



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 809 OF 2017

MUGUNA ANDU WHOLESALER LIMITED.....PLAINTIFF

VERSUS

FAMILY BANK LIMITED.....DEFENDANT

RULING

What is before Court is the Plaintiff's Notice of Motion dated 12th July, 2017 brought pursuant to Order 40 Rules 1 & 2 of Civil Procedure Rules, Section 1A, 1B and 3A of Civil Procedure Act and all the other enabling provisions of the law.

The application is based on the grounds which in summary are that the Plaintiff leased a commercial office space measuring approximately 5,156 square feet at the Plaintiff's building in Ngong Town known as Ngong Business Arcade situated on LR Number Ngong Township/Block 1/233 (hereinafter referred to as the 'suit property') at an agreed rent of Kshs. 335,140/= per month exclusive of VAT. The Lease Agreement was for a period of ten (10) years and three (3) months effective from 1st October, 2014 and there is no provision for termination of the lease on the grounds of financial hardships. The Defendant has continued paying rent to the demised property up to 30th May, 2017 where it issued a three months' notice of their intention to terminate the agreement to lease, relinquish the space and requested the Plaintiff to utilize the three months deposit that it had earlier paid to cover rent during the notice period. On 23rd May, 2016 the Plaintiff had taken a loan facility of Kshs. 10,000,000/= with the Defendant's Kahawa West Branch whereby the security of the loan was the rental income accruing from the suit property. The suit property was already charged in favour of Equity Bank Limited however the Defendant was ready and willing to become the second chargee against the property since it was adequately protected from the rental income which is recovered from source. The Defendant is in breach of the terms of the lease agreement by failing, refusing and/or ignoring demands made by the Plaintiff for payment of the current quarter's rent.

The application is supported by the affidavit of JOHN NJUGUNA KIBUTHU who is the Managing Director for the Plaintiff where he deposes that in furtherance to the Lease Agreement dated 12th October, 2015 the Defendant first paid a sum of Kshs 819,000 as the requisite three months deposit then thereafter paid an additional sum of Kshs. 186,420 as a further deposit and the Defendant has continuously paid rent for the demised property up to 30th May, 2017 when he issued to the Plaintiff a three months notice to terminate the lease agreement and requested the Plaintiff to utilize the three months deposit to cover the rent during the notice period. He avers that the Plaintiff applied for a loan facility with the Defendant's Kahawa West Branch on the 9th May, 2016 and at that time was well aware the Defendant would continue being their tenant until 31st December, 2024. He affirms that the Defendant approved the loan facility of Kshs. 10 million to the Plaintiff on 23rd May, 2016 and clearly stated in the offer letter that the security for the loan facility was a registered irrevocable deed of rental assignment over the suit property. He reiterates that it is the Defendant who came and promoted to the

Plaintiff their loan facilities including a working loan facility with a security based on the rental income and is now in breach of the Lease Agreement by failing, refusing and/or ignoring the demands by the Plaintiff for payment of the current quarter's rent.

The application is opposed by the Defendant whose Senior Legal Counsel ANTHONY OUMA swore a replying affidavit where he deposed that the application is fatally defective, devoid of merit, vexatious, brought in bad faith and ought to be dismissed as the Plaintiff has not come to court with clean hands. He admitted that the Plaintiff and the Defendant entered into a lease agreement for a term of ten (10) years and three (3) months effective 1st October, 2014, and the said Lease contained a termination clause which the Defendant rightfully invoked having given reasons why. He states that before they invoked the termination clause in the Lease, they had abided by the contents of the entire lease and does not accede to the alleged contents of reconciliation of rent statement. He avers that the Plaintiff of their own volition applied for and was granted the banking facility of Kshs. 10 million and they provided the following security which included: Registered irrevocable deed of rental assignment over the property LR No. NGONG TOWNSHIP/BLOCK 1/233 INO Muguna Andu Wholesalers; Duly executed joint and several guarantees by the company directors and Fixed Deposit for 3 months instalments to be held under lien until the loan is cleared in full. He reiterates that the rental income was due from the Plaintiff's tenants within the suit premises and the Defendant's continued occupation of the said premises had nothing to do and/or correlation whatsoever with the banking facility taken by the Plaintiff and one transaction has nothing to do with the other. He states that the impugned allegation that the repayment of the banking facility herein was dependent on the rent to be paid by the Defendant is unfounded as it is still subsisting and the Plaintiff at the point of taking it was well aware of the duties and obligations therein. He denies that the Plaintiff was coerced and/or forced to take the banking facility herein as implied and that the lease agreement between the Plaintiff and Defendant stood terminated at the end of the three months notice.

