



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO. 72 OF 2017**

**SAYANI INVESTMENTS LIMITED.....PLAINTIFF**

**-VERSUS-**

**KENYA INSTITUTE OF PROFESSIONAL STUDIES.....DEFENDANT**

**RULING**

The Plaintiff filed the application dated 1/2/2017 seeking a mandatory injunction to compel the Defendant to continue paying rent in accordance with the lease without making any deductions. The application was filed with the plaint in which the Plaintiff seeks a declaration that the terms of the lease executed between the Plaintiff and the Defendant are binding.

The Plaintiff and the Defendant entered into a lease on 15/8/2016 in which the Plaintiff demised to the Defendant 11,000 square feet of floor space on the 1<sup>st</sup> and 2<sup>nd</sup> floors of the premises known as Philadelphia House, Nairobi erected on L.R. No. 209/675 at a quarterly rent of Kshs. 3,138,960. The Defendant took up the premises and is running a college on the suit premises. After taking up the premises the Defendant wishes to have the lease reviewed so that the space it has let is reduced to 9421.4789 on the basis that it should not be made to pay rent for the common areas.

Parties agreed to get valuers to measure the let floor space and prepare a report. Joint reports dated 2/3/2017 and 10/3/2017 were prepared and filed in court.

The Plaintiff contends that since the Defendant is the sole tenant occupying the 1<sup>st</sup> and 2<sup>nd</sup> floors of Philadelphia House, it is liable to pay rent for the gross lettable area which includes the carpet area and the common pass on two floors that it occupies. The Plaintiff contends that having wholly rented the entire 1<sup>st</sup> and 2<sup>nd</sup> floors of the premises the Defendant is estopped from imposing on the Plaintiff a reduction of the size of the let premises and the rent payable by claiming that some of the areas are not lettable. The Plaintiff maintains that the Defendant is wholly liable for the rent for the total space comprising the 1<sup>st</sup> and 2<sup>nd</sup> floors in accordance with the lease executed between the parties.

The Plaintiff submits that it is entitled to a mandatory injunction since it considers this case a clear one which the court ought to decide at once.

The Defendant maintains that even though it signed the lease agreement, the Plaintiff misrepresented to it that the total space being leased to it was 11,000 square feet. After signing the lease and taking possession of the premises, the Defendant claims that it realized that the premises were in fact smaller than what the Plaintiff had indicated to the Defendant.

The Defendant concedes that the joint report prepared by its valuers, that is, Paragon Properties Valuers

Ltd and the Plaintiffs Valuers, Shelter (M) Valuers Ltd; shows that the total space for the two floors is 11,071.42 square feet. Its contention however, is that this includes the main staircase, electrical ducts, lifts, cleaner store/refuse chute and the corridor. The Defendant sees the issue in dispute that the court needs to determine being whether or not the premises which are subject of the lease includes the main staircase, the rear staircase, electrical ducts, lifts, cleaner store and the corridor.

The Defendant relies on the definition of the premises in the lease as follows:-

*“All that area of the 1<sup>st</sup> and 2<sup>nd</sup> floors of Philadelphia House comprising 11,000 feet approximately as more particularly defined in the 1<sup>st</sup> schedule.”*

The 1<sup>st</sup> schedule states that the premise is all that area measuring 11,000 square feet approximately on the 1<sup>st</sup> and 2<sup>nd</sup> floors of Philadelphia House.

The Defendant submits that since the premises and the common parts are defined separately in the lease then the common parts are those intended for use by all the tenants and other occupants of the building. Common parts are defined as pedestrian ways, forecourts, entrance halls, landings, lifts, staircases, passages and other areas which from time to time during the term are provided by the landlord for common use by the tenants and occupiers of Philadelphia House. It is the Defendant's position that the common parts do not form part of the premises it leased. It also submits that a lease grants to the lessee the rights to exclusive possession and use of a specified physical space for a specified period of time on the terms of the lease.

The Defendant contends that the size of the premises it has let from the Plaintiff ought to be adjusted downwards by excluding the common parts and that it ought to pay rent commensurate to the reduced size. The Defendant argues that it will be grossly unjust for it to be required to continue paying rent based on the size of 11,000 square feet when the actual size is 9806.608 square feet.

The Defendant contends that the Plaintiff missed the point when it argues that the common parts cannot be apportioned with any other tenant since the Defendant is the sole tenant occupying the two floors. It maintains that under the terms of the lease it is only liable to pay rent for the space leased to it and not any other space and that the question of apportionment of the common part does not arise because it is not contained in the lease.

The Plaintiff relies on the case of **National Bank of Kenya Ltd V. Pipeplastic Samkolit (K) Ltd & Another** (2002) 2 EA 507 in support of its submission that it is not within the province of the court to vary contracts duly executed between parties. The court stated that a court of law cannot rewrite a contract between the parties. The parties are bound by their terms of contract unless coercion, fraud or undue influence are pleaded and proved. The court cited the statement by Shah J.A in **Fina Bank Ltd V. Spares and Industries Ltd** (2000) 1 EA 52 that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily not a function of equity to allow a party to escape from a bad bargain.

The Plaintiff also relies on the case of **Joseph D. K. Kimani t/a as Pyramid Auctioneers & Another V. Simon Chege Kamangu** (2016) eKLR where the court observed that a mandatory injunction can be granted on an interlocutory application as well as at the hearing. The court stated that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remitted; or where the Defendant had attempted to steal a match on the Plaintiff. Before granting a mandatory injunction the court has to have a high assurance that at the trial it would appear that the injunction had rightly been granted.

The court has looked at the plaint, the application and the replying affidavit together with the submissions of counsel. The Defendant has not filed a defence to the Plaintiffs claim.

The court notes that the joint report dated 10/3/2017 confirms that the total space on the 1<sup>st</sup> and 2<sup>nd</sup> floors is 5535.71 square feet. The Defendant is running a college on the two floors and therefore has exclusive use of the two floors. It is expected that only the Defendant will have the use of the lift and the stairs as well as the corridors leading to these two floors. One cannot expect tenants from other floors to come and use the corridor on the 1<sup>st</sup> and 2<sup>nd</sup> floors occupied by the Defendant. It is only the tenants going to upper floors who would be expected to use stairs on the 1<sup>st</sup> and 2<sup>nd</sup> floors to access the 3<sup>rd</sup> up to the 5<sup>th</sup> floors of the building. The electrical duct and the cleaners store/ refuse chute on these two floors would be used for purposes of serving the 1<sup>st</sup> and 2<sup>nd</sup> floors.

The court agrees with the Plaintiff that since the Defendant is the sole tenant on these two floors, the rent chargeable for common parts cannot be apportioned to any other party. Where there are several tenants on one floor, then the common parts would be apportioned on a *pro rata* basis among the tenants.

This is a clear case where a mandatory injunction ought to issue.

The court finds that the Plaintiff has met the threshold for the grant of a mandatory injunction and allows the application dated 1/2/2017. The Plaintiff will have the costs of this suit.

Dated and delivered at Nairobi this 14<sup>th</sup> day of December 2017.

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Mong'eri for the Plaintiff

No appearance for the Defendants

Mr. V. Owuor- Court Assistant