



Restore and Renew Wellness Group Limited v Tradeline Express Company Limited & another (Environment & Land Case E129 of 2023) [2024] KEELC 75 (KLR) (15 January 2024) (Ruling)

Neutral citation: [2024] KEELC 75 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E129 OF 2023
EK WABWOTO, J
JANUARY 15, 2024**

BETWEEN

RESTORE AND RENEW WELLNESS GROUP LIMITED PLAINTIFF

AND

TRADELIN EXPRESS COMPANY LIMITED 1ST DEFENDANT

PYRAMID AUCTIONEERS 2ND DEFENDANT

RULING

1. This Ruling is in respect to the Plaintiff’s application dated 24th October 2023 and the Defendant’s preliminary objection dated 9th November 2023. In the application dated 24th October 2023, the Plaintiff sought the following reliefs;
 - 1) Spent...
 - 2) That pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to grant an order of temporary injunction restraining the 1st and 2nd Respondents by themselves or through their agents, servants or assigns, from further levying distress for rent and from selling or from interfering with the Applicant’s attached movable goods which are the subject of a proclamation dated 9th September, 2023.
 - 3) That pending the hearing and determination of this Application inter parties, this Honourable court be pleased to grant a temporary injunctive order staying any further accrual of the rent arrears as the Applicant’s movable goods which are its tools of trade have been attached and it is no longer in operation.
 - 4) That pending the hearing and determination of this application and suit this Honourable Court be pleased to issue an order of injunction permitting the Applicant to enter the leased premises and remove any movable properties in exercise of its right to vacate the premises.



- 5) That pending the hearing and determination of this Application and suit, this Honourable Court be pleased to grant a stay of the proclamation notice dated 9th September, 2023.
 - 6) That pending the hearing and determination of this Application and suit, this Honourable Court be pleased to grant an order that the proclaimed and attached movable goods be valued by an independent valuer.
 - 7) That costs of this application be provided for.
2. The application was premised on the grounds that the Applicant and Respondent executed a tenancy agreement for term of five (5) years and one(1) month for a commercial house on L.R. NO. 195/199 Rhino Park Road, Nairobi. It was averred that since the legally authorized use of the suit premises was for residential purposes and the Applicant wanted to use the premises for commercial use, Clause 2(X) of the tenancy agreement specifically provided that the Respondent should immediately apply and procure from the relevant authorities an extension of user for commercial purposes for the entire lease period and that based on the above understanding, the Applicant executed the tenancy agreement and took possession of the suit premises and as agreed proceeded to make payment for the deposit and rent payment of the months of November, 2022 and December, 2022.
 3. The Applicant averred that the 1st Respondent in breach of the tenancy agreement failed to immediately make the requisite application for the procurement of an extension of user for commercial purposes of the suit premises and that this necessitated the Applicant to inform the 1st Respondent that due to the lack of the requisite change of user approval it could not obtain approvals/permits and business permits at the County level and as such it could not start its business operations and was incurring significant loss of business.
 4. It was contended that some of the licenses that the Applicant was not able to apply because of the lack of change of user include but are not limited to:
 - a) County business registration certificate
 - b) County fire inspection reports;
 - c) County fire certificate;
 - d) County Public health inspection report;
 - e) County public health certificate
 - f) NEMA public report and certifications;
KMPDC license.
 5. It was further contended that during the contested period the Applicant lost a number of profitable business partnerships with insurance companies and corporate companies as they all needed a proof of proper applied and approved licenses from the relevant authorities and that the Applicant vide its letters dated 17th January, 2023 and 13th July, 2023 informed the 1st Respondent that it was not in a position to pay rent as it did not have any income generating activities as it was yet to commence its business.
 6. It was averred that the 1st Respondent only provided the Applicant with the change of user for commercial use of the suit premises on or about 6th July, 2023 and immediately started demanding for rent arrears for the months of January 2023, February, 2023, March 2023, April 2023, May 2023, June



- 2023, and July 2023 and that during the said month the Applicant was not in business and operation due to the 1st Respondent's failure to procure an extension of user for commercial use of the premises.
7. It was also averred that the 1st Respondent proceeded to instruct the 2nd Respondent to proclaim at the Applicant's movable goods of trade claiming for the payment of purported rent arrears amounting to Kshs. 3,400,000/=.
 8. The Applicant also averred that on 23rd October, 2023 the 2nd Respondent acting under the instructions of the 1st Respondent attached the Applicant's movable goods, assets and tools of trade.
 9. It was further averred that the Proclamation dated 9th September, 2023 is illegal and irregular as it fails to comply with the mandatory provisions of Rule 12 of the Auctioneers Rules, 1997 requiring a Proclamation of movable goods to indicate the value of specific items and the condition of each item proclaimed. It was argued that the impugned Proclamation notice does not contain an inventory of the specific items proclaimed and their estimated value and condition as required by Rule 12 of the Auctioneers Rules, 1997 but merely and casually states that;

