



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.282 OF 2016**

**KLAUS HOTEL LIMITED .....PLAINTIFF**

**VERSUS**

**KEDONG RANCH LIMITED.....DEFENDANT**

**RULING**

***(Application for injunction; principles to be applied; plaintiff having leased out certain premises from the defendant; premises gutted by fire; lease providing that the obligation to insure and repair premises destroyed by fire is of the lessor; lease providing for reduction in rent for duration of the repairs; defendant claiming full rent; defendant claiming right of re-entry as plaintiff was in rent arrears; plaintiff entitled to reprieve for the duration after the fire; plaintiff ordered to pay full rent before the fire and prorated rent after the fire together with utilities to be assessed by the valuer and in default to vacate the premises)***

1. This suit was commenced by way of a plaint that was filed on 28 July 2016. The plaintiff has pleaded that on 22 September 2010, it entered into a lease agreement with the defendant over the land parcel Naivasha/Maraigushu Block 10/29 for a period of 15 years. It is pleaded that at the commencement of the lease, the plaintiff constructed two cottages to add to the two that were pre-existing. It is pleaded that the plaintiff also renovated the existing two cottages. On 8 November 2015, a fire broke out at the lodge, and the main building, called Longonot House, was destroyed. It is pleaded that it was a clause of the lease agreement that the defendant was to insure the building which was destroyed by fire and that she had a duty to reconstruct it. It is also pleaded that it was a clause of the agreement that the defendant was to suspend rent or part of the rent on the happening of an event such as a fire. The plaintiff now complains that the defendant has not suspended rent or part of it and has threatened the plaintiff with immediate eviction. It is also averred that the defendant has disconnected water and electricity and demands that the plaintiff pays full rent and gate collection fees even when the lodge is not operating. In this suit, the plaintiff wants the defendant permanently restrained from evicting the plaintiff or taking possession of the premises, general damages and interest.

2. Together with the suit, the plaintiff filed an application for injunction seeking to stop the defendant from taking possession of the suit premises until this case is heard and determined. It is that application which is the subject of this ruling. To the supporting affidavit, sworn by the plaintiff's director, one Margaret Hopf Schroder, the plaintiff has annexed the lease in issue. It is deposed that after the fire, there has been decline in business.

3. The defendant has opposed the application through the replying affidavit of Christine Chronchey. She has deposed that the suit land consists of 2,656.9 Hectares. The lease that they had with the plaintiff was

over a portion of 200 acres. It is in this portion where the lodge in issue, known as Longonot House, is situated. The initial rent was Kshs. 300,000/= per quarter which escalated annually. She has deposed that it is a clause in the lease that the plaintiff was to insure the premises and also pay monies for preparation of the lease. It is contended that the plaintiff failed to settle the legal fees for preparing the lease which prompted the advocate to sue the plaintiff. It is further averred that upon taking the premises, the plaintiff soon fell in breach and defaulted on rent. She has given an account of periods where the defendant demanded for rent arrears and where the plaintiff pleaded for accommodation or paid rent very late. She has deposed that in the year 2014, the plaintiff had insured the premises but did not secure an extension for the year 2015 and 2016.

4. On 9 November 2015 fire gutted down the main building which the defendant has attributed to the negligence of the plaintiff. On 26 November 2015, the plaintiff requested to meet the defendant as the defendant had written to it an email stating that it would terminate the lease following an inspection and an opinion by engineers that the building cannot be salvaged. She has deposed that as at May 2016, the plaintiff owed the sum of Kshs. 2, 299,487.84/= which they demanded. She has deposed that the plaintiff has failed to disclose its persistent non-payment of rent. She has stated that if the plaintiff did any additional construction, this was without the consent of the defendant and in breach of the lease agreement. She has pointed out that the increase or decline in business was not stipulated in the lease as a condition to payment of rent. She has denied that the lease has any provision for suspension of rent and it is her view that the lease ceased to exist following the fire incident. She has deposed that they held a meeting with the plaintiff's directors on 20 July 2016, where the plaintiff's directors stated that they are willing to surrender the lease on condition that the defendant would not pursue them for rent arrears but she could not make a decision on this. She has averred that the lease allows the defendant to reenter the premises on account of defaulted rent. She is of the view that the plaintiff does not deserve the orders sought.

5. The plaintiff filed a supplementary affidavit sworn again by Margaret Hopf Schroder. She has denied that it was the obligation of the plaintiff to insure the premises but its obligation was only to insure against third party risks. She has averred that in any event, the lease agreement made provision for the defendant to insure in case the plaintiff did not. She has stated that on 16 May 2016, they received a demand for Kshs. 2,229,487.84/= and has contended that the only amount that they were aware of were utility bills and gate fees which stood at Kshs. 1,900,000.50/= as at 30 November 2015 which she avers was acknowledged in a letter dated 24 February 2016 from the defendant. She has argued that it is incorrect for the defendant to combine rent arrears with disputed utility bills. She has denied that the fire occurred due to their negligence. She has stated that it was the duty of the defendant to reconstruct Longonot House and that the lease had no provision for termination in case of fire. She has also denied that the plaintiff constructed the two cottages without authority and has referred to an email by the defendant approving the request.

