



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 173 OF 2014**

**SAMSON MULIRO AKETCH T/A**

**KENYA AERONAUTICAL COLLEGE..... PLAINTIFF**

**VERSUS**

**KENYA AIRPORTS AUTHORITY..... DEFENDANT**

**RULING**

**The Application**

The application before the Court is a Notice of Motion dated 17<sup>th</sup> February 2014 filed by the Plaintiff, in which he is seeking the following orders:

1. An order of injunction to restrain the Defendant from evicting the Plaintiff; terminating the lease with the Plaintiff; disposing, alienating, reclaiming and/or taking over the premises situate in L.R No. 209/13080 Wilson Airport, Nairobi (hereinafter referred to as “the suit premises”); and/ or harassing or interfering with the Plaintiff’s peaceful occupation of the said premises pending the hearing of this suit.
2. An order for specific performance of the agreement comprised in the letter of offer dated 24<sup>th</sup> January, 2007, and consequent procurement of a duly registered lease in respect of 8000sq.ft in LR. No. 209/13080 in favour of the Plaintiff.
3. A declaration that the Plaintiff is entitled to a lease over premises occupied and built on LR. No. 209/13080 in terms of the letter of offer dated 24<sup>th</sup> January, 2007.
4. An order that the OCS (Officer Commanding Station) Langata Police Station do assist in enforcing orders granted herein.

The grounds for the application are that the Plaintiff is a tenant of the Defendant under a Build Operate and Transfer agreement of a portion measuring 8,000sq.ft on L.R No. 209/13080 at Wilson Airport Nairobi, where he has built a 3 storied-building known as Kenya Aeronautical College. However, that the Defendant has frustrated the Plaintiff from recouping his investment, and in particular that it has refused to provide the Plaintiff with a registered lease document over the premises. The Plaintiff claims that due to the said refusal by the Defendant, he is in dire need of finances to run the operations of the said college, and is severely indebted to the tune of about Kshs.22 million, while his investment of Kshs.126 million cannot afford him credit for lack of a registered lease.

The Plaintiff gave a detailed account of the dispute herein in a supporting affidavit and supplementary affidavit he swore on 17<sup>th</sup> February 2014 and 2<sup>nd</sup> April 2014 respectively. He explained therein that he approached Kenya Airports Authority for a lease of a portion of their property namely LR. NO.

209/13080 at Wilson Airport Nairobi, to construct an aeronautical college. Further, that by a letter dated 17<sup>th</sup> August 2006 and later by a letter of offer in writing dated January, 24<sup>th</sup> 2007, the Defendant agreed to grant him a lease over 8000 square feet of its parcel of land known as L.R No. 209/13080 at Wilson Airport, Nairobi, for a renewable term of 10 years and for an annual rent of Kshs.480,000/=. He attached copies of the said letters.

The Plaintiff stated that the terms of the lease were that upon payment of the annual rent he would build and operate on, and after recouping his investment transfer the property to the Defendant. Further, that he would also be responsible for the legal costs of preparation, stamp duty and registration of the lease. The Plaintiff stated that he executed three sets of the lease and paid the Defendant's Advocates legal fees. However, that since the lease was sent to the Defendant by its advocates for execution on 15<sup>th</sup> December 2008, he has made many requests to be provided with the registered copy but in vain. The Plaintiff attached various letters in support of his claim.

Further, that the failure by the Defendant to provide him with a copy of the registered lease has made it impossible for him to obtain credit on favourable terms, as well as negatively affected his chances of attracting partners and investors in building and developing the college. The Plaintiff also averred that the Defendant has consistently demanded their quarterly rent as per the lease, and he has paid the same even though they refuse to honour their part of the lease and letter of offer. He attached evidence of the said payments.

The Plaintiff denied that he commenced construction of the college without submitting his drawing to the Defendant for approval, and stated that on 24<sup>th</sup> February, 2009 he submitted his plans to the Defendant, after a joint meeting on the 12<sup>th</sup> February 2009. Further, that on 7<sup>th</sup> May, 2009 at the request of the Defendant, he submitted the deed plan and further informed the Defendant that he had complied with all their requests and demands made. He attached copies of the letters dated 24<sup>th</sup> February 2009 and 5<sup>th</sup> May 2009. The Plaintiff averred that the construction of the buildings was done within the law and the same meet the standards set for such buildings under section 152 of the Kenya Airports Authority Act and local government requirements.