“ All distrainable assets/goods that belongs to yourselves herein at Karen such as beds, office furniture, kitchen wares, household goods and your motor vehicles are proclaimed enough to satisfy aren't plus auctioneers fees,... Any other goods in the chattel are proclaimed.”
 10. The Applicant averred that it stands to suffer great prejudice and irreparable loss and damage which cannot be compensated by an award of damages as result of the illegal distress including closure of business due to the attachment and sale of the entire movable goods and disruption in business and disturbance to clients and employee which will worsen the already bad business environment.
 11. The application was also supported by the affidavit sworn by Nelly Ketura Otieno on the 24th October 2023.
 12. The Defendants/Respondents in opposition to the said application filed a Replying Affidavit sworn by Njama Wambugu, Managing Director of the 1st Defendant on 8th November 2023 and a preliminary objection dated 9th November 2023. The Defendants preliminary Objection was premised on the following grounds; that the Court lacks jurisdiction in view of the fact that the Plaintiff is a protected tenant and that the suit offends the doctrine of exhaustion.
 13. During the plenary hearing of the application counsel for the plaintiff urged the Court to grant the Orders sought and submitted that the Court has jurisdiction to hear the suit because the lease is for a period of 5 years and 1 month and as such the tenancy is not a controlled tenancy. It was also submitted that the Tribunal cannot grant the reliefs sought. Counsel further submitted that the terms of lease agreement were breached by the 1st Defendant. The 1st Defendant breached clause 2(X) of the lease agreement dated 30th September 2022 when he failed to obtain change of user of the premises leading to the plaintiff to be locked out from the premises.
 14. The Plaintiff also challenged the proclamation notice which did not meet Rule 12 of the Auctioneer Rules. The Court was urged to allow the application and grant the reliefs sought.
 15. The Defendants/Respondents relied on their Replying Affidavit sworn by Njama Wambugu and the preliminary objection on record. Counsel submitted that the Tribunal had powers to determine the dispute. It was also submitted that the Plaintiff's suit should be dismissed and/or struck out for failing to comply with the doctrine of exhaustion since the ELC is not a court of the first instance.
 16. This Court has considered the application, the preliminary objection and the oral submissions made by counsel for the parties and has outlined the following issues for determination;



- i) Whether this court has jurisdiction to hear the suit.
 - ii) Whether the Plaintiff has met the threshold for grant of the reliefs sought.
17. This Court shall proceed to analyze the said issues sequentially.
18. The Defendants/Respondents objected to the suit on the basis that the plaintiff is a protected tenant within the meaning of Section 2 of the Landlords and Tenant's (Shop, Hotels and Catering Establishments Act CAP 301) and further that the same offended the doctrine of exhaustion.
19. A controlled tenancy is defined in Section 2 of Cap. 301 as follows: -
- ("A controlled tenancy" means a tenancy of a shop, hotel or catering establishment.
- a. Which has not been reduced into writing or
 - b. Which has been reduced into writing and which
 - i. Is for a period not exceeding five years or
 - ii. Contains provision for termination, otherwise their breach of covenant, within five years from the commencement thereof.
 - iii. Contains provision for termination, otherwise their breach of covenant, within five years from commencement thereof or
 - iv. Relates to premises of a class specified under sub-section (2) of this section.
20. In the instant case, the tenancy agreement annexed as ("NKO-1") in the Plaintiff's supporting affidavit shows that the parties executed a tenancy agreement for a term of five years and one month for a property on L.R. No. 195/199 Rhino Park Road, Nairobi. The tenancy agreement between the parties herein stipulated that the term of the tenancy would be from 1st November 2022 to 31st November, 2027. The Respondents have not disputed this evidence. In view of the foregoing this Court is satisfied that the tenancy between the parties was not a controlled tenancy and was therefore not protected under the providers of Cap. 301. The lease of 5 years and one month falls outside the jurisdiction of the Tribunal. In view of the foregoing this suit is properly before this Court.
21. On the second issue on whether or not the Plaintiff has met the threshold for grant of the reliefs sought, the remedy for injunction being an equitable remedy is a discretionary remedy to any court. The discretion must be exercised judiciously. This is what every court should bear in mind when dealing with such kind of an application. In the cases of Kahoho Vs Secretary General, EACJ Application No. 5 of 2012 and Daniel Kipkemoi Siele Vs Kapsasian Primary School & 2 Others (2016) eKLR, courts held that the grant or not of an order of injunction is upon the discretion of the court which discretion must be exercised judiciously. In Farah Awad Gullet Vs CMC Motors Group Limited (2018) eKLR, the Court of Appeal repeated the same position and went on to state that it means it is ...

