



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 178 OF 2017

PARAGON ELECTRONICS LTD.....1ST PLAINTIFF

REMAX PROPERTY MANAGEMENT LTD.....2ND PLAINTIFF

=VERSUS=

YUSUF SHARAFALLY ESUFALI.....1ST DEFENDANT

AMAMA YUSUF SHARAFALI ESUFALI.....2ND DEFENDANT

RULING

1. Paragon Electronics Limited is the registered proprietor of Land Reference Number 330/355. On the said parcel of land are erected four (4) blocks of apartments known as Remax Terrace Apartments (the **premises**). Remax Property Management Limited is a management company incorporated to manage the premises.

2. Pursuant to a lease dated 30/11/2015 and registered in the Government Lands Registry on 11/3/2016 under Presentation No 1448 Volume N 119 Folio 87 File 31674, Yusuf Sharafally Esufali and Amama Yusuf Sharafali Esufali (the **defendants**) are joint owners as lessees of Apartment Number 12 located on the 5th Floor of Block B1 within the premises. Under Clause 1.1.5 as read together with Paragraph 10 of the Tenth Schedule of the said Lease, the defendants by virtue of owning the said Apartment are entitled to two (2) parking slots.

3. On 17/3/2017, the plaintiffs brought this suit contending that the defendants were occupying four parking slots instead of the two (2) which they were entitled to. They, among other prayers, sought a permanent injunction restraining the defendants against the said encroachment. Together with the plaint, they brought a notice of motion dated 22/2/2017 seeking an interim restraining order against the defendants. That notice of motion is the subject of this ruling.

4. The application is supported by an affidavit sworn by Bulent Gulbahar on 22/2/2017 in which he deposes that under the relevant car park licence issued to the defendants consequent to the lease, the defendants were entitled to park only 2 motor vehicles in the premises. He has exhibited a copy of the licence. He contends that in breach of the said licence, the defendants are parking four cars in the premises. This has prompted the plaintiffs to terminate the car parking licence.

5. The defendants oppose the application through their respective replying affidavit both sworn on 12/4/2017. Their case is that the car parking licence is supplemental to the lease and they both ought to be read in relation to each other. They add that under the lease, any dispute is supposed to be resolved through arbitration. They contend that this court lacks jurisdiction to deal with the present dispute. The defendants add that the photographs exhibited were taken when the cars had been parked in the premises on intermittent dates and further that the parking slots are not demarcated. They insist that they only park two cars in the premises.

6. The defendants further depose that they had authority from one Fardouse Adam of Apartment Number 1 Block B1 permitting them to occupy one of his parking slots. They add that they similarly had authority from one Cecilia Bjerborn of Apartment No B2 permitting them to utilize her parking.

7. I have considered the application together with the replying affidavits and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudential principles. Two key questions fall for determination in this application. The first question is whether this court is divested of jurisdiction to handle the present dispute. The second question is whether the plaintiffs have satisfied the criteria for grant of an interim injunctive order.

8. I must however caution myself that at this stage, the court is not required to delve deep into the merits of the parties' respective cases. What is required of the court is to examine the materials placed before it with a view to determining whether a prima facie case is established and whether the criteria in **Giella v Cassman Brown (1973) EA 358** is satisfied.

9. In opposing the application, the defendants contended that the sale agreement between the parties herein contain an arbitration agreement

and that this court lacks jurisdiction to handle this dispute. Firstly, the present dispute relates to the lease and the car parking licence issued consequent to the lease. It does not relate to the sale agreement. Reliance on the sale agreement to question the jurisdiction of this court is therefore misplaced. Secondly, on 12/4/2017, the defendants filed a memorandum of appearance in this suit. Subsequently, on 30/5/2017, they filed a joint statement of defence. They did not bring a motion to stay the present proceedings and refer the dispute to arbitration. The tenor and import of the filing of defence and the default to move the court to refer this dispute to arbitration is that the defendants lost the opportunity to seek stay and referral under Section 6 of the Arbitration Act. That opportunity was lost on close of day on 12/4/2017, the day they filed their memorandum of appearance. Consequently, my finding on the question of jurisdiction is that this court has jurisdiction and is properly seized of the dispute herein.

10. The second question is whether the plaintiffs have satisfied the criteria for grant of an interim injunctive order. There is common ground that the plaintiffs are the proprietor and manager respectively of the suit premises. There is also common ground that under the lease, the defendants are entitled to a parking licence for two parking bays. The defendants contend that the four vehicles exhibited were parked in the premises intermittently. They further contend that they had authority from other owners of apartments to occupy their respective parking slots. Those other people have not sworn affidavits to state which parking bays they assigned to the defendants and when.

11. Secondly, the role of the management company in the scheme of things at Remax Terrace Apartments cannot be gainsaid. It is the entity that is mandated to ensure there is order in the premises. For this reason, any authorization by one apartment owner to another apartment owner sanctioning the other to utilize one's parking slot must be granted with the concurrence of the management company. To disregard the need to seek concurrence from the management company would lead to disorder.

12. For the above reasons, I am persuaded that there is a *prima facie* case that the defendants may be infringing on the rights of the lessor, the management company and other property owners in Remax Terrace Apartments. Secondly, if the defendant and indeed the rest of the apartment owners are allowed to engage in that kind of breach, there will be unlawfulness and disorder in the premises and the anticipated disorder may not be indemnifiable through damages.

13. I have however carefully scrutinized the wording of the injunctive order sought by the plaintiff and weighed it against the doctrine of proportionately. The defendants own one apartment. By dint of that, they are entitled to two parking slots. They are alleged to have breached the terms of the car parking licence leading to a termination of the licence. They have contended that the licence is an integral part of the lease. If I were to grant the order sought by the plaintiffs in the manner they have framed the prayer, the defendants will be precluded from occupying the two parking slots they are entitled to. In my view, that will be unproportional. Consequently, I will rephrase the interim order to limit the defendants to only two (2) parking slots.

14. The upshot of the foregoing is that, the Notice of Motion dated 22/2/2017 succeeds and the following Orders are issued against the defendants

a) Pending the hearing and determination of this suit, the defendants are restrained against parking more than or allowing the parking of more than two cars in the suit premises, LR No. 330/355 Nairobi.

b) The defendants shall bear costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF SEPTEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Chepkoech holding brief for Mr Kimathi Advocate for the plaintiff

Mr Mugando holding brief for Mr Nganga Advocate for the defendants

Ms June Nafula - Court Clerk