Further, that the Defendant allowed the Plaintiff to sub-let part of the building and approved installation of electricity in the same. The Plaintiff also averred that the letter of offer dated 24<sup>th</sup> January 2007 did not make the preparation, signing and registration of the lease subject to his submission of plans for approval as claimed by the Defendant.

### **The Response**

The Defendant opposed the Plaintiff's Notice of Motion in a replying affidavit and further affidavit sworn on 17<sup>th</sup> March 2014 and 15<sup>th</sup> April 2014 respectively by Fred Odawo, its Manager in charge of Planning, Research & Budgeting. The deponent stated that on or about 2006 the Defendant offered the Plaintiff premises for the construction of an office block at Wilson Airport Nairobi, and that under section 12(3) (b) of the Kenya Airports Authority Act, the Defendant is under a duty to control construction and use of aerodromes within its jurisdiction. Further, that the construction must be in line with the Local Government (Adoptive By-Laws Buildings) Order 1968, the Local Government (Adoptive By-Laws) Grade II Building) Order 1968 and other regulations also known as the Building Code.

The deponent stated that as a result, any person who wishes to erect any structure on an aerodrome must submit building plans to the Defendant for approval, and that the Defendant also makes periodical checks while construction of any such building is in progress to confirm compliance with the Building Code and other requirements. The deponent explained that in the month of September 2009, he and other members of a Committee that is charged with inspecting buildings in airports and airstrips around the country known as the Development Approvals Committee visited an office building which was being erected by the Defendant Wilson Airport, and observed that the Plaintiff had commenced constructions without first submitting its drawings to the Defendant for approval contrary to clause 17 of the letter of offer. Further that the construction did not meet the required standards set by the Building Code.

The deponent gave a detailed account of the violations of the Building Code by the Plaintiff and other defects noted by the said committee, and stated that the same rendered the building unsafe for habitation. Further, that the said committee ordered the Plaintiff to provide acceptable building plans to be approved by the Defendant before proceeding with any further construction. The deponent also stated that the Plaintiff was also required to make certain specified critical structural and architectural modifications to the building as a pre-condition to the approval of the plans.

The deponent averred that the defects and proposed adjustments are set out in letters dated 23<sup>rd</sup> April, 2009 and 19<sup>th</sup> October, 2009 which he annexed. He stated that the first letter referred to drawings which the Plaintiff submitted pursuant to the Defendant's instructions contained in the letter dated 24<sup>th</sup> February, 2007, while the second one was written after the Plaintiff had re-submitted the same drawings without correcting the anomalies which had been pointed out in the first letter. The deponent explained that at the time of the visit by the Approvals Committee, the construction by the Plaintiff had reached the 2<sup>nd</sup> floor.

However, that the Plaintiff did not effect the required adjustments, and that the building plans subsequently submitted by him were not approved for that reason, and for the reason that the plans were not signed by a registered architect as required. Further, that the Plaintiff has not complied with the said requirements to date, and went on to complete the construction which comprises 2 floors and a rooftop balcony, and is now operating a fully-fledged aeronautical college in defiance of the Defendant's requirements.

The deponent also stated that it was an express condition of the letter of offer that before commencement of construction, the Plaintiff would submit 3 sets of building plans for approval by the Defendant, and further, that the granting of the proposed lease was subject to observance by the Plaintiff of the conditions set out in the letter of offer. Further, that the Defendant allowed the Plaintiff to install electricity to the said building and also allowed him to sublet the premises purely due to departmental mistakes which were based on the assumption that he had complied with all necessary requirements for the construction. The same reason was also given for the Defendant's instructions to its advocates to prepare the lease and forward it to the Plaintiff for execution.

The deponent averred that this notwithstanding, the said mistakes do not constitute a waiver of the requirements of the letter of offer, and that the Defendant is entitled to decline to sign the said lease and even repudiate or revoke the entire contract since the Plaintiff commenced construction and continued with the same in defiance of the Defendant's requirements. It was the deponent's contention that any loss that the Plaintiff may have suffered or stands to suffer as alleged is of his own making, and should not be attributed to the Defendant.

