



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MILIMANI**

**ELC CASE NO. 56 OF 2017**

**TUSKER MATTRESS LTD.....PLAINTIFF**

**=VERSUS=**

**BANK OF BARODA (KENYA) LTD.....1<sup>ST</sup> DEFENDANT**

**JUNCTION HOLDINGS LIMITED.....2<sup>ND</sup> DEFEDNANT**

**RULING**

**BACKGROUND**

1. This is a Ruling in respect of two separate applications both of which seek injunctive orders. The first application is dated 25<sup>th</sup> January 2017, and it is brought by the Plaintiff. It seeks a temporary injunction against the defendants. The second application is dated 7<sup>th</sup> February 2017 and is brought by the defendants. It seeks a mandatory injunction against the Plaintiff.

2. The first defendant is the registered owner of a property known as LR No.209/1419 situate a long Tom Mboya Street in Nairobi (suit premises). The Plaintiff had leased part of the suit premises on which it is operating a super market under the name of Tuskeys Beba Beba. The lease was for a period of 5 year and three months commencing on 1<sup>st</sup> November 2011 and expiring on 31<sup>st</sup> January 2017.

3. During the currency of the lease, the first defendant started the process of selling the suit premises to the second defendant who has made a deposit for the purchase of the suit premises. The Plaintiff was made aware of this new development and there were even attempts to negotiate on a licence which would have enabled the Plaintiff to remain on the suit premises for a period of one year for purposes of winding up its business on the suit premises.

**PLAINTIFF'S APPLICATION**

4. The Plaintiff moved to court and filed the present suit against the defendants. It contemporaneously filed an application seeking injunctive orders against the defendants restraining them from interfering with its quiet enjoyment of the suit premises or evicting it from the same. The Plaintiff contends that clause II of the lease provided for an automatic option for renewal. That on 24<sup>th</sup> October 2016, the first defendant's advocate wrote to the Plaintiff seeking it to communicate its intention to renew the lease by 31<sup>st</sup> October 2016. On 31<sup>st</sup> October 2016, the Plaintiff wrote to the first defendant's advocate signifying its desire to renew the lease.

5. On 9<sup>th</sup> January 2017, the Plaintiff's advocates and their representatives and those of the first defendant

held a meeting wherein the issues of the new terms of the lease were to be discussed. During this meeting, the first defendant's advocate intimated to the plaintiff's advocates that the suit premises had been sold to the second defendant.

6. The Plaintiff now contends that the defendants have reneged on their obligation to give the Plaintiff a new lease as stipulated under clause II of the lease. That instead, the defendants have proposed a draft licence for the Plaintiff to occupy the suit premises at a licence fee of **Kshs.7,500,000/=** per month. The Plaintiff further contends that it is ready and willing to pay a reasonable rent per month but not what is being proposed which amounts in terms as extortionist, exploitative, illegal and unlawful hence its approach to court for protection.

#### **DEFENDANTS' CONTENTION TO THE PLAINTIFF'S APPLICATION.**

7. The defendants have opposed the plaintiff's application through two replying affidavits. The first replying affidavit is by Patrick Sila the Finance Manager of the first defendant sworn on 30<sup>th</sup> January 2017. The second replying affidavit is by Paul Ngugi Mwaura a director of the second defendant sworn on 7<sup>th</sup> February 2017. The defendants contend that renewal of the lease was not automatic as the Plaintiff claims. That renewal of the lease was subject to the Plaintiff complying with all the conditions in the clauses thereon.

8. The Plaintiff was approached with the option of renewal based on new rent in terms of the provisions of the lease. Where there was no agreement on the new rent, the lease provided that the parties were to appoint a surveyor within 60 days to the expiry of the existing lease. The Plaintiff had the option to agree to the new rent or have a surveyor appointed. The plaintiff did not do any of this and there was no further communication from the plaintiff.

9. The Plaintiff had been in rent arrears and the first defendant had to levy distress. The defendants further contend that as at the time the plaintiff signified its intention to renew the lease, it was in arrears of rent. The lease provided that there was to be an option of renewal if the tenant had complied with all the terms of the lease. When it became apparent that the lease was not going to be renewed, a meeting was held where the plaintiff was asked to pay Ksh. 7,500,000/= being licence fees per month for a year to enable the plaintiff to wind up its business.

10. The amount of **Kshs.7,500,000/=** was arrived at based on monthly interest which the second defendant was to pay on a **Kshs.300,000,000/=** loan. It had taken to purchase the suit premises. The amount was not therefore fixed arbitrarily as claimed by Plaintiff.

#### **ANALYSIS**

11. I have carefully considered the Plaintiff's application as well as the opposition thereto by the defendants. This being an application for injunction which is given at the discretion of the court, an applicant must come to court and disclose all material facts. The applicant should not hide from the court any fact that may disentitle him to the equitable remedy of injunction. In other words an applicant must do equity to get equity.

12. An applicant must also meet the conditions set out in the celebrated case of **Giella Vs Cassman Brown & Co.Ltd ( 1973) EA 358**. The Plaintiff's main prayers are a permanent injunction and specific performance of the contract in this case the lease. A person can only be entitled to an order of specific performance if it is shown that he has done all that he was expected to do and that what is remaining is for the other to meet his part of the bargain.

13. In the instant case, it is clear from the affidavits by the defendant that contrary to the Plaintiff's assertions that it was ready and willing to do its part, it was actually in breach of terms of the lease. There were rent arrears which had to be paid after distress for rent was levied. As at the time the Plaintiff signified its intention to have the lease renewed, it was in rent arrears of over **Kshs.6000,000/=**.