6. Both counsels made submissions which I have considered in my ruling.

7. The subject matter before me is an application for injunction. For one to succeed in such an application, one needs to demonstrate a prima facie case with a probability of success and also show that he stands to suffer irreparable loss. If in doubt, the court will decide the application on a balance of convenience. These principles were settled in the case of **Giella vs Cassman Brown (1973) EA 358**. I have no problem with these principles save to add that in facing an application for injunction, the court is actually being asked to determine how the subject matter of the suit should be preserved pending hearing of the suit. In my view, the court has wide discretion and can make such orders as it deems fit given the circumstances of the case.

8. In this case, the plaintiff wishes to have the defendant stopped from taking possession of the demised property until this case is heard and determined. There is no contention that the parties do have a lease agreement over a portion of 200 acres of the suit land. There is a lodge within this portion identified as Longonot House. I have discerned from a reading of the affidavits on record, that the defendant seems to charge some gate entry fees and also supplies the plaintiff with utilities for which the plaintiff is supposed to pay. The parties also seem to have had various disputes over what is payable as rent, gate fees and

utilities and they have held various meetings to reconcile accounts. It does appear that the relationship of the parties is much more complex than simply a tenancy for a lodge.

9. Be as it may, I have gone through the lease. It is for a term of 15 years. What is leased is Longonot House and approximately 200 acres. The property in issue serves as a safari lodge with an accommodation of about 60 guests. The initial rent payable was Kshs. 1,200,000/= per year payable quarterly in advance. This was to increase gradually over time. Apart from the rent, the lease also provides that the lessee will pay a bed night fee at the rate of USD 20 per person per night revisable after the first five years. The lessee is also to indemnify the lessor against all charges for water, electricity, telephone and other services consumed in relation to the premises.

10. There is no question that the demised property was gutted by fire. The plaintiff has argued that it was the obligation of the lessor to insure the premises and has pointed me to clause 2 (c) of the agreement which is drawn as follows :-

*2. The lessor hereby covenants with the lessee, to the intent that the covenants shall be observed by the lessor throughout the subsistence of this lease, as follows :-*

*(a)...*

*(b)...*

*(c) to insure and keep insured Longonot House from loss or damage by fire storm tempest and such other risks as the lessor may deem expedient in some insurance office or with underwriters of repute to the full insurable value thereof and to pay all premiums necessary for that purpose and to rebuild or reinstate Longonot House and other buildings including the means of access thereto so far as the same may be damaged or destroyed and to apply all monies received by virtue of such insurance in making good the loss or damage in respect of which the same shall have been received but without prejudice to the liability of the lessee to pay or contribute towards the cost of such making good in the event of the insurance money being wholly or partially irrecoverable by reason of any act or default of the lessee or the servants licencees or invitees of the lessee.*

11. It does appear, prima facie, that the plaintiff is correct in arguing that the obligation to insure was that of the defendant. I have seen accompanying clauses which seem to support this position including clause 3 (b) which is drawn as follows :-

*3(b) If at any time the premises or any part thereof or the means of access thereto or the landlord's fixtures and fastenings therein shall be damaged or destroyed by fire or other risk against which the lessor shall have insured so as to render them unfit for occupation or use the lessor shall (unless the insurance moneys shall be wholly or partially irrecoverable by reason solely or in part of any act default or omission of the lessee) until such time as the same shall again be rendered fit for occupation and use allow to the lessee a total or proportionate abatement of the rent hereby reserved as the case may be provided that the lessor shall in no circumstances be liable for any damage or loss suffered by the lessee by reason of such loss of occupation and use of the premises and provided also that the lessee shall not have any such right of determination of the term hereby created as is contemplated by Section 108(e) of the Indian Transfer of Property Act 1882.*

12. It seems from the above, as argued by the plaintiff, that where the property is destroyed by fire, there is supposed to be a total or proportionate abatement of the rent reserved, but the lessor will not be liable to pay damages for any loss that may be suffered by the lessee.