### **The Issues and Determination**

The parties were directed to file and serve written submissions in which they reiterated the averments made in their pleadings. The Plaintiff's counsel filed submissions dated 30<sup>th</sup> September 2014 while the Defendant's counsel filed submissions dated 10<sup>th</sup> November 2014. I have read and carefully considered the pleadings, annexed evidence and submissions made by the Plaintiff and Defendant. The issue arising herein is whether the Plaintiff has met the threshold for the grant of the temporary and mandatory orders of injunctions he seeks.

The requirements for the grant of temporary injunctions are stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and these are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience. For the grant of mandatory injunctions, the principles were set out by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** wherein it was held that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter

ought to be decided at once.

Lastly, as to what constitutes a *prima facie* case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** stated as follows:

**“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

The Plaintiff in this respect submitted that it had clearly shown that it had a *prima facie* case with a probability of success since there was a valid letter of offer duly executed by the parties which created a legal relationship between them, and that the Plaintiff had performed his part by continuing to pay rent to the Defendant. The Plaintiff also stated that he would suffer irreparable harm as he had invested Kshs 126 million in the suit property which he could not recoup without a lease agreement.

Further, that this was a clear case to warrant the grant of mandatory orders sought, as the Defendant was clearly in violation of the letter of offer by refusing to forward to the Plaintiff with the lease agreement. The Plaintiff relied on the decisions in **Bachelors Bakery Ltd vs Westlands Securities Ltd, Civil Appeal No. 2 of 1978, Waterfronts Outlets Limited vs Njeka Ochunyi, NRB ELC 270 of 2012 and Republic vs Municipal Council of Nakuru & Another, (2009) e KLR** in this respect.

The Defendant on the other hand submitted that there is no provision in the Civil Procedure Act and Rules for granting the orders of specific performance and declaration sought by way of an interlocutory application. Further, that the acceptance of rent by the Defendant created a periodic tenancy terminable by giving the appropriate notice, and that the Plaintiff was in violation of clause 17 of the letter of offer by commencing construction without acceptable building plans and was hence in breach of contract. The Defendant lastly submitted that the Plaintiff was therefore not entitled to the equitable orders sought as he had not done equity and had not come to court with clean hands.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. I note from the Plaintiff's Plaint dated 17<sup>th</sup> February 2014 that he is seeking the same orders of a permanent injunction, specific performance and declaration as those sought in his Notice of Motion as well as damages. He relies on his letter of offer by the Defendant dated 24<sup>th</sup> January 2007 which he accepted on 30<sup>th</sup> January 2007, and the payments he made as rent and investments on the suit property. He brought evidence of the said letter of offer and acceptance, of the acknowledgment of receipt of rent by the Defendant and of a valuation report dated 13<sup>th</sup> November 2012 of the buildings on the suit property.

The Defendant does not deny that it made an offer to the Plaintiff which was accepted. To this extent I find that the Plaintiff has shown that a contract exists between him and the Defendant and therefore has demonstrated a *prima facie* case. In addition, in light of the investments he has also shown to have made on the suit property which the valuation report identified as a four storeyed office block with an open market value of Kshs 126,000,000/=, I find that he will suffer irreparable damage which may not be adequately compensated in damages in the event that he is evicted from the said premises. I also note from the letter of offer that it was subject to a lease which was to be for a term of 10 years with effect from 1<sup>st</sup> March 2007, which term has not yet expired.

This finding notwithstanding, this court also notes that the Defendant has raised an objection that the construction made by the Plaintiff on the suit property was without the required approval, and voiced concerns about the structural integrity of the buildings constructed by the Plaintiff. The details thereof are indicated in its letters dated 23<sup>rd</sup> April 2009 and 19<sup>th</sup> October 2009. The Plaintiff in the said letters was requested to get in touch with the General Manager, Projects and Engineering to rectify the identified defects. The Plaintiff on the other hand claims that the construction he undertook on the suit property were within the law, but he did not provide any evidence of the necessary approvals. The Court in this

regard also notes that clause 17 of the letter of offer to the Plaintiff dated 24<sup>th</sup> January 2007 provided that he was to provide three sets of the proposed development plans to the Airport Manager for approval before commencement of any construