



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 113 OF 2017

(Formerly Nairobi ELC No. 420 OF 2017)

AGRISEED COMPANY LIMITED.....PLAINTIFF

VERSUS

GRANDWAYS VENTURES LIMITED.....DEFENDANT

R U L I N G

1. By an application dated 21/6/2017, the plaintiff sought the following orders against the defendant:-

(1)spent.

(2) THAT pending the *inter-partes* hearing and determination of this application, this honourable court be pleased to grant a temporary injunction restraining the defendant/respondent by themselves, their servants agents, employees or otherwise, from proclaiming, attaching, alienating or in any other manner whatsoever interfering with the office furniture of the applicant.

(3) THAT at the *inter-partes* hearing of this application, and pending the hearing and determination of this suit, this honourable court be pleased to grant a temporary injunction restraining the defendant/respondent by themselves, their servants, agents, employees or otherwise, from proclaiming, attaching, alienating or in any other manner whatsoever interfering with the office furniture of the applicant.

(4) THAT the costs of the application be provided for in the cause.

2. The defendant filed a replying affidavit sworn by Suku Elisha Sherwin on 24/7/2017. The application was argued before this court orally on the 27th July, 2017. Both parties were represented.

3. Mr. Juma for the applicant urged that the defendant offered the plaintiff rental space where the plaintiff was to operate an office. The offer was subject to contract in the form of a lease, which was to be issued by the defendant. However, the said lease was never issued, yet the plaintiff had taken possession fully knowing that it would be issued with a lease. After the plaintiff had taken up the relevant space, the adjacent space was leased by the defendant to a university. The university operated lecture halls on it. According to the plaintiff, the noise emanating from the student activities made it impossible for the plaintiff to operate its office and the plaintiff sought to terminate the relationship with the defendant. So, by a letter of termination dated 24/11/2016 exhibited as **Exhibit 2** in the supporting affidavit sworn by one Kassim Owino in support of the application, the plaintiff notified the defendant of its intent to vacate

the rented office within the 1st Floor of Mega Plaza, Kitale. The letter gave the defendant a three month notice, effective from **23/11/2016**, upon the expiry of which the plaintiff would vacate the premises without further reference to the defendant.

4. However, by a letter dated **14/12/2016**, the defendant informed the plaintiff that the lease in respect of the space rented by the plaintiff expires on **30/6/2021** and that there was no provision to terminate it prior to its expiry. The defendant further informed the plaintiff that if the plaintiff wished to “*terminate the same, as per clause 3(a) of the lease*” the plaintiff would have to pay rent for the entire period of the lease which the defendant calculated at **Kshs.1,814, 697/= + VAT**.

5. Subsequently counsel for the applicant urged, the defendant ejected the plaintiff out of the property despite the rejection of the termination of the relationship. Mr. Juma urged that **Section 57** of the Land Act gives the plaintiff the right to exit subject to notice. Further, he said where there is no written contract, then the relationship is a periodic tenancy terminable by notice. Counsel also referred to **Cap. 301, (Shops, Hotels and Catering Establishments) Act**. The Schedule to the Act, he urged, provides that there is an implied term that the lessor shall not use the adjoining premises for purposes unfit for the purposes were leased out earlier. Counsel submitted that due to the use by the universities, which engendered much noise, the plaintiff could not use the premises as an office. Lastly the counsel for the plaintiff urged that it was not the intent of the parties that when the plaintiff entered into the contract, it would stay there for three years.

6. The defendants, it was stated, are now detaining the plaintiff’s goods in the premises. The defendant has taken the keys and may dispose of the property, which would occasion plaintiff loss of goods and machinery which the plaintiff would not be able to recover.

7. Mr. Owino, for the defendant submitted in reply that there was a lease agreement between the parties. He urged that the plaintiff must have been aware of **Clause 21(c)** of the Letter of Offer and **Clause No. 3(a)** of the Registered Lease. **Clause 21(c)** of the Letter of Offer states as follows:-

“(c) In the event of such a determination of the term hereby created as set out in paragraph (b) above the Lessee shall remain liable to the Lessor for payment of all the rentals, service charge, and/or any other sum payable under the terms and conditions of this agreement and for the entire period of this agreement and the Lessor shall at its own discretion be entitled to re-enter the premises hereby let to the Lessee and to enjoy the premises in their former state and the Lessee hereby waives the right of re-entry into the premises”.

