



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 107 OF 2017

MUGO & GATUNGO LIMITEDPLAINTIFF/APPLICANT

-VERSUS-

ABDULRAHMAN FARAH OSMAN.....DEFENDANT /RESPONDENT

RULING

Introduction

1. By a plaint dated **12th June, 2017** and filed on **15th June 2017**, Mugo & Gatungo Limited (hereinafter referred to as “the applicant”) brought the suit herein *inter alia* seeking to permanently restrain the defendant from evicting it and/or interfering with its quiet possession of the shop and store it occupies in the business premises known as plot No. **Nyeri Municipality Block II/373** situated along Harambee Avenue in Nyeri town.
2. Simultaneously with the plaint, the applicant filed the notice of motion dated **15th June, 2017** to restrain the defendant by himself, his servants and/or agents and or anyone acting under his instructions or otherwise howsoever from evicting it or interfering with its quiet possession of the suit premises pending the hearing and determination of the application and the suit.
3. The application is premised on the grounds that the applicant has been a tenant of the respondent since 2005, that there existed a written lease agreement between the applicant and the defendant which the defendant purported to terminate on 19th April, 2016.
4. The applicant explains that upon termination of the tenancy, the applicant continued occupying the suit premises and paying rent to the respondent, which rent the respondent initially refused to accept but later on accepted.
5. Explaining that the defendant subsequently issued it with another notice of termination of the lease that existed between them, the applicant explains that based on the respondent’s conduct of accepting rent upon expiry of the lease, it increased its stock which it is unable to dispose of within the period given in the 2nd notice.
6. Contending that it will suffer irreparable loss and damage if the order sought is not granted, the applicant has deponed that it is ready and willing to continue paying rent for the premises and to observe all implied covenants of the new tenancy agreement pending the hearing and determination of this suit and the suit filed in the Business Premises Tribunal (BPRT).

7. The application is supported by the affidavit of the managing director of the applicant, Njue Mugo, in which the grounds on the face of the application are reiterated.

8. In support of the averments contained in the application and the affidavit, the deponent has annexed the following documents to the affidavit:

i. A copy of the lease agreement executed between the applicant and the respondent, marked **MN-1**;

ii. A copy of the initial notice of termination of the lease which the respondent issued to the applicant, dated 19th February, 2016, marked **NM-2**;

iii. A bundle of copies of invoices and receipts showing that the respondent continued demanding and receiving rent from the applicant even after issuance of the initial notice of termination of the lease, marked **NM-3**;

iv. A copy of the subsequent notice of termination of the tenancy agreement dated 7th April 2017, marked **NM-4**.

v. A copy of the reference it filed in the BPRT challenging the termination of the lease marked, **NM-5**.

9. The applicant contends that by issuing it with a fresh notice of termination of lease, the respondent is out to force it to vacate the suit premises prematurely, without reasonable cause and in breach of the law.

10. In reply and opposition to the application, the respondent has acknowledged that he issued the notices referred to in the affidavit sworn in support of the application.

11. The respondent explains that the applicant contested the initial notice by serving him with a letter dated 17th March, 2016 in which it indicated that it was unwilling to comply with the notice.

12. The applicant also filed a suit to wit, Nyeri ELC 100 of 2016 through which he obtained an order restraining him from evicting it from the suit premises or altering the terms of the lease dated 1st August, 2012 or interfering with its quiet possession of the suit premises pending the inter partes hearing of the suit on 6th June, 2016.

13. Upon being served with the pleadings and order in the matter referred to in paragraph 11, he organized for a meeting with his advocate on record who upon reviewing the pleadings advised him that he should settle the suit as the notice he had issued was inappropriate and ineffective.

14. Based on the advice of his advocate, he instructed his advocates to enter into negotiations with the applicant with a view of settling the matter out of court. Consequently, his advocate entered into negotiations with the applicant which culminated in withdrawal of the suit.

15. Arguing that the initial notice was incapable of terminating the lease and based on the fact that the suit the applicant filed to challenge the propriety or otherwise of that notice was withdrawn by consent of the parties, it is submitted that the applicant is estopped from relying on the initial notice in these and any future proceedings.

16. According to the respondent, the lease remained operational after the withdrawal of the suit and terminable according to its provisions and in particular clause 7 thereof which provided for termination of the lease upon issuance of a three (3) months' notice.

17. Expaining that he decided to use the suit premises to run his own business, the respondent has deponed that he instructed his advocates to issue a notice terminating the tenancy in accordance with clause 7 of the lease agreement.

