



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO.1281 OF 2013

PARAMOUNT ELECTRONICS LIMITED..... PLAINTIFF

VERSUS

SIMON GATEMBU MUGAA.....1ST DEFENDANT

MOHAMED IBRAHIM GULED T/A RASMA RESTAURANT.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 2nd April 2014 in which the Plaintiff/Applicant seeks for the following orders:

1. Spent.
2. Spent.
3. That a mandatory injunction do issue requiring the 1st Defendant to renew the Plaintiff's lease dated 30th January 2009 in respect of the premises known as Shop No. 2 situated on the ground and mezzanine floors of building commonly known as 'Solace House' which is erected on the property known as L.R. No. 209/875 along Tom Mboya street in Nairobi (hereinafter referred to as the "suit property") for a further period of 5 years and 1 month from 1st March 2014;
4. That a mandatory injunction do issue requiring the 1st Defendant to terminate the leasing arrangement entered with the 2nd Defendant vide a lease dated 1st July 2013 with regard to the suit property;
5. That a mandatory injunction do issue requiring the 2nd Defendant to make payments due to the Plaintiff in respect of the business in the suit property from July 2013 onwards and in default thereof he be ordered to cease running the same therefrom; and,
6. That costs of this Application be provided for.

The Application is premised on the grounds set out on its face together with the Affidavit of Moez Sherali Haji, a director of the Plaintiff/Applicant, sworn on 2nd April 2014 in which he averred that at all material times M/s Lake Dry Cleaners Limited (hereinafter referred to as the "Former Landlord") were the registered owners of the suit property. He averred further that by a lease dated 30th January 2009, the Former Landlord leased to the Plaintiff the suit property for a term of 5 years and 1 month for exhibition stalls to be used by stallholders for sale of general merchandise. He further averred that the Plaintiff continued its exhibition business in the suit property by the name 'Noor Exhibition Centre' which was

being managed on behalf of the Plaintiff by one Hassan Mohamed Ahmed with the assistance of the 2nd Defendant. He averred further that the Plaintiff wrote to the Former Landlord its letter dated 30th May 2011 requesting for permission to change the user of the suit property from exhibition stalls to a restaurant/hotel which permission was granted. He confirmed that the previous arrangement of running the business was maintained whereby the said restaurant was to be run by the 2nd Defendant and from the proceeds thereof he would pay a monthly sum of Kshs. 400,000/- to the Plaintiff and keep the balance as his commission/fees. He further stated that by a letter dated 17th June 2013, the Former Landlord informed the Plaintiff that the 1st Defendant had acquired the building and that the 1st Defendant had therefore become the Plaintiff's new landlord. He averred further that upon taking over as the new landlord, the 1st Defendant wrote to the Plaintiff a letter dated 27th June 2013 seeking to increase the rent payable contrary to the express terms of the lease. He stated further that in response thereto, the Plaintiff wrote a letter dated 1st July 2013 pointing out the relevant provisions of the lease and declined to accede to the demand for rent increment. He stated further that the 1st Defendant did not take kindly the Plaintiff's refusal to accede to his demand for rent increment and wrote back through his lawyers accusing the Plaintiff of a litany of alleged misdeeds including that it had sublet the suit property to the 2nd Defendant contrary to the terms of the lease. He added that the 1st Defendant also stated through his advocates that he had purportedly exercised the landlord's right under the lease to retake possession of the suit property with immediate effect and that he would proceed to lease the same to any other party including the 2nd Defendant. He averred further that the Plaintiff's advocates wrote to the 1st Defendant denying the alleged misdeeds and pointed out that the purported forfeiture of the lease was contrary to the law and therefore illegal null and void. He stated further that the Plaintiff subsequently came to learn that the 2nd Defendant wrote a letter dated 27th June 2013 to the 1st Defendant misrepresenting that he was a sub-tenant of the Plaintiff in the suit property and requested the 1st Defendant to grant him a direct lease for the same with an offer to pay the increased rent that the 1st Defendant had demanded from the Plaintiff. He further added that the Plaintiff subsequently came learn that the 1st Defendant purported to lease the suit property to the 2nd Defendant and the 2nd Defendant defaulted in his obligations to the Plaintiff from the month of July on the basis that he now has a direct lease from the 1st Defendant. He stated further that by the 1st Defendant's illegal conduct, the Plaintiff was dispossessed of the suit property before the expiry of its lease and upon the anticipated renewal thereof as a consequence of which it has suffered and will continue to suffer serious loss of income at the rate of Kshs. 400,000/- per month unless this honourable court intervenes. He also pointed out that when the Plaintiff sought to renew the lease, the 1st Defendant refused to renew the same claiming that there was no lease agreement between the parties.