On 24th July, 2017 both parties submitted to the application dated 12th July, 2017.

The Plaintiff's Counsel Mr. Mungai submitted that he was relying on the grounds on the face of the application and the supporting affidavit. He stated that the Plaintiff is the owner of the suit property and they entered into a Lease agreement with the Defendant for 10 years 3 months where they duly executed a Deed of Assignment of rental income. He referred to paragraph 3 of the Deed of Assignment where the Plaintiff was assigning or giving rental income towards payment of the loan facility. He said it is not disputed that the Loan facility was disbursed, with the Plaintiff servicing the same from the rental income and the Defendant has purported to terminate the lease vide letter dated 30th May, 2017 which the Plaintiff has declined to accept vide its letter dated 31st May, 2017. He referred to a letter dated 15th June, 2017 where the Defendant's advocate responded to them stating that the Lease Agreement and Loan facility are separate contracts. He submitted that the Loan facility came after Lease Agreement and was cemented after the signing of the Deed of Assignment. Further that the Defendant's failure to pay rent has led to the Plaintiff's default in loan repayment.

Mr. Onsare referred to the Lease Agreement, Letter of Offer and Deed of Assignment. He submitted that the Lease was for a fixed term and gives parties option to renew, and Clause 3.8 contains provisions for its termination being notice period of 90 days and it does not provide for Defendant to consult Plaintiff before terminating the Lease.. He submitted that the reason for terminating the lease was in line with clause 3.8 (a) of the Lease Agreement with the grounds given falling within making the premises unsuitable, not viable for Defendant to carry out its business. He said three months is sufficient for the Plaintiff to get a tenant and it is not the role of the Defendant to get it a tenant. He referred to paragraph 7 of the Letter of Offer where the monthly repayments are outlined and where the same is to be sourced from while paragraph 8 indicates the securities required with one of them being the suit property. He conceded that the amounts to be collected as rental income are to be used for loan repayment. He pointed out that the premises made reference to in the Deed of Assignment is not the premises occupied by the Defendant but the whole building, and it does not define premises to be space occupied by the Lender. He submitted that if the Plaintiff insists the facility was being serviced from rental income from the suit property then the Deed of Assignment could have been specific to space occupied by the Defendant. He disputed the authenticity of Plaintiff 's annexures 'JNK 3" showing analysis of rent received from the

Defendant.

Mr. Mungai reiterated that this is not anticipatory suit but was filed because Defendant has breached the Lease Agreement with the three months notice period lapsing on 30th September, 2017. He submitted that the rent is to be paid quarterly with the repayment being sufficient for the Plaintiff to repay the loan and that is why the Deed of Assignment was executed. He reaffirmed that financial difficulty is not a reason for termination of the Lease, hence Clause 3.8 cannot be used by Defendant to do so and no good reason has been given, the Defendant must continue with his obligation under the Lease Agreement.

Analysis and Determination

Upon perusal of the notice of motion including the respective affidavits filed herein plus the annexures, I find that the only issue in contention at this juncture is whether the Plaintiff is entitled to the injunctive orders sought.

Looking at the documents annexed to the respective affidavits and the evidence presented, it is not in dispute that the Plaintiff entered into a Lease Agreement with the Defendant for a term of 10 years 3 months from October 2014. It is also not in dispute that on 23rd May, 2016 the Plaintiff took a loan facility of Kshs. 10,000,000 with the Defendant's Kahawa West Branch whereby the security of the loan is the rental income accruing from the suit property.

What is in dispute is that the Defendant issued a three months notice from 1st May, 2017 to terminate the Lease Agreement with the Plaintiff. The Plaintiff seeks injunctive relief and contends that the Defendant is not legally allowed to terminate the Lease as they signed a Deed of Assignment where the rental income from the suit property was being used to repay the loan, hence the Defendant should continue with his obligations under the lease.

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the plaintiff/applicant has made out a prima facie case with a probability of success at the trial.

