



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO.23 OF 2018**

**NGUMBAU INVESTMENTS LTD *t/a***

**COURTYARD HOTEL.....PLAINTIFF/APPLICANT**

**VERSUS**

**KITELE INVESTMENTS LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ADMINISTRATORS OF THE ESTATE OF**

**THE LATE LABAN MAINGI KITELE....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**AND**

**KINDEST AUCTIONEERS.....INTERESTED PARTY**

**RULING**

1. In the Application dated 5<sup>th</sup> February, 2018, the Plaintiff is seeking for the following orders:

***a. That thereafter, pending a determination of this suit, the Respondents and their agents, employees, servants and/or otherwise assigns and/or whosoever and the Interested Party be restrained from attaching and/or advertising for sale and/or offering for sale and/or taking possession and/or auctioning and/or transferring and/or leasing and/or charging and/or interfering in any way with the properties and equipment of the Plaintiff as contained at Courtyard Hotel which is part of all that land situated in Machakos Town being land reference number Machakos Town/Block II/89.***

***b. That this Honourable Court do declare that the Proclamation Notice dated 23<sup>rd</sup> January, 2018 issued by the Interested Party is illegal, irregular and unlawful and the same be set aside.***

***c. Any other relief that this Honourable Court deems fit to grant.***

***d. That costs be in the cause.***

2. According to the Affidavit of the Plaintiff's Managing Director, the Plaintiff and the late Laban Maingi Kitele agreed to Lease part of land known as Machakos Town/Block 11/89 to the 1<sup>st</sup> Respondent; that a hotel known as "Courtyard Hotel" has been put up on the said land and that as part of the Agreement, the deceased was also supposed to Lease to the Plaintiff a separate property on which a hotel known as Garden Hotel has been erected.

3. It is the Plaintiff's case that on the basis of the above, a Lease was entered into for a term of six (6) years from 1<sup>st</sup> January, 2014; that it was agreed that the Plaintiff would renovate the suit premises and that the costs of the renovation was to be recovered once the Garden Hotel is Leased to the Plaintiff. According to the Plaintiff, the cost of renovating the suit premises was Kshs. 5,400,000 and that due to the dilapidated state of the suit premises, there was loss of revenue which was assessed at Kshs. 4,106,250 per annum.

4. The Plaintiff's Director deponed that when the tenant of Garden Hotel declined to give up the hotel, the Plaintiff and the late Kitele agreed to freeze the rent for the entire Lease term to Kshs. 300,000 and that later on, the Plaintiff undertook further renovations of the suit premises at a cost of Kshs. 3,600,000, which amount was to be paid by the deceased.