The Application is contested. The 1st Defendant filed his Replying Affidavit sworn on 24th April 2014 in which he averred that he is the registered proprietor of the suit property pursuant to a Grant and instrument of transfer registered at the Land Titles Registry at Nairobi as No. I.R. 141587/2. He averred that he acquired the suit property for valuable consideration. He stated further that the lease relied on by the Plaintiff was never registered as required by law or at all and that the only interest that the Plaintiff can claim is a monthly tenancy terminable by 15 days' notice. He added that by virtue of **section 25 of the Land Registration Act 2012**, his rights as proprietor of the suit property are not subject to any lease, charge or other encumbrances not noted in the register. He denied that there has ever been any landlord and tenant relationship between him and the Plaintiff as alleged. He added that any landlord and tenant relationship subsisted only between the Plaintiff and the Former Landlord. He further added that he has never accepted any rent from the Plaintiff and that the position is that after he acquired ownership of the suit property, he offered the Plaintiff a new lease at an increased rent but they could not agree on the rent payable hence the lease never came into existence. He further stated that the Plaintiff cannot purport to take advantage of a lease entered into with a completely different entity and the 1st Defendant is not a successor in title to the Former Landlord. He further stated that the Plaintiff sub-let the suit property to one Hassan Mohamed Ahmed who in turn purported to sub-let the same to the 2nd Defendant. He added that these purported sub-lettings were all illegal and in blatant breach of the 1st Defendant's rights as registered proprietor of the suit property. He also pointed out that in any event the Plaintiff's lease upon which he relies expired by effluxion of time on 1st March 2014, well before filing this Application.

The Application is further contested by the 2nd Defendant, Mohamed Ibrahim Guled, who filed his Replying Affidavit sworn on 27th June 2014 in which he averred that he is a lawful tenant of the 1st Defendant in the suit property. He pointed out that before he became a direct tenant of the 1st Defendant, he had been a sub-tenant of Hassan Mohamed Ahmed at the suit property. He stated that he has no contract with the Plaintiff and that the copy of lease annexed was between the Plaintiff and the said Hassan Mohamed Ahmed, who is not a party to this suit. He confirmed that he applied for and was granted by the 1st Defendant a lease over the suit property where he established his business by the name Rasma Restaurant.

The issue arising from this Application is whether or not to grant the mandatory injunctions sought after by the Plaintiff. The leading authority on this issue is the case of **Locabail International versus Agro Export (1986) 1 ALLER 901** wherein it was stated as follows:

“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 thought that the matter ought to be decided at once, or where the injunction was directed at simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

Going by the facts of this case, it appears to me that granting the prayers sought in this Application, to be specific the mandatory injunctions set out in prayers 3-5 of this Application, will in essence result in the determination of the main issues in this suit as prayed in the Plaint without going through the trial. To further complicate matters, the Plaintiff is not in possession of the suit property. The 2nd Defendant is the one in possession. Granting the mandatory injunctions sought after by the Plaintiff may result in the position on the ground being altered without the suit being heard and determined. The Plaintiff has to my knowledge failed to demonstrate that there are special circumstances warranting this court granting to it the mandatory injunctions it seeks without the benefit of the full trial of this suit. This case is not clear and this court finds that the Plaintiff has failed to meet the threshold for the grant of the mandatory injunctions sought after.

To that extent therefore, this Application is dismissed with costs to the Defendants.

DELIVERED AND SIGNED AT NAIROBI THIS 29TH DAY OF JANUARY 2016.

MARY M. GITUMBI

JUDGE