13. There is also a clause 1(hh) which makes further provision in case of fire. The same is drawn as follows :-

*1.(hh) In the event of Longonot House or any part or parts thereof including any fixtures, fitting,*

*electrical installations and equipment being damaged or destroyed by fire or any other risk against which the lessor shall have insured at any time during the said term and the insurance money under any insurance against fire or such risks as aforesaid effected thereon being wholly or partially irrecoverable by reason solely or in part of any act or default of the lessee or of any servant licensee or invitee of the lessee then and in every such case forthwith (in addition to the said rent) to indemnify and pay to the lessor the whole or (as the case may require) a fair proportion of the cost of completely re-building and re-instating the same any dispute as to the proportion to be so contributed by the lessee or otherwise in respect of or arising out of this provision to be referred to arbitration in accordance with the provisions of the Arbitration Act or any Act or Acts amending or replacing the same.*

14. To me this clause covers a situation where the lessor (defendant) has insured the premises, but the insurance company declines to pay owing to a fault of the lessee. In such an instance, the lessee is to indemnify the lessor.

15. In our situation, there is no evidence that the lessor (defendant) ever took out an insurance policy to insure the premises against fire as it was obliged to do. The premises was thereafter gutted by fire. I think the plaintiff has shown prima facie that the obligation to repair and make good the premises in such an instance is that of the lessor. Under Clause 3 (b) there is supposed to be a proportionate abatement of rent. This, I believe should subsist until the premises is restored.

16. The main thrust of the defendant's argument is that the plaintiff has perennially been defaulting in rent payments. It is contended that the defendant therefore has a right to re-enter the premises. I do not think that there can be any argument that the plaintiff's payments of rent were erratic and irregular. There are many emails and correspondences showing this. It is clear to me that at the time the premises burnt down, the plaintiff was in rent arrears.

17. Clause 3 (a) of the lease agreement has a provision for re-entry and termination of the lease. It provides as follows:-

*If the rent hereby reserved or any part thereof shall at any time be unpaid for fourteen days after becoming payable (whether lawfully demanded or not) or if any of the covenants on the part of the lessee herein contained shall not be performed and observed then and in any of the said cases it shall be lawful for the lessor to re-enter upon the premises or any part thereof in the name of the whole and thereupon this lease shall determine absolutely but without prejudice to the right of action of the lessor in respect of any antecedent breach of any of the covenants on the part of the lessee herein contained.*

18. However, in as much as the plaintiff defaulted in rent, the defendant continued to accommodate the plaintiff. They actually never gave notice of termination of the lease or a notice to reenter the premises save for the letter dated 16 May 2016 which demanded rent of Kshs. 2, 299,487.84/= and in default the plaintiff to vacate the premises. I think it is this which prompted this suit. There was certainly rent owing, but I do not think that the defendant was entitled to ask for full rent without first agreeing to a proportionate reduction since the premises had been gutted by fire.

19. Well, I have to make a decision on how the premises ought to be maintained considering all the above. I think if the plaintiff wants to continue being in the premises, it must first pay all monies due as at November 2015 before the fire. The plaintiff has a point that the defendant needed to repair the premises after the fire, and if not, give the plaintiff a proportionate reduction of the rent. I do not know the extent to which the premises was destroyed. I will need an assessment of a valuer to find out the extent of the damage and the proportion to which the premises can be utilized. I will of course ask the plaintiff to continue paying the rent in proportion to what it can use of the premises, if it wishes to continue being in possession, pending hearing of the suit. Utility bills and other charges must of course be paid; for this, there can be no argument. I am of the view that if the defendant is paid the above monies then it suffers no prejudice until this case, if at all there will be anything left of it, is determined. To actuate this, I do order the Government Valuer, in charge of Naivasha, to proceed to the premises and make a report on the

usability of the premises and to specifically note the percentage usable having in mind that part of the premises was gutted by fire. The costs of the valuation shall be shouldered equally by both parties.

20. Following the above, I make the following orders :-

(i) *That for the plaintiff to continue being in use of the suit premises pending hearing and determination of the suit it must :-*

(a) *Pay all rent arrears in full as at November 2015 before the fire.*

(b) *Pay all utility bills including water and power upto date.*

(c) *Pay the percentage of rent as from November 2015 to date in the proportion that is declared usable by the Government valuer.*

(ii) *The rent arrears in (i) (a) above and the utility bills in (i) (b) above must be paid within 30 days of today. If these are not paid, then the plaintiff must vacate the premises and give vacant possession to the defendant and will have to stay away until this case is heard and determined.*

(iii) *The amount due to date as portion of rent, that is from November 2015, as may be determined by the valuer, to be paid within 30 days of such determination, and if the same is not paid, the plaintiff must vacate the premises and give vacant possession to the defendant.*

(iv) *If the plaintiff complies with the above, it must continue paying rent in the same proportion as may be determined by the valuer until this suit is finalized and if there is default which continues beyond 14 days of when the monies are due, then the defendant after giving notice may re-enter the premises and terminate the lease.*

21. The costs of this application shall be costs in the cause.

22. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 17<sup>th</sup> day of May 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of:**

Mr. Kawamara for the plaintiff/applicant.

No appearance on the part of M/s J.K Kibicho & Co. Advocates for the defendant/respondent

Court Assistant: Nelima.

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**