REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 218 OF 2017

ALI ELMI ABDI.....PLAINTIFF

VERSUS

NAIROBI COUNTY GOVERNMENT.....DEFENDANT

RULING

What is before me for determination is a Notice of Motion application dated 29th March, 2017 in which the plaintiff/ applicant has sought a temporary injunction restraining the defendant/respondent either by itself or through its agents, employees, contractors, agents or its concessionaires from evicting the applicant from a parcel of land occupied by the applicant off Muratina Street near Burhan Estate (hereinafter referred to only as "the suit property") pending the hearing and determination of this suit**.**

The application is supported by an affidavit sworn by the applicant on 27th March, 2017. The applicant has contended that the respondent granted him a temporary occupation license (hereinafter referred to only as "license") over the suit property for purposes of operating a car wash business in respect of which he holds a valid permit issued by the respondent. He has averred that it was a term of the license that either party could terminate the same upon giving the other one (1) month notice. The applicant has averred that in breach of the terms of the license, the respondent served him with 7 days notice on 24th March, 2017 to vacate the suit property. The applicant has averred that the notice that was given to him by the respondent is contrary to the terms of the license. The applicant has averred that if the orders sought are not granted, his investments on the suit property would be put in jeopardy.

The application is opposed by the respondent through grounds of opposition dated 18th April, 2017. The respondent has averred that it is the registered owner of the suit property and that a license does not confer upon the applicant proprietary rights over the suit property. The respondent has contended further that the applicant can be adequately compensated in damages for the notice period that was not given to him by the respondent. The respondent has averred that the applicant has not put forward valid grounds to warrant the issuance of a temporary injunction.

The application was argued on 7th March, 2018 when Ms. Rao appeared for the applicant while Ms. Savini appeared by the respondent. Ms. Rao submitted that the applicant was carrying out legitimate business on the suit property and had complied with all the conditions of the license that was granted to him by the respondent. She submitted that the 7 days notice that was given to the applicant by the respondent had undermined the applicant's legitimate expectation. Ms. Rao submitted that if the respondent's eviction threat against the applicant was carried out, the applicant would be denied an opportunity to earn a living. Ms. Rao submitted that the applicant had satisfied the conditions for granting a temporary injunction. In conclusion, she submitted that the respondent could not be allowed to unlawfully evict the applicant from the suit property because it could pay damages.

Ms. Savini relied on the respondent's grounds of opposition in opposing the application. She submitted that the applicant had not established a prima facie case against the respondent. Ms. Savini submitted that clause 5 of the license gave the respondent a right to repossess the suit property if the use for which it was put was no longer acceptable to the respondent. She submitted that the respondent was entitled to terminate the license and demand possession of the suit property from the applicant. Ms. Savini reiterated that damages would be an adequate remedy to the applicant. She submitted that even if the application was considered on a balance of convenience, the same would tilt in favour of the respondent.

I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the respondent's grounds of opposition filed in reply to the application. Finally, I have considered the submissions which were made before me by the parties' respective advocates. The applicant has sought a temporary injunction pending the hearing of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in the case of Giella *v* Cassman Brown & Co. Ltd [1973] EA 358**,** an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further in that case that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In the case of Nguruman Limited *v* 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 *v* 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 bona fide 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."**

I am satisfied from the material before me that the applicant has established a prima facie case with a probability of success against the respondent. It is not in dispute that the respondent gave the applicant a license to occupy the suit property for the purposes of his car wash business. The license was in writing and had terms and conditions binding on both parties. It is not disputed that the license could only be terminated by either party giving one (1) month notice. It is not in dispute that the respondent gave the applicant a notice of 7 days to vacate the suit property. The notice was given on the grounds that the services rendered by the applicant were no longer required by the respondent and that the applicant's presence on the suit property and/or that of his structures were not desirable.

Under clause 5 of the licence that was relied on by the respondent's advocate in her submissions, the respondent could only terminate the license without notice or with notice less than the prescribed notice period of one (1) month if the suit premises were required by the respondent for a particular purpose or where the user for which the applicant had put the premises was no longer acceptable to the respondent for any reason. I am not persuaded that the reasons that have been given in the notice that was served upon the applicant entitled the respondent to terminate the applicant's licence immediately or without giving the applicant one (1) month notice provided for in the license. There is no indication in the notice that was served upon the applicant that the respondent required the suit premises for its own use or that the car wash business the applicant is carrying out on the suit property was no longer acceptable to the respondent. I am satisfied that the applicant has established a prima facie case of breach of the license by the respondent.

I am also satisfied that the applicant will suffer irreparable harm which cannot be compensated in damages if the orders sought are not granted. The applicant is running a business on the suit property which is licensed by the respondent. The applicant had legitimate expectation that in case he would be required to close down his business, he would be given one (1) month notice. The 7 days notice that was been served upon him will no doubt disrupt his business and jeopardize his investment. The loss he is likely to suffer may be difficult to quantify for compensation. Even if the loss that the applicant is likely to suffer was quantifiable and could be compensated in damages, I would still have granted the injunction sought. In the case of Waithaka *v* Industrial and Commercial Development Corporation [2001] eKLR Ringera J. stated as follows:

> **"I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy. By using the word "normally" the Court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not injuncted. I think some of the considerations to be borne in mind is the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high-handed or oppressive in its dealings with the applicant this may move a Court of equity to say: "money is not everything at all times and in all circumstances and don't you think you can violate another citizen's rights only at the pain of damages."**

I am entirely in agreement with that statement. In the circumstances of this case, I am of the view that it would not be just to allow the respondent to breach the license agreement between it and the applicant because he can pay damages. For the foregoing reasons, it is my finding that the applicant has satisfied the conditions for granting a temporary injunction. The applicant's Notice of Motion application dated 29th March, 2017 is allowed in terms of prayer 3 thereof. The order shall however not stop the respondent from terminating the applicant's license upon giving him a valid notice of termination.

Delivered and Dated at Nairobi this 13th day of December 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Maina for the Plaintiff

Mr. Ajiki for the Defendant

Catherine-Court Assistant