Clause 21(c) is dependent upon **Clause 21(b)** which states as follows:-

“(b) Upon receipt of your confirmation and the deposits required, we will arrange for the sub-lease to be prepared and sent to you for execution. It is hereby further agreed that you shall communicate to the Lessor your approval or amendments on the sub-lease within seven (7) days from the date of receipt of the sub-lease. Upon expiry of the said seven (7) days you shall execute and return the sub-lease to the Lessor in triplicate within a further seven (7) days thereafter failing which this agreement shall be terminated for all intents and purposes”.

8. Further, counsel urged that the plaintiff was deemed to be aware of its liability all the way up to the year **2021**. Mr. Owino urged that due to the **Clause 21(c)** the applicant was bound to pay for the entire period as there was no provision for premature determination of the lease. Mr. Owino urged that there was no noise and that in any event the applicant knew in advance the condition of the property. The applicant, it was urged, has also not shown any evidence of noise and disturbance.

9. In reply to the respondent’s arguments, counsel for the plaintiff stressed that the Letter of Offer was a mere invitation to treat, and a lease was to issue later. If the terms were unacceptable, the plaintiff would reject the lease.

10. I have considered at length the rival arguments and the documents filed. Though the plaintiff avers

that there was no lease, the defendant has exhibited by affidavit a sub-lease agreement which appears to have been registered. The same is marked **Exhibit “SS2”**. It is a sub-lease between the plaintiff and the defendant. It is in respect of **Kitale Municipality Block 7/14, First Floor FIA, 011-M.E.**, measuring 455 square feet.

11. The sub-lease cites the property by the name **Mega Centre**. The sub-lease appears to have been executed by certain persons on behalf of the plaintiff. The existence of a lease between the parties, however, having been disputed by the plaintiff, is an issue to be determined at the hearing of the main suit after evidence has been called. However it is noteworthy that the letter from the defendant to the plaintiff which is dated **14/12/2016** refers to a “Lease” and not a “Letter of Offer”. It is common ground that the plaintiff is no longer in possession of the premises.

12. At this stage, this court is called upon to determine whether the plaintiff has established a *prima facie* case with probabilities of success and whether the plaintiff is likely to suffer irreparable damage in the event the orders sought are not issued. The question that follows is whether this court should grant the injunction asked for.

13. The conditions for the grant of an interlocutory injunction are set out in the case of **Giella v Cassman Brown & Co Ltd [1973] EA 358**. The applicant must show a *prima facie* case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award of damages. If in doubt the court shall decide the application on the balance of convenience.

14. Upon consideration of the evidence presented by affidavit, at this interlocutory stage, there appears to be a proper question for determination by this court as to whether the plaintiff is liable to pay the rent amount for the entire remaining part of the six year period that was intended by the Letter of Offer to be the proper lease period. This question arises, whether it turns out that the document exhibited as “**SS2**” is eventually found to be a valid lease or not.

15. I find that the plaintiff has therefore established that it has a *prima facie* case with a probability of success. Secondly, the plaintiff is no longer in possession of the premises. Therefore, on the question of irreparable damage, I find that the plaintiff would probably suffer irreparable damage were its goods auctioned by the defendant in an attempted recovery of the rents due for the remaining period of the term if the disposition occurs before the suit is determined.

16. The two main conditions applicable in considering the grant of a temporary injunction as laid down in the celebrated case of **Giella Vs Cassman Brown** have therefore been satisfied by the plaintiff. I therefore grant **prayer No. 3** of the application dated **21/6/2017**.

17. However the grant of that prayer is on the condition that the plaintiff shall deposit the sum of **Kshs.1,814,697/=** in a joint account held by both the plaintiff and the defendant’s advocates. In addition all the goods of the plaintiff/applicant which are in possession of the defendant/respondent shall by way of an inventory to be verified by both parties be released to the plaintiff/applicant upon the deposit of the sum ordered herein into a joint account. The costs of this application shall be in the cause.

Dated, signed and delivered at Kitale on this **24th** day of **August, 2017**.

MWANGI NJOROGE

JUDGE

24/8/2017

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Mr. Juma for Plaintiff/Applicant

Mr. Bisonga holding brief for Amimo for the Respondent

COURT

Ruling read in open court.

MWANGI NJOROGI

JUDGE

24/8/2017