondent also stated that an unregistered lease does not change to a monthly lease. He stated that they have even been paying rent in terms of the new lease which is a binding contract which cannot be varied by virtue of being unregistered. The respondents also contend that the slaughter house is in a hygienic state contrary to the allegations by the respondents. The applicants also averred that they have done renovations to the slaughter house to the tune of Kshs.1,672,000/= and that the facility is now in good shape contrary to the allegations by the respondents. The applicant also contend that they have been paying their rent to the 1st respondent as and when it becomes due and payable. He attached several copies of official receipts for rent marked MSA 1(a) (b)(c)(d)(e)(f)(g)(h)(i)(j).

FACTS IN OPPOSITION TO THE APPLICATIONS

In an affidavit sworn on 12th February 2018, by the Mulki Salat Onle, the respondents opposed the application for injunction stating that the purported lease agreement dated 17/01/2017 cannot be relied on as the applicants have not paid stamp duty. The respondent also contend that the said lease is not registered which translates into monthly tenancy terminable by one month's notice. The respondent also averred that the initial lease entered into on the 1st day of October 2012 for a term of five (5) years expired on 1st October 2017 by afflunxion of time and that the 1st respondent has not entered into any further extension of lease with the applicants. The respondents also averred that the purported lease entered between the applicants and the respondents dated 1st October 2017 is not a proper lease capable of enforcement since there was original lease for five (5) years which was to expire on 1/10/2017.

The respondents also contend that the purported renewed lease dated 17/01/2017 signed by one Honourable Hajjir M. Dahiye on behalf of the 1st defendant was not sunctioned by the 1st respondent. It is averred that the said Hon. Hajjir M. Dahiye was not an authorized person as he was not an appointed County Chief Officer who is the accounting officer to execute the lease on behalf of the 1st respondent under Section 45 of the County Government Act. No. 17 of 2012.

The respondents further contend that after the expiry of the initial lease, it was necessary to call for advertising and an open procurement to the widest circulation possible as required under Section 4 of the Public Procurement and Disposal Act, No. 33 of 2015. In a further affidavit sworn by the same officer on 2nd March 2018, the 1st respondent referred to two affidavits sworn by one Fatuma Omar and Jackson Kinyua where they denied having been involved at all in any process of making the purported renewed lease agreement. The two affidavits are attached to that affidavit and marked MS 5.

The deponent of that affidavit also stated that there could have been no direct procurement when the subsisting lease was still in force and that could have been contrary to Sections 103 and 104 of the Public Procurement and Asset Disposal Act No. 33 of 2015. The respondent also contend that a plain reading of the purported lease dated 17th January 2017 shows that is not a lease proper but an agreement to lease which cannot be equated to lease.

APPLICANT'S SUBMISSIONS

The applicants through Mr. Nyaga Advocate instructed by the firm of Paul Mugwe & Co. Advocates submitted that Section 45 of the County Government Act, No. 17 of 2012 does not in any way require the County Chief Officer to sign all agreements on behalf of the County Government. To the contrary, counsel submitted, the Act bestows such Authority on the County Executive Committee Members under Section 34 of the said Act. The learned Counsel also cited Article 179 (1) of the Constitution which vests the exercise of executive authority with the County Executive Committee. He stated that a County Executive Committee Member has authority to exercise executive functions.

In his further submissions dated 8th May, 2018, the Learned Counsel submitted that the lease dated 17th January 2017 had now been registered on 13th March 2018 after payment of stamp duty on 5/3/2018. The Learned Counsel further submitted that any party to a lease agreement is at liberty to register the same pursuant to Section 12 of the Registration of Documents Act Cap. 285 Laws of Kenya.

In conclusion, the applicant submitted that they had satisfied the court the principles for the grant of injunction orders as set out tin celebrated case of **Grella –Vs- Cassman Brown C. Ltd [1973] EA 358** and urged me to allow the application. He cited the following authorities;

1. **Parvi Holdings Ltd –Vs- Nairobi City Council (2006) eKLR**

2. **Chon Jeuk Suk Kim –Vs- E.F Austin & 2 Others [2013] eKLR**

3. **Pancras T. Swal –Vs- Kenya Breweries Ltd [2014] eKLR**

4. **Jonh Ndungu Thiongo –Vs- Michael Kariuki Mwangi & Another [2013] eKLR**

5. Naftali Ruthi Kinyua –Vs- Patrick Thuita Gachure & Another [2015] eKLR

RESPONDENTS SUBMISSIONS

The respondents through Mr. Githinji Advocate submitted that there is no lease that was extended by the 1st respondent in favour of the applicants. He submitted that both Fatuma Omar and Jackson Kinyua have sworn affidavits stating that they have seen for the first time the purported lease dated 17th January 2017 annexed to the supporting affidavit of the applicant. The Learned Counsel further submitted that it is inconceivable that the 1st respondent could enter into another lease allegedly on 17th January 2017 as at the time there was an existing lease with the applicants that was to lapse in October 2017. It was further submitted that the applicants have not established a prima facie case with a probability of success as set out in the celebrated case of **Giella –Vs- Cassman Brown Co. Ltd [1973] EA 358.** He also stated that the applicants have not shown that they will otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and finally that the balance of convenience does not tilt in favour of granting the injunction orders in favour of applicants. The learned Counsel relied on the following cases;

1. Giella –Vs- Cassman Brown Co. Ltd [1973] EA 358.

2. Mrao Ltd –Vs- First American Bank of Kenya Ltd & 2 others [2003] KLR 125

3. Rogan Kamper –Vs- Lord Grosvenor [1977] KLR 123

4. Public Procurement and Asset Disposal Act No. 33 of 2015.

DECISION

The application before me is seeking an order of injunction pending the hearing and determination of the main suit. This court has rendered itself severally on the principles governing the grant of such orders in the celebrated case of **Giella –Vs- Cassman Brown Co. Ltd [1973] EA at 358.**

The three principles for the grant of injunction orders are set out as follows;

(i) An application must show a prima facie case with a probability of success.

