



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO.354 OF 2015

STARNET INVESTMENTS LIMITED.....PLAINTIFF

- VERSUS -

RUKIA SALIM.....DEFENDANT

RULING

What is before me is the plaintiff's application brought by way of Notice of Motion dated 4th May, 2015 seeking a temporary injunction to restrain the defendant from interfering with its possession and use of parking bays No.25 and No. 26 at Connaught Apartments situated on L.R. No. 1870/VI/85 Nairobi (hereinafter referred to as "the suit property"). The application is brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the plaintiff's managing director, Martin Ogang' on 4th May, 2015. The plaintiff's case against the defendant is that, the plaintiff is registered as the leasehold proprietor of Apartment Number 62 on the 6th floor of the suit property under a lease dated 8th December, 1998 which commenced on 31st May, 1998 and terminates on 27th March, 2095. Under the said lease, the plaintiff has a right to use parking bays No.25 and No.26 formerly referred to as parking bays No.15 and No.16 respectively situated on the ground floor of the suit property. The plaintiff has contended that it has utilized the said parking bays since 1998 when he purchased the said apartment without interference. The plaintiff has contended that the defendant has from time to time without its permission entered upon and forcefully parked her motor vehicles on its said parking bays thereby trespassing on the same. The plaintiff has contended that the defendant's actions aforesaid have occasioned him prejudice and inconvenience on various occasions. The plaintiff has contended that it has been unable to legally enjoy peaceful use of the said parking bays and that complaints made to the management company of the apartments and to the defendant directly for her to cease interfering with the said parking bays has not resulted in any positive outcome.

The application is opposed by the defendant through a replying affidavit sworn on 23rd June, 2015. The defendant has averred that she is a leasehold proprietor of Apartment No. RH003 on the lower ground floor 2 of Connaught apartments pursuant to a lease dated 6th November, 2000. The defendant has averred that upon taking up the said lease, she was allocated parking bay No.02 which is currently referred to as No.25 for her vehicle by Gimco Limited which was then the managers of the suit property. The defendant has contended that the plaintiff cannot own a parking bay on the suit property since the parking bays are common parts of the suit property which are owned jointly by all the owners of the apartments on the suit property. The defendant has averred that if indeed the plaintiff was allocated the two parking bays that the plaintiff is complaining about, the allocation was done at a time when many of the apartments were unoccupied and hence, apartment owners had ample parking for more than one vehicle. The defendant has averred further that under paragraph 1.1 of her lease, the company managing the apartments was at liberty to re-designate parking bays from time to time as it so desired. The defendant has contended that a meeting held on 19th July, 2014 by the apartment owners to resolve the parking dispute resolved that each

apartment owner is entitled to one parking bay on the upper or middle parking level and that those with two vehicles were to be allocated parking space in the basement parking bay. The defendant averred further that at the annual general meeting that was held on 11th April, 2015, some apartment owners offered to surrender their upper parking bays to the plaintiff provided that he cleared service charge arrears he owed in the sum of Kshs. 18,524,297.00 which offer the plaintiff has not taken up due to his failure to settle the said service charge arrears. The defendant has contended that the plaintiff is not entitled to the prayers sought since it has approached the court with unclean hands and that the court cannot provide relief to the plaintiff for a hardship brought about by the plaintiff's own failures and/or omissions. The defendant has contended that if the orders sought are granted, she will suffer loss and damage as she would be left without a parking slot and would be forced to park at the basement where her vehicle would be at risk of damage. She has contended that the plaintiff already has a parking space for one vehicle and as such he would not suffer prejudice were it to park one of its cars in the basement. The defendant has averred that the plaintiff's application is incompetent since the deponent of the affidavit in support thereof has not tendered evidence showing he had authority to swear the said affidavit. The defendant has averred further that she has been wrongly sued since the proper plaintiff should have been Maple Management Limited which is the company managing the suit property. Finally, the defendant has termed the plaintiff's application misconceived, incompetent, frivolous and unmeritorious and an abuse of the court process.