14. A meeting was held where the Plaintiff was asked to stay on for one year at a licence fee of **Kshs.7,500,000/=** monthly. This amount was meant to carter for the interest on loan taken by the second defendant who had started the process of acquiring the suit premises. It is therefore not right for the plaintiff not to have disclosed that this was the case. The plaintiff had been offered a licence to remain on the suit premises for a year to enable it clear its business. It failed to agree to the sum asked for and this is what prompted it to move to court not that it was being asked to pay rent of Kshs.7,500,000/= per month as alleged. I therefore do not see what prima facie case the plaintiff would have against the defendants.

15. In **NBI HCCC No. 4522 of 1992 Ripples Ltd Vs Kamau Mucuha** it was held as follows:-

***“ It is trite law that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of the covenant by the other party as that will be inequitable”.***

16. The plaintiff in this case has been shown to be the party in breach of the lease and it cannot turn to the courts to get an injunction in the face of that breach. It is the conduct of the Plaintiff which disentitled it to the renewal of the lease and no injunction can be granted in its favour in the circumstances.

17. In the case of **West Country Cleaners ( Falmouth ) Ltd Vs Sally (1966) 3 ALL ER 210**, the Court of Appeal had this to say regarding a tenant who had failed to repaint a ceiling when the time to exercise the option to renew the lease came:-

***“ The tenant was not entitled to a renewal of the lease under the option because at the termination of the term , which on true construction of this option was the relevant date, the tenant was in breach of the covenant in that the ceiling had not been painted every three years and no painting had been done in the last year of the term; and the triviality of the breaches did not prevent them from rendering the option unenforceable”.***

18. The Plaintiff had been in breach of the lease by not paying rent as required. This rendered its option to renew the lease unenforceable. In any case, it had agreed to take part in negotiations to have one year to vacate the suit premise even though no agreement was reached and it cannot legally turn back and seek to enforce the renewal clause which had become unenforceable due to breaches.

## **CONCLUSION**

19. I find that the Plaintiffs application for injunction lacks merit. The same is hereby dismissed with costs to the defendants. I now turn to the second application by the defendants.

## **DEFEDANTS’ APPLICATION**

20. The defendants have made an application for a mandatory injunction seeking to compel the plaintiff to hand over vacant possession of the suit premises. I have stated the background of this case while dealing with the introduction herein above and during the laying out of the contention by the plaintiff and the defendants. I need not to go over the facts again. What is being sought at interlocutory stage is also what is being sought at the counter claim by the defendants except that there are prayers for general damages in the counter-claim.

The principles for grant of a mandatory injunction at interlocutory stage are well captured in **Halsbury’s Laws of England Volume 24, 4<sup>th</sup> Edition para 948** as follows:-

***“ A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances , it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied or if the Defendant attempts to steal a march on the plaintiff.... a mandatory injunction will be granted on an interlocutory application”.***

21. The above text from Halsbury's Law of England has been quoted with approval by the Kenyan Courts . Applying the above principles, I have now to decide whether the prayers sought ought to be granted at this stage. I have demonstrated hereinabove that the Plaintiff was clearly in breach of the covenants in the lease. The lease provided the manner in which the option to renew, the same was to be exercised. Though the Plaintiff made its intimation on the renewal it never followed through the process of renewal. For instance there were clauses on increase of rent which was to be agreed upon or determined by an independent surveyor to be appointed. The manner of appointment of the said surveyor was provided for. The plaintiff did not follow this process. Instead, it waited until the time of expiry of the lease was near to come to court for injunctive orders.

22. The defendants have demonstrated that there were attempts by the first defendant and the plaintiff to discuss a probable exit of the plaintiff from the suit premises. The discussions however could not go through due to non-acceptance of the rent to be paid by the plaintiff. The lease has since expired. The suit premises are in the process of changing hands and the plaintiff is aware of this. The second defendant has paid a deposit of **Kshs.100,000,000/=** to the first defendant. The second defendant is repaying the loan yet it is not enjoying the suit premises which it acquired with a view to renovating it and or rebuilding it.

23. The plaintiff had sublet the suit premises to a third party. This was without the consent of the first defendant. The Plaintiff is receiving rent from the third party yet on its part; it is not remitting any rent to the first defendant. The actions of the plaintiff amount to stealing a march on the defendant. The plaintiff is aware of its breaches yet it is determined to hang on.

24. In **Locabail International Finance Ltd Vs Agro-Export (1988) 1 ALL ER 90** the Court of Appeal laid down the principles for grant of a mandatory injunction as follows:-

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction.”***

25. I have carefully considered the principles set out in the Locabail case (supra) and the circumstances in the present case and find that a mandatory injunction can be granted at interlocutory stage. At the end of the day, the feeling which the court has now will be the same during the final hearing. This is a clear case where the plaintiff should give vacant possession. I therefore allow the defendant's Notice of Motion dated 7<sup>th</sup> February 2017, in terms of prayers (2) (3) and (4). As had already been ordered hereinabove, the defendants shall also have costs of the Plaintiffs' Notice of Motion dated 25<sup>th</sup> January 2017, which has been dismissed.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** this **19<sup>th</sup>** day of **April 2017**

**E.O .OBAGA**

**JUDGE**

In the presence of M/s Kilenge for Mr Kanchory for the plaintiff and Mr Gathaiya for the defendants.

Court Assistant : Hilda

**E.O .OBAGA**

**JUDGE**