"..... without caprice or whim and on sound reasoning".

However, in order for a party to succeed in an application for a temporary injunction, he/she has to pass the test that was set out in the case of *Giella v Cassman Brown* [1973] E.A 358. The test has three limbs to be satisfied. These are:-

- a. Whether the Applicant has established a prima facie case.



- b. whether he or she would suffer irreparable loss that may not be compensated by damages.
 - c. That if the court is in doubt, it may rule on a balance of convenience.
22. It was the Plaintiff's case that 1st Defendant instructed the 2nd Defendant to proclaim the Plaintiff's movable goods and tools of trade claiming for payment of purported rent arrears amounting and Kshs.3,400,000/= and that the 2nd Defendant maliciously attached the Plaintiffs movable goods, assets and tools of trade on 23rd October, 2023. It was further contended that the proclamation was illegal and irregular and failed to comply with the mandatory provisions of Rule 12 of the Auctioneer's Rules 1997 requiring a proclamation of movable goods to indicate the value of specific items and the condition of each of item proclaimed. The Plaintiff further contended that the 2nd Respondent was not entitled to the sum of Kshs. 375,500/= which was for the illegal distress and proclamation. The Plaintiff averred that there is a real danger that if the orders sought by the Court are not granted it will suffer great prejudice and likely to lose its investment. It was also argued that the 1st Defendant is holding a deposit of Kshs. 900,000/= as security for rent and service charge despite the fact that the Plaintiff's tools of trade have been attached and it is not in operation for the said period.
22. The 1st Defendant's reiterated that the Plaintiff was in arrears and underserving of the orders sought.
23. Clause 3(a) of the lease agreement executed by the parties herein clearly stipulated that the 1st Defendant was to immediately after commencement of the lease apply for extension of user for commercial use of the premises. The 1st Defendant despite being aware of the said clause didn't comply with the same as required. The application for change of user was essential in respect to the Plaintiff's business. The evidence on record confirms that the same was only made available on 6th June 2023. In the intervening period, the Plaintiff was unable to undertake its business and continued to suffer loss and damages.
24. In respect to irreparable harm, irreparable harm means that the result of the actions of the adverse party if left un-attended to by a court order halting them will be such that the other party is not likely to be compensated adequately by damages. It is not enough to show a prima facie case. The Applicants must demonstrate that the effect of the actions of the Respondent is so grievous that when all is said and done, he or she will not be in the same position as was originally. In the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR, the court stated as follows:
- “.....the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient . The Applicant should show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury”.
25. The Court has taken the liberty to peruse the proclamation notice and it is indeed evident that the value of the specific items and condition for each item were not stated as required under Rule 12 of the Auctioneers Rules. This in essence raises doubts as to its credibility. It was also evident that the Plaintiff has invested heavily in the said premises and its business. In view of the foregoing and considering all the facts herein, this Court is satisfied that the Plaintiff has established a prima facie case and has made out a case for the grant of the Orders sought.
26. In conclusion, the Plaintiff's application dated 24th October, 2023 and the 1st Defendant's Preliminary application dated 9th November 2023 are hereby disposed of in the following terms:-



- i. The preliminary objection dated 9th November 2023 is hereby dismissed.
- ii. That pending the hearing and determination of this suit, an injunctive Order is hereby issued restraining the defendants by themselves, or their agents, agents or assigns from further levying distress for rent and from selling and or interfering with the Plaintiff's attached movable goods which are the subject of the proclamation dated 9th September 2023.
- iii. The Defendants are directed to grant the Plaintiff access to the leased premises within 10 days from today for the purposes of removing its movable properties.
- iv. Both parties are hereby directed to appoint an independent valuer to determine the value of the proclaimed and attached goods as per the proclamation notice and subsequently file the report in Court within 30 days from today.
- v. Costs of the application to abide the determination of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF JANUARY 2024.

E.K. WABWOTO

JUDGE

In the presence of;

Mr. Mango for Plaintiff/Applicant.

Mr. Nyamagwa for Defendants/Respondents.

Court Assistant – Caroline Nafuna.

