REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 115 OF 2017

OMARI WAFULA ASMAN…… PLAINTIFF

VERSUS

JOHN TABALYA MUKITE…….DEFENDANT

R U L I N G

1. The plaintiff brought an application dated 29/6/2017 seeking the following orders:-

> **(1) …….spent**
>
> **(2) pending the hearing and determination of this application interpartes, an injunction do issue restraining the defendant whether by himself, his employees, servants or agents or otherwise howsoever from obstructing or in any manner howsoever interfering with the plaintiff's quiet use, enjoyment and/or occupation of that property known as L.R No. 2116/529/IV Kitale Municipality (part) situated Kitale.**
>
> **(3) pending the hearing and determination of the dispute between the plaintiff and the defendant herein by arbitration, an injunction do issue retraining the defendant, whether by himself his employees, servants or agents or otherwise howsoever from obstructing or in any manner howsoever interfering with the plaintiff's quiet use, enjoyment and/or occupation of that property known as L.R No. 2116/529/IV Kitale Municipality (part) situated Kitale.**

2. The application is supported by two affidavits, one dated 29/6/2017 filed on the same date and another one dated 31/7/2017 filed on that date.

3. The application is brought under the provisions of ***Section 7(1) of the Arbitration Act 1995, Section 3A and 63(c) and (e) of the Civil Procedure Act.***

4. The applicant's case is that vide a lease made on **1/11/2016**, he entered into a **6 year lease** with the defendant over the premises situated on land reference to as **LR. No. 2116/529/IV Kitale Municipality**. However, according to the applicant, the respondent requested for vacant possession of the premises vide a letter dated **10/2/2017** which was allegedly served upon the applicant's manager on 18/5/2017. The giving up of vacant possession was ostensibly to facilitate renovation of the premises, which was estimated to last for two months at the most starting 18/5/2017. The applicant handed over the keys to the respondent. It was agreed that the respondent would hand over the premises to the applicant once the renovations were over. The applicant claims that the respondent has since been paid Kshs.700,000/= by a 3rd party and intends to lease the premises to the said 3rd party despite there being a valid lease agreement between the applicant and the respondent

5. The application is opposed. The respondent has filed a replying affidavit sworn on 12th July, 2017 by the respondent. In that affidavit the respondent avers that the lease dated 1/11/2016 was never registered though it was the applicant's duty to register the lease and consequently no interest was created in favour of the applicant over the land. It is also the contention of the respondent that the applicant failed to pay the rents due, leading to an outstanding sum of Kshs.320,000/= as at 30/4/2017. According to the respondent the applicant also failed to pay utility bills in respect of the premises. Further the applicant failed to keep the premises in good and tenantable repair leading to demands by the Public Health Department that the respondent should as owner, repair the premises. The applicant allegedly informed the respondent that he did not have fund to effect repairs, hence the request for vacant possession by the respondent in order to effect repairs.

6. It is further alleged that in April, 2017 the applicant confessed to the respondent that he was unable to carry on business that he would surrender the premises to the respondent in May, 2017. It was after this that the applicant removed his goods from the premises and handed over the keys thereof to the respondent. The respondent contends that the applicant never even obtained licenses for 2017. It is the respondent's position that the applicant is seeking a mandatory injunction rather than a temporary injunction. It is also the respondent's position that the handing over of the premises to him was not founded on the lease of 1/11/2016 but on the failure of the applicant to pay rent for the premises and other financial obligations leading to his decision to voluntarily close down his business.

7. In the further affidavit sworn by the plaintiff on 31/7/2017, he avers that the lease is registered and exhibits a copy thereof showing that it was registered on 11/7/2017. He also avers that he has been advised by his counsel that "a lease can be registered at any time even when the suit is in court" and that the lease was for a period of 6 years commencing on 1st November, 2016 to 31st October, 2022. It is contended, that Clause 5 of the lease provides for Arbitration. It states as follows:-

> **"Save as may be hereinbefore otherwise specifically provided all questions hereafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled and agreed between the parties hereto shall be referred to arbitration by a single arbitrator assisted by such assessors or professional advisers as the arbitrator shall deem necessary to appoint to sit with him and in default of agreement to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators and every award made under this clause shall be expressed to be made under the Arbitration Act 1995 or other Act or Acts for the time being in force in the said Republic in relation to arbitration".**

8. I have considered various facts, among them that the letter served upon the applicant's manager sought vacant possession of the premises with effect from three months after the date of that letter. The renovations were to be at the expense of the applicant. The repairs would take about 2 months. The removal of the applicant's assets from the premises was a requirement in the letter. It was so proposed to remove these to make the renovations process easy. These were the words of the defendant. The said letter was not expressed as a termination of the lease. It still recognized the plaintiff as a tenant in the premises. I find no other evidence at the moment to the effect that the lease agreement between the parties has ever been terminated. Now the lease has been registered albeit after the suit was commenced. The legal validity of such action, is an issue for determined at the hearing of the main suit.

9. While the lease is still in existence, the terms of the lease have to be referred to and given effect by either party. In this instance it is the applicant's prayer that the respondent be restrained from interfering with the plaintiff's quiet use enjoyment and/or occupation of the suit premises. Since I have found that the lease agreement has not been terminated, and that the respondent's expressed intention was to only renovate the premises at the expenses of the plaintiff, it follows that what is being sought is a temporary injunction and not a mandatory injunction as has been urged by the respondent. If deserving, the prayers may issue. In my view, during the pendency of the lease agreement, any act of interference with the physical possession of the premises excluding such acts of renovation as the respondent has undertaken at the plaintiff's expense, would adversely impact on the rights of the applicant under the agreement.

10. The applicant's case is that an injunction should issue against the respondent pending the hearing and

determination of arbitral proceedings to be initiated under Clause 5 of the lease agreement.

11. As expressed by the applicant, I find that ***Section 7(1) of the Arbitration Act, Act No. 4 of 1995*** is applicable in this situation. The same provides as follows:-

> **S.7(1) it is not incompatible with an arbitration agreement for a party, to request from the High Court, before or during arbitral proceedings, an interim measure of protection for the High Court to grant the measure.**

12. The applicant has cited 3 cases in support of his application. The case of ***Safari Limited –vs- Ocean View Beach Hotel Ltd and 2 others 2010 eKLR***. The case of ***Presbeta Investments Ltd & Another –vs- National Bank of Kenya & 2 Others & 2 Others, 2016 eKLR,*** and ***Euro Water Services Ltd –vs- Peter Gatune 2015 eKLR.***

13. In the cited case of **Portlink Ltd**, the Landlord had not taken possession of the leased premises. While the court was considering whether there was any threat to the subject matter it stated as follows in the ruling: (para 15, 16, 17)

> **15. Is the subject matter under threat? "In my view the subject matter is under threat. In this regard reference is made to expense plaintiff has incurred which includes Kshs.8,970,000/= paid to the defendant. In respect of the lease; and it includes the expenses incurred in construction of the building. If plaintiff is evicted as sought by defendant by 28th February, 2015, the plaintiff will lose the value of the property. It is instructive to note that to date defendant has not conceded that the plaintiff is entitled to be compensated for that development. Having not made that concession there is therefore a dispute.**
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> **16. In the above circumstances the appropriate measure of protection is for plaintiff to be granted an injunction. I so state because the plaintiff by its letter dated 16th December, 2014 identified the issues to be determined by the arbitrators as whether defendant was entitled to terminate the lease; whether circumstances have arisen to entitle the defendant to terminate; and what is the quantum of compensation that plaintiff is entitled to".**
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> **17. It is important to note that the lease provided that defendant could terminate the lease at any time or when it needed the land for development or other reasonable reason. In my view the arbitrator may need to inquire whether indeed defendant is entitled to terminate. But I qualify that by saying that it is not the place of the Court to determine the issues for determination by the Arbitrator. If the Arbitrator's determination would be that defendant was not entitled to terminate and the plaintiff has been evicted and its development demolished the finding of the Arbitrator may be academic and of no use to the plaintiff.**

The court in that case granted the injunction sought.

14. In that case of **Presbeta Investment (Supra),** the court stated as follows at **para 44:-**

> **"I am therefore bound to ignore the principles of injunction laid down in the case of *Giella –vs- Cassman Brown (Supra)* and go with the principle laid down in the case of Portlink Limited (Supra) for the determination of an application for interim measure of protection. The first question is therefore whether there exists an arbitration agreement. The answer to that is in the affirmative. Clause 14.2 of the Purchase Agreement clearly provides that any dispute arising therefrom shall be resolved by consultation in default of which the same shall be submitted for arbitration. Although the 1st defendant's case is that it is not a substantial party to the Purchase Agreement and will therefore not be a party to arbitration proceedings between the vendor and the purchaser, at this stage it is not appropriate for this court to make a finding whether the 1st respondent will be a party to the intended arbitration proceedings or not. In my view, that is an issue that the arbitrator will have to determine**

once the arbitration proceedings are commenced as per the Purchase Agreement".

15. In the case of **Euro Water Services Ltd –vs- Peter Gatune (2015) eKLR**, the court considered whether conditions for the award of the protective measures do exist. It said as follows:-

> **51. As far as the defendant was concerned, if the plaintiff were to continue to use the rig, that would defeat the arbitration.**
>
> **52. I must say that I failed to understand how the use of the rig, during the arbitral proceedings could defeat the purpose of arbitration.**
>
> **53. The defendant does not challenge the plaintiff's contention that the detention of the rig has resulted in the plaintiff suffering "*tremendous monetary losses, since it does not operate and has been sued for non-performance for other contracts*".**
>
> **54. Assuming that the defendant was to succeed in the arbitral proceedings, it is conceivable that the plaintiff may either be compelled to drill the borehole to a greater depth or the plaintiff may be compelled to compensate the defendant for breach of contract.**
>
> **55. Another possible solution might be achieved though the defendant engaging another contractor to complete the job, and thereafter seek compensation from the plaintiff.**
>
> **56. If the plaintiff was using the rig to work elsewhere, it might be able to compensate the defendant, is so ordered. Or if the plaintiff was ordered to complete the task, the financial muscle of the plaintiff would determine its ability or otherwise to do the needful.**
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> **57. To my mind, therefore, the continued detention of the rig is not beneficial to any of the parties. If anything, it raises a serious sense of prejudice against both parties. I say so because the financial losses being experienced by the plaintiff may make it impossible for the plaintiff to either complete the job or to compensate the defendant.**

16. The respondent on the other hand submits that though the court can in an appropriate case accord an interim measure of protection the court's discretion in this regard must be exercised judiciously. It must be satisfied of the need to preserve the subject matter. The respondent relies on the case of ***Safari Ltd – vs- Ocean View Breach Hotel Ltd and 2 others 2010 eKLR*** where the court laid down the factors to be taken into account in an application seeking an interim measure of protection before or during arbitral proceedings. The respondent argues that in the cited case, the appellant in favour of whom the Court of Appeal issued an injunction, was in possession of the leased land on which a Telecommunication mast had been constructed. He advances the same argument to distinguish the case of Portlink Supra. He argues that in the instant case the injunction sought should not be granted because the plaintiff is not in possession. In support of this the respondent avers that it is inconceivable that the defendant could have been served with a notice on 18/5/2017 and on the same day, given the keys and possession to the defendant. The respondent goes to great length to show that the applicant was doing a bar and lodging business and clearing all his assets to give room for renovation could not have been done on the same day of alleged service. It is the position held by the respondent that the premises are in the possession of the defendant and repairs are ongoing. The respondent also submits that the applicant was in rent arrears, though he also admits that there is a dispute as to whether the Kshs.300,000/= that the applicant had paid as goodwill was to be treated as rent.

17. The truth of these allegations and counter-claims cannot therefore be verified at present. This court can only note the existence of such disagreement between the parties but will not resolve it for the reason that the application at hand is only aimed at persuading the court to issue an injunction pending the determination of a dispute or disputes by way of arbitration as provided for in the lease agreement.

18. The respondent has also urged that no business is being conducted on the premises by the applicant and that the applicant has not exhibited any licence for the year 2017, without which conduct of business

in the premises would not be possible. He also denies that the respondent has been paid Kshs.700,000/= by a third party in respect of the said premises. If the last statement is true, then in the pendency of the lease between the respondent and the applicant, I find that the respondent would sustain no prejudice in the event the orders sought were issued.

19. Further, I find that owing to the fact that the applicant would still owe the respondent some legally enforceable responsibilities, the respondent would suffer no immediate prejudice if the orders sought were issued.

20. However, the main point in these proceedings is that the respondent does not deny that he requisitioned the premises for the purpose of effecting repairs which repairs were said in the letter dated19/2/2017 to be at the applicant's expense and which would last for two months.

21. If the possession of the premises was granted to the respondent in May, 2017 for the purpose of the said repairs, and this application was lodged on 29/6/2017, the applicant was therefore vigilantly watching the unfolding events, sufficiently to enable him come to court when he perceived that things were not going according to his wish.

22. There is therefore no concession by the applicant that he had ceased, or is unable to continue operating the business he was carrying on at the premises prior to the giving up of possession. The allegations are coming from the respondent's side, and therefore this is still a debatable issue. Possession is still with the applicant.

22. From the above reason, I am persuaded that in order to protect the subject matter, it is necessary to grant the application as prayed. However, this order of injunction will only last for a period of **30 days** to enable the parties to institute the necessary arbitral proceedings in default of which the order shall automatically cease to operate. Costs will be in the intended arbitration.

Finally, I wish to thank both counsel for their co-operation and well researched submissions which were quite helpful in the matter.

Dated, signed and delivered at Kitale on this 28th day of September, 2017.

MWANGI NJOROGE

JUDGE

28/09/2017

Before – Mwangi Njoroge Judge

Court Assistant – Picoty

Mr. Teti for Plaintiff/Applicant

Ms. Mufutu for the Respondent/Defendant

COURT

Ruling read in open court in the presence of counsel for the parties.

MWANGI NJOROGE

JUDGE

28/09/2017