At the hearing of the application on 24th January, 2017, the parties relied entirely on the affidavits in support of and in opposition to the application. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the affidavit in reply by the defendant. What I need to determine is whether the plaintiff has satisfied the conditions for granting a temporary injunction which were set out in the case of Giella vs. Cassman Brown & Company Limited[1973] E.A 358. The apartments on the suit property were constructed by SR Flats Limited and is being managed by Maple Management Limited. Clause 1.1 of the lease dated 8th December, 1998 between SR Flats Limited and the plaintiff conferred upon the plaintiff additional rights as follows:

“The right of the owner to use the car parking bays numbered 15 and 16 on the Ground level of the car park of Connaught Apartments or such other parking bay as the company may from time to time designate in writing to the owner...”

On the other hand, the lease dated 6th November, 2000 between SR Flats Limited and Maple Administrators Limited from which the defendant derives her parking rights has conferred upon the defendant the following additional rights in clause 1.1:

“The right of the owner to use the one car parking bay on the Basement level of the car park of Connaught apartments for the purposes of identification only marked 02 on the architects building plan... or such other car parking bay as the company may from time to time designate in writing to the owner”

It is clear from the foregoing that, the plaintiff was allocated 2 parking bays on the ground level parking while the defendant was allocated 1 parking bay on the basement of the suit property. SR Flats Limited or Maple Management Limited has power under the leases held by the plaintiff and the defendant to re-designate the car parking bays which were allocated to the plaintiff and the defendant under the said leases from time to time in writing. No evidence of such re-designation has been placed before the court by either party. What the defendant has placed before the court is the extract of the minutes of the annual general meeting of Maple Management Limited which was held on 11th April, 2015 at which a resolution was passed that each apartment owner is entitled to one parking bay on the upper ground level car park and that those with additional vehicles should park the same on the basement parking.

The defendant has also placed before the court a copy of an e-mail dated 13th November, 2013 that was addressed to the plaintiff by Gimco Limited the former managers of the suit property to the effect that parking bay No.25 had been allocated to the defendant. In the said e-mail, the plaintiff was asked to park his extra cars at the basement parking. As I have stated above the parking bays No. 25 and No.26 which

were allocated to the plaintiff under the lease dated 8th December, 1998 can only be re-allocated to another apartment owner by SR Flats Limited or Maple Management Limited. The same applies to the parking bay that was allocated to the defendant. The re-allocation of the said parking bays has to be done in writing. As I have already observed, there is no evidence before the court showing that parking bay No. 25 was taken away by SR Flats Limited or Maple Management Limited from the plaintiff and re-allocated to the defendant.

I am of the view, that the plaintiff is entitled to continue using parking bays No. 25 and No. 26 until SR Flats Limited or Maple Management Limited allocates to him new parking bays in writing. There is no evidence before me that Gimco Limited which purported to allocate parking bay No. 25 to the defendant was the duly established management company for the suit property. Its e-mail to the plaintiff dated 13th November, 2013 had no basis in the circumstances. The resolutions which were passed at the annual general meeting of Maple Management Limited on 11th April, 2015 which the defendant has also relied on to support her claim over parking bay No. 25 is not of much help either. The resolutions had to be followed by a letter to the apartment owners concerned re-allocating their excess parking bays on the ground level parking to the apartment owners who had no parking. I am of the view that the procedure provided for in the plaintiff's lease dated 8th December, 1998 was not followed when Gimco Limited purported to re-allocate the plaintiff's parking bay No. 25 to the defendant. In the circumstances, I am in agreement with the contention by the plaintiff that the defendant has no right to park her car on parking bay No.25. The said parking bay has not been allocated to her lawfully.

For the foregoing reasons, I am persuaded that the plaintiff has established a prima facie case against the defendant with a probability of success. I am also satisfied that the plaintiff would suffer irreparable harm if the orders sought are not granted. As I have stated above, the plaintiff has not been allocated another parking bay. The upshot of the foregoing is that the plaintiff's application dated 4th May, 2015 has merit. The same is allowed in terms of prayer 3 thereof. The injunction granted herein shall remain in force until the hearing and determination of the suit or for a period of 12 months from the date hereof whichever comes earlier. The costs of the application shall be in the cause.

Delivered and Signed at Nairobi this 6th day of October 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Limo for the Plaintiff

No appearance for the Defendant

Catherine Court Assistant