5. It is the deposition of the Plaintiff's Director that when the late Laban Maingi Kitele died, it was agreed that the Plaintiff would from October, 2015 recover the Kshs. 5,400,000 which the Plaintiff had used to renovate the suit premises; that the amount was to be recovered by offsetting Kshs. 150,000 from the rent payable; that the 2<sup>nd</sup> Respondent reneged on this agreement; that in the year 2017, the 2<sup>nd</sup> Respondent backdated the outstanding arrears by twenty (20) months and that the 2<sup>nd</sup> Respondent does not have the legal capacity to instruct the Interested Party to levy for distress for rent for an alleged debt of Kshs. 2,129,734.90 .
6. It is the Plaintiff's case that in any event, the demanded rent was Kshs. 1,590,000 and not Kshs. 2,129,734 as shown in the Proclamation and that the Proclamation of the Plaintiff's assets was not in accordance with the provisions of the Rent Distress Act.
7. In response, the administrator of the Estate of the late Kitele deponed that the agreeable rent for the suit premises was clearly tabulated at paragraph 3 of the Lease; that there has never been any amendment to the said Lease and that the allegation of any agreement to freeze the rent is unfounded.
8. According to the 2<sup>nd</sup> Defendant, the repayment of Kshs. 5,400,000 through rent deductions by the Lessor ended in August, 2017 and that the Plaintiff has not paid any rent since December, 2017.
9. The Plaintiff's advocate submitted that the Replying Affidavit does not have annexures that are duly marked in accordance with Rule 9 of the Oaths and Statutory Declaration Rules; that there is no evidence that the Respondents are the legal administrators of the Estate of the deceased and that Dephine Musyoki has no legal authority to collect rent.
10. The Plaintiff's counsel finally submitted that the Respondents' advocate is demanding for rent on behalf of Kitele Investments Limited which is not mentioned in the purported Grant of Letters of Administration and that a court order is required before one can proceed and proclaim over a property.
11. The Defendants' advocate submitted that all the administrators of the Estate of the late Kitele gave Dephine Mueni Musyoki the authority to plead and act on their behalf; that the duty of the tenant is to pay the rent and that the Defendants followed the law in distressing for rent.
12. The Defendants' counsel submitted that the non-compliance with the provisions of Order 5 of the Oaths and Statutory Act is attributed to the haste in preparation of the Affidavit; that the court should invoke the provisions of Order 19 Rule 7 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159(2) of the Constitution in saving those annexures.
13. It is not in dispute that on 13<sup>th</sup> September, 2013, the late Laban Maingi Kitele entered into a Lease Agreement with the Plaintiff in respect of a portion of land known as Machakos Town/Block II/89. According to the Lease, the monthly payable rent was Kshs. 300,000 which was to graduate to Kshs. 350,000 on the 2<sup>nd</sup> year, Kshs. 385,000 in the 3<sup>rd</sup> year and 4<sup>th</sup> year, Kshs. 423,500 in the 5<sup>th</sup> and 6<sup>th</sup> year. The Lease was to run for a period of six (6) years.
14. According to the Plaintiff's director, it was agreed that the Kshs. 5,400,000 which he had used to renovate the suit land should be deducted from the monthly rent at the rate of Kshs. 150,000, and that he further agreed with the deceased that the monthly rent should be frozen at Kshs. 300,000.
15. While paying the reduced rent of Kshs. 150,000, the Plaintiff's Director deponed that it received a Proclamation of distraint of its movable property from the Interested Party claiming for a sum of Kshs. 2,129,734.90 being rent arrears. This, according to the Plaintiff, is contrary to what the Plaintiff had agreed with the late Laban Kitele and that the Defendants' demand letter of 8<sup>th</sup> January, 2017, Kshs. 1,590,000 was demanded as rent arrears and not Kshs. 2,129,734.90.
16. The first issue that I should determine is whether the annexures annexed on the Defendants' Replying Affidavit are admissible in evidence considering that they are not commissioned.
17. The Defendants' advocate has admitted in his submissions that the annexures on the Replying Affidavit offends the provisions of the Oaths and Statutory Declarations Act and the Rules; that the said oversight was due to the filing of the Affidavit in a hurry and that the court should ignore the oversight and consider the documents as duly filed.
18. Rule 9 of the Oaths and Statutory Declarations Rules provides as follows:

***“All exhibits to Affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification.”***
19. The above provision of the law is in mandatory terms. Indeed, where an annexure to an Affidavit is not marked as required by the law, the same ceases to be a document capable of being recognized by the court. The failure to comply with the provision of the law which is in mandatory terms cannot be said to be an undue procedural technicality contemplated by the provision of Article 159(2) of the Constitution. Consequently, the uncommissioned annexures on the Defendants' Replying Affidavit are hereby expunged from the record.
20. It is not in dispute that the Lessor, the late Laban Maingi Kitele died on 22<sup>nd</sup> August, 2015. Considering that the Lessor is deceased, it follows that it is only the administrators of the Estate of the late Kitele who can lawfully instruct the Interested Party to levy distress in respect of the rent arrears. As was held in the case of ***Re Estate of Ndiba Thanda (deceased) eKLR***, it is fallacious for a spouse or child to imagine that they cannot be guilty of intermeddling when they handle property belonging to their dead spouse or parent without a grant of representation. Intermeddling can be committed by any person so long as the handler has no grant of representation.

21. All the correspondence annexed on the Plaintiff's Supporting Affidavit shows that it is Dephine Musyoki who was acting "*for administrators of the Estate of late Hon. Laban Maingi Kitele.*" The Proclamation of distraint that was issued by the Interested Party does not show if indeed the instructions to the said auctioneers were issued by the administrators of the Estate of the late Kitele.

22. Consequently, in the absence of evidence to show that the Proclamation of the Plaintiff's movables was done on the instructions of the Lessor's legal representatives as required under the Law of Succession Act, I find that the Plaintiff has a prima facie case with chances of success viz-a-viz the Defendants' legal standing in this matter.

23. In any event, the Defendants have not come out clearly on the outstanding rent arrears. In their advocate's letter of 8<sup>th</sup> January, 2017, it was indicated that the rent arrears was Kshs. 1,590,000. However, in the Proclamation of Distrait of Movable Property by the Interested Party dated 23<sup>rd</sup> January, 2018, the rent arrears is shown as Kshs. 2,129,734.90. This discrepancy can only lead to one conclusion: the Defendants are not sure of the payable rent. The actually payable rent and the rent arrears, if at all, can therefore only be ascertained after trial.

24. For those reasons, I allow the Application dated 5<sup>th</sup> February, 2018 as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12<sup>TH</sup> DAY OF OCTOBER, 2018.**

**O.A. ANGOTE**

**JUDGE**