



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MILIMANI
ELC NO. 740 OF 2015

KENLAYSIA TRADING LIMITED.....PLAINTIFF

=VERSUS=

KENYA TOURISM DEVELOPMENT CORPORATION.....1ST DEFENDANT

NAIROBI CITY COUNTY.....2ND DEFENDANT

HILTON HOTEL LIMITED.....3RD DEFENDANT

RULING

BACKGROUND.

1. The first Respondent is the registered owner of a building on **LR No. 209/9733** within Nairobi Central Business District. (Suit premises). The first Respondent leased the suit premises to the Applicant for a period of five years and one month with effect from 16th December 2005. The lease period expired on 15th January 2011, but the applicant did not give vacant possession. This prompted the first Respondent to file a suit against the applicant in the Chief magistrates Court at Milimani Commercial Court seeking among other reliefs an order of eviction against the applicant. The suit CMCC No. 526 of 2011, is still pending in Court.

2. The suit premises is opposite Hilton Hotel which is the third Respondent herein. The second Respondent is Nairobi City County. In or around July 2015, the second Respondent's representatives moved to the suit premises and painted the same. This is what prompted the applicant to file the present application in which it seeks the following reliefs:-

a. Spent

b. Spent

c. That an order of injunctions do issue directed at the first and second Defendant whether by themselves, or through their servants, agents or employees restraining them from entering the premises on LR No. 209/9733 or remaining thereon or from placing any advertisements and or taking over or in any way attempting to alienate or dispose the suit premises from the plaintiff pending the hearing and determination of the suit.

d. That the third defendant be restrained from denying access to the Plaintiff's leased premises

on L.R NO.209/9733 and be ordered to remove all barriers restricting access to LR No. 209/9733, pending hearing and determination of the suit.

e. That costs of the application be provided for.

f. Such other order as the Court may deem necessary to grant.

APPLICANT'S CONTENTION

3. The applicant contends that it is the lessee of the suit premises from the first Respondent. The applicant had sought authority from the second Respondent to have the suit premises painted and a few repairs carried out. The second Respondent granted it authority to carry on the painting and repair on 16th July 2015. Before the applicant could carry out repairs and paintings of the suit premises, the second Respondent moved into the suit premises and forcefully painted the same without permission from the applicant.

4. The applicant further contends that the first and second Respondents connived with the third Respondent who erected barriers blocking access to the suit premises. That the first Respondent has attempted on a number of occasions to illegally evict it from the suit premises.

FIRST RESPONDENT'S CONTENTION

5. The first Respondent opposed the applicant's application through a replying affidavit sworn on 18th September 2015. The first Respondent contends that the applicant's application is an abuse of the process of Court. That the applicant is illegally in the suit premises as the lease it had with the applicant expired on 15th January 2011. The first Respondent moved to Court and filed a suit against the applicant seeking recovery of rent arrears, mesne profits and eviction order. That case is still pending in the Chief Magistrate's Court at Milimani Commercial Courts.

6. The first Respondent argues that the applicant had no authority to paint the suit premises without permission from it and that it is a stranger to the applicant's allegation of convenience with the second and third Respondents.

THIRD RESPONDENT'S CONTENTION

7. The third Respondent has opposed the applicant's application through a replying affidavit sworn on 12th August 2015. The third Respondent contends that the painting of the suit premises was undertaken by the second Respondent because it had remained in a sorry state of disrepair for a long time. The second Respondent's action was prompted by the impending Global Entrepreneurship Summit which was to be held in Kenya and was to be attended by world leaders among them the then President of the United States of America Barrack Obama.

8. On the issue of the barriers being complained of, the third Respondent states that the same were erected with the permission of the then City Council of Nairobi, the predecessor of the second Respondent. That the applicant has three entrances to its premises. There is one entrance facing Moi Avenue, another one from Kencom House and a third one from Mama Ngina Street. The barriers were put in place following the security threats from terrorists' activities then and has nothing to do with blocking access to the suit premises.

ANALYSIS

9. I have considered the applicant's application as well as the opposition to the same by the first and third Respondents. I have also considered the submissions by the first and third Respondents. The only issue for determination in this application is whether the Applicant has met the threshold for grant of injunctive orders. The applicant is seeking both prohibitory and mandatory injunction.

10. Injunctive orders are equitable in nature and whoever comes to court for the same has to disclose all material facts. In the instant case, the applicant did not disclose the fact that the lease between it and the first Respondent had expired and that there was a pending case filed against it in which the first Respondent is seeking eviction orders against it. All that the applicant stated is that there have been illegal attempts by the first Respondent to have it evicted from the suit premises. Of course the suit against the applicant is not one of such illegal attempts and to this extent, the applicant was not being candid about the whole issue.

11. For an applicant to succeed in having injunction orders, the applicant must demonstrate that there is a prima facie case with probability of success. On the material placed before the court, the applicant does not have a prima facie case against the Respondent. Part of what he wanted to prevent has already taken place. The suit premises has already been painted. Other than the painting, there is no evidence of any other interference from the Respondents with the suit premises. The first Respondent is seeking to evict the applicant through court process at Milimani Commercial Courts and this is not one of the illegal attempts to evict the applicant.

12. On the issue of mandatory injunction against the third Respondent compelling it to remove the security barriers, the third Respondent has given the reason why those barriers are existing. The barriers have not blocked the applicant in any way. The applicant has entrances to the suit premises from more than one side of the suit premises. The third Respondent sought and obtained permission to erect those barriers. It is for the security of the Hotel occupants. The court takes judicial notice of the threat posed by terrorists. Not long ago, there were terrorists attacks on what used to be the American Embassy which was nearby. Moving closer, there was another attack at Eureka Hotel which is on the opposite street where the suit premises is situate. The security threats are still there. There can therefore be no order compelling the removal of such security barriers.

13. The suit premises had fallen into a state of disrepair and the coat of paint gave the premises a new lease of life. The applicant should not be heard to complain. It had been given authority to do the painting subject to concurrence from the landlord who is the first Respondent. There is no evidence that the applicant sought permission from the first respondent as advised in the letter which gave it authority to paint the suit premises. When it became apparent that the applicant was not painting the suit premises, the second Respondent had to come in and paint it to save the country's image from the visitors who were to be in town.

CONCLUSION

14. From the analysis hereinabove, I find that the applicant's application lacks merit. It is hereby dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* on this *31st* day of *July 2017*.

E.O.OBAGA

JUDGE

In the Presence of :-

Mr Angaya for Mr Mogeni for Plaintiff

Mr Irako for 2nd defendant

Court Assistant: Hilda

E.O .OBAGA

JUDGE