18. In accordance with his instructions, his advocate issued and served the applicant with a termination notice in accordance with clause 7 of the lease agreement. The notice was served upon a manager of the applicant on 7th April, 2017.
19. Arguing that the applicant is bound by the clause on termination of the lease and that he has a right to enjoy all rights to his property, the respondent accuses the applicant of having made it impossible for him to enjoy the suit premises through court cases.
20. Arguing that there was unreasonable delay in bringing the current application and that the applicant approached the court with unclean hands, the respondent submits that the applicant is underseiving of the orders sought.
21. The respondent further argues that the court cannot be called upon to re-write or enforce the agreement they entered into and that the time given in the notice to the applicant was sufficient for the applicant to secure alternative premises from which to run its business.
22. Having failed to look for alternative premises to run its premises, it is contended that the applicant cannot ask the court to assist it to validate its continued use of the suit premises against the respondent's wishes and in blatant disregard of the respondent's freedom to contract and right to property as enshrined in **Article 40** of the constitution.
23. Should the court find that the issuance of the notice was erroneous, the respondent urges the court to find that the loss, if any to be suffered by the applicant, is compensable by way of damages and that the balance of convenience tilts in favour of the respondent as the owner of the suit property.
24. In a rejoinder, the applicant through its managing director, Njue Mugo, has deponed that contrary to the averments contained in paragraphs 8 and 9 of the respondent's replying affidavit, there was no negotiation between the parties to this dispute to withdraw the former suit to wit Nyeri ELC No.100 of 2016.
25. According to the applicant, the former suit was withdrawn after the respondent issued the applicant with invoices for payment of rent long after the initial notice had lapsed hence creating a new tenancy governed by the provisions of Cap 301, Laws of Kenya.
26. Terming the respondent's contention that the former suit was withdrawn following negotiations between the parties false and made in bad faith, the applicant points out that there are no correspondences produced in respect thereof.
27. Maintaining that the initial termination notice terminated the lease, the applicant points out that the consent withdrawing the former suit was filed way after the time intimated in the notice for termination of the lease had expired.
28. As proof that the notice terminated the lease, the applicant contends that after the initial notice was issued, the respondent refused to invoice it and refused the rent it tendered on the basis that the tenancy had lapsed.
29. The applicant further explains that by the time the former suit was filed, the notice had already lapsed. The invoices issued for payment of rent are said to have been issued after the notice period had lapsed.
30. The applicant also contests service of the 2nd notice saying that it has no manager by the name Gibson on whom the notice could have been served. The process server is said to have failed to explain how he identified the person he served.
31. The applicant maintains that the notice of termination of tenancy was received in their Embu town offices on 19th May, 2017.

32. Terming the affidavit of service and the annexures thereto fabricated, the applicant points out that whilst the affidavit of service is dated 10th April, 2017 it shows a thread of emails dated 16th and 17th January, 2017.

33. Credibility of the affidavit of service is also challenged on the ground that it indicates that the deponent attended court in Nairobi before he proceeded to Nyeri, which activities, according to the applicant, the process server could not accomplish.

34. Maintaining that the subsequent notice was intended to steal a match against it hence unlawful, the applicant maintained that the notice was not served on the date and time indicated in the affidavit of service of Mwanja.

Submissions

35. The parties to this dispute filed submissions reiterating their respective positions concerning the application herein.

Analysis and determination

36. From the pleadings filed in this matter and the submissions by the respective parties the sole issue for determination is whether the applicant has made up a case for being granted the order sought.

37. As pointed out in the submissions filed on behalf of the respondent, for the applicant to be granted the order sought he must demonstrate that he has a *prima facie* case with a probability of success; that unless the order sought is granted, it might suffer injury which is not compensable by way of damages and, if the court is in doubt, demonstrate that the balance of convenience tilts in its favour. See **Giella v. Cassman Brown & Co. Ltd (1973) E.A 358**.

38. What amounts to a *prima facie* case was described by the Court of Appeal in the case of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 others (2003)KLR 125** thus:

“In civil cases a *prima facie* case is a case in which on the material presented to court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case”.

39. On whether the applicant has made up a *prima facie* case, I note that his case is premised on the contention that the lease that existed between him and the respondent was terminated by the initial notice that was issued by the respondent and that upon termination of that notice, there exists a controlled tenancy between him and the respondent that can only be terminated in accordance with the provisions of Cap 301.

40. Whilst the respondent does not deny having issued the initial termination notice, he contends that the said notice could not and did not terminate the lease that existed between the applicant and himself firstly because it was issued under Cap 301 when the lease was not governed by the provisions of that statute (was not a controlled one) and secondly because the applicant went to court and obtained orders restraining him from enforcing that notice. Thirdly, the suit filed by the applicant was withdrawn by consent of the parties and the applicant allowed to continue using the suit property on the basis of the lease executed between them.