(ii) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and

(iii) If the court is in doubt, it may decide an application on the balance of convenience.

From the facts of the case, the applicants argue that they have a lease agreement existing between them and the respondents which should be protected by a court of equity dated 17th January 2017. The respondent has pocked holes on the purported lease agreement arguing that the same is not a lease but an agreement to lease which is not the same as a lease. On that ground, the respondents submitted that no proprietary right has been shown to exist in favour of the applicant over the suit property capable of being protected by a court of equity. The respondent also attacked the purported lease saying that the same is not registered and that no stamp duty has been paid as required under the law. In a rejoinder to those averments, the applicant contend that though they did not register the lease initially, they have since complied with the law and had the same registered and stamp duty duly paid.

I have considered all these arguments by the parties in their documents both in support and in opposition to this interlocutory application. I have also considered the submission by their counsels and the applicable law. The applicants have attached an initial lease agreement for a term of five (5) years dated 1st day of October 2012. Clause 3 of that lease agreement reads as follows;

"3. The lease period has been agreed for a period of 5 years, with the effect from October 2012 up to October 2017. Renewable on terms and conditions as shall be agreed then by the landlord and the tenant."

My plain reading of that portion of the initial lease agreement is that the lease was to be renewed in October, 2017. The purported lease entered between the applicants and the respondents dated 17th January 2017 is not a lease properly but an agreement to lease as indicated in the covering of the purported lease agreement. I agree with submissions by counsel for the respondent Mr. Githinji that it was inconceivable for the parties to enter into a lease agreement on 17th of January 2017 when there was a subsisting lease agreement which was to expire in October, 2017.

I therefore find and hold that there is no proper lease agreement entered between the parties herein on 17th January, 2017. Capable of being protected by a court of equity. A proper lease between parties creates a right which a court of equity is obligated to protect upon infringement. That was the decision in the case of Mrao Ltd –Vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 where the court held;

"…a prima facie case is far 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….."

In the case of Rogan Kamper –Vs- Lord Grosvenor (No. 2) [1977) KLR at page 123, the court held thus;

> **" The court recognised that an agreement for a lease is not a lease and therefore cannot be a basis for suit for specific performance and cannot itself be regarded as a lease. It was further the court's view that a contract for a lease is different from a lease and each has a different incidents attaching to it, and one cannot be substituted for the other. According to the court, in terms of Section 107 of the Transfer of Property Act as well as Section 40 of the Registration of Titles Act, a varied lease of the subject premises for over one year can only be made by a registered instrument. Therefore, as no lease for five years and one month was created, no stipulations as to termination could be implied and therefore the rights of the parties were governed by the relationship which was created between them by possession of the suit premises and acceptance of rent, which is a monthly tenancy and as the parties agreed that the premises were a "shop" within the meaning of the landlord and tenant(shops, hotel and catering establishment) Act the procedure prescribed by that Act for terminating the tenancy had to be complied with."**

The other triable issue is clause three (3) of the lease agreement dated 1st October, 2012 where the parties agreed to renew the lease on terms to be agreed upon. The 1st defendant is the County Government of Garissa which is a public entity. Being a public entity, the 1st defendant is subject to the public Procurement and Assets Disposal Act 2015.

The actions by the former Municipal Council of Garissa to purport to renew the lease with the plaintiff/applicant after five (5) years is tantamount to direct procurement which is contrary to Public Policy and an act calculated to avoid competition which is not only unlawful but a criminal offence punishable by imprisonment. I find the submission by Mr. Nyaga, Counsel for the applicant that the purported lease agreement dated 1st October 2012 created an automatic binding contract for renewal of the lease not serious submissions. A public entity such as the 1st defendant which is subject to the Public Procurement and Asset Disposal Act No. 33 of 2015 cannot make an agreement to opt out of a statutory obligation which is mandated by law. The purported clause for renewal of the lease does not only offend the public Procurement and Asset Disposal Act of 2015 but the same also offends National values and Principles of governance under Article 10 of our Constitution.

For all the reasons I have given herein, I find that the applicants have not established a prima facie case with probability of success. The applicants have not also demonstrated that they will suffer injury for which damages will not be an adequate remedy. Deciding this case on the third principle, I find that the scales of justice tilt in declining the application which I hereby do. In the upshot, the application dated 1st February 2018 be and is hereby dismissed with costs to be in the cause.

Read, Delivered and Signed in the open court this 27th day of June 2018.

Hon. Justice E. C. Cherono

ELC JUDGE

In the presence of:

1. Mr. Nyaga for applicant

2. Mr. Faruq holding brief Githinji for respondent

3. Court clerk: Ijabo