On the first limb as to whether the Plaintiff has established a prima facie case with probability of success, Clause 3.8 (a) of the Lease Agreement dated 27th November 2014 between the Plaintiff and the Defendant states as follows: ***'The Lessee may terminate this Lease giving the Lessor Ninety (90) days' written notice of the same in the event that in the sole opinion of the Lessee the Premises become unsuitable for the Lessee's Permitted Use or other technical reasons preventing the Permitted Use or there is complete or partial destruction of the Premises. '***

From the reading of this clause, it is clear that the Defendant was indeed allowed to terminate the Lease if it wanted to. The Defendant's Counsel Mr. Onsare submitted that as per the termination clause the Defendant was under no obligation to consult Plaintiff before terminating the lease and the reason for terminating lease was in line with clause 3.8 (a) of the Lease Agreement with the grounds given falling within making the premises unsuitable, not viable for Defendant to carry out its business. Mr. Onsare insisted their notice for termination adhered to the Lease Agreement. Mr. Mungai maintained that the Defendant's notice to terminate the lease did not adhere to the grounds for termination as set out in the Lease. He insisted the Plaintiff would not accept it and Defendant should continue with his obligations under the Lease. Further, the Plaintiff reiterates the Defendant duly executed the Letter of Offer and Deed of Assignment which confirmed that the rental income from the suit premises was used security for the

loan and also to be used to repay the Loan hence cannot terminate the Lease Agreement.

I note that as per the Letter of Offer, the Plaintiff charged his property to secure a loan of Kshs. 10 million, which loan was disbursed by the Defendant's Kahawa West Branch. From the Letter of Offer, the Plaintiff's obligations as a Chargor arise therefrom and it is expected to repay the loan as stated within the letter. The Lease Agreement and Letter of Offer are two different contracts that should be treated separately.

The Acceptance Clause within the Letter of Offer states as follows: ***'I/We hereby accept the offer for the facilities on the terms and conditions contained in this Letter of Offer and the attached General Terms and Conditions, and acknowledge that the conditions form an integral part of and are not divisible from this Facility Letter. I/We further confirm that I/We have obtained independent legal advice in understanding the Facilities and the implications of the terms of this Facility Letter including the attached General Terms and Conditions.'***

The Deed of Assignment dated 15th April, 2016 at Clause (3) ***' The Lender at the request of the Assignor agreed to accept a legal assignment of the Assignor's rental income in respect of the said premises as well as the benefit of any amount payable by any surety or guarantor of any rental fee (together called the Rental Income) to go towards the payment of the Secured Amount in the manner and subject to the terms and conditions set out below.'***

Clause 4 of the Deed of Assignment provides that ***' Nothing in this Deed shall affect in any way any obligation of the Assignor to comply with the provisions of any existing security or legal Charge or any facility letter or letter of commitment from the Lender and such other existing security shall remain in full force and effect and IT IS AGREED that this Deed is in addition to and not in substitution of such security. In the event of any conflict between the provisions of this Deed and the provisions of any such other security such other security shall prevail.'***

From the Acceptance Section of the Letter of Offer and Clause 3 & 4 of Deed of Assignment above, I note that the Plaintiff indeed accepted the terms and conditions contained in the said letter and acknowledged that the conditions form an integral part of and are not divisible from this Facility Letter. In the Deed of Assignment I note it is the Plaintiff who requested the Defendant to accept a legal assignment of its rental income. Clause 4 of the Deed of Assignment is very explicit in terms of the Plaintiff's obligations to comply with the provisions of the legal Charge or any facility letter or letter of commitment from the Defendant and is not in substitution of such security. From the foregoing I find that that in so far as the Plaintiff had a legitimate expectation from the Defendant to continue with the Lease Agreement, it has not established a prima facie case to warrant the injunctive orders sought at this juncture.

On the second limb that the Plaintiff will suffer irreparable injury, which would not adequately be compensated by an award of damages. I find that the issues in dispute raised by the Plaintiff relate to breach of contract and if after the hearing and final determination of this suit, the Defendant is found in breach; it is a bank which has even extended a loan facility to the Plaintiff, and can be adequately compensate Plaintiff by way of damages.

On the question of balance of convenience, from the evidence presented by the parties, I am not convinced that the balance tilts in favour of the Plaintiff who it seems expects the Court to intervene and rewrite the contractual obligations between itself and the Defendant.

In the circumstances I find that the Plaintiff's application dated the 12th July, 2017 is not merited and I dismiss it with costs.

Dated signed and delivered in open court at Kajiado this 9th day of October, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Mungai for plaintiff

No appearance for Maina Onsare for defendant

Court assistant Mpoye