41. Whilst at this juncture, the court should not make a definitive determination on whether the lease that existed between the applicant and the respondent was terminated by the initial notice, a review of the conduct of the applicant shows that it did not treat the initial notice as having brought to an end the lease that existed between it and the respondent. I say so, because if indeed it considered that notice to have

terminated the lease, it would not have based its case, to wit Nyeri ELC No.100 of 2016 on that lease. In that regard, see paragraphs 7 and 8 of the former suit which clearly shows that the applicant did not treat the initial notice as having brought to an end the lease that existed between it and the respondent.

42. It is dishonest for the applicant, having urged the earlier case on the basis that the tenancy that existed between itself and the respondent had not terminated, at existed between itself and the respondent to change tact and argue that the initial lease had the effect of terminating the tenancy which existed between it and to create a new tenancy under Cap 301 Laws of Kenya.

43. Being of the view that the conduct of the parties to this dispute and in particular the conduct of the applicant negates such a finding, I find and hold that based on the conduct of the parties to this dispute, the initial notice did not and could not have terminated the lease which existed between the parties to this suit. In that regard, see the order issued in the former suit which *inter alia* restrained the respondent from altering the terms of the lease agreement dated 1st August, 2012 pending the *inter partes* hearing of the matter.

44. The only reasonable interpretation of the pleadings filed by the applicant and the order issued in respect thereof, is that the applicant considered the lease not to have been terminated by the initial notice.

45. With regard to the 2nd notice, it is said to have been issued pursuant to clause 7 of the lease which provides as follows:

“Either party is entitled to terminate the lease by submitting a notice in writing of three months’ prior to vacating the property”. (Emphasis supplied).

46. According to the respondent, the said clause gave him the right to terminate the tenancy which existed between him and the applicant, in exercise of his freedom of contract and right to property.

47. Whilst the said clause entitled either party to the lease to terminate it by giving a three month’s notice, a whollistic interpretation of the lease suggests that the clause was only applicable to the applicant, as it is the one who ordinarily would be required to vacate the property.

48. In my view, the termination clause cannot be read in isolation but alongside the other rights and obligations created under the lease agreement. In this regard, it is note worthy that the lease executed between the applicant and respondent created some rights and obligations to be enjoyed and observed by the parties.

49. In my view, the only circumstance that will call for parties wriggling out of the obligations they had imposed on themselves, through the exit clause that the respondent invoked, is if there is none observance of those obligations.

50. It is my considered view, that it would defeat the purpose for which the termination clauses are put in lease agreements if parties, not arising from breach of the terms of the lease or difficulties in meeting the terms of the lease, would be allowed to wriggle out of the obligations they have imposed on themselves.

51. Although the clause relied on by the respondent to terminate the lease could be relied on to bring the lease to a close, I am not persuaded that the clause could be resorted to merely for the sake of bringing the lease to an end. For the respondent to seek to rely on that clause, he must provide proper reasons for wriggling out of the obligations he imposed on himself of allowing the applicant to enjoy quiet use and possession of the premises for the reserved term provided that he is not in breach of the terms of the lease agreement.

52. Unlike in the former notice where the respondent contended that the applicant was in breach of the terms of the lease, I note that in the second notice the respondent does not allege that the applicant is in breach of any of the obligations reserved for it to observe.

53. In view of the foregoing, I find and hold that the applicant has made up a *prima facie* case with probability of success.

54. Having determined that the applicant has made up a *prima facie* case with probability of success I need not consider the other condition for grant of an injunction before determining whether or not the applicant has made up a case for being granted the orders sought. In this regard see the case of **Risper Auma Okoth v. Maloba Petrol Station Ltd & 3 Others (2015)eKLR** where it was stated:

“...I would also not have considered the issue of damages if the applicant had established a *prima facie* case. I say this because the law required that the conditions for granting interlocutory injunctions be considered sequentially. The second condition cannot be considered if the first is not and the third, which is balance of convenience, cannot be considered without considering the first...” (Emphasis supplied).

55. The upshot of the foregoing is that the application herein has merit and is allowed as prayed.

Dated, signed and delivered at Nyeri this 18th day of October , 2017

L N WAITHAKA

JUDGE

In the presence of:

Mr. Githui h/b for Mrs Kayugira for the defendants

Ms Macharia h/b for Ms Wanja Kibe for the plaintiff/applicant

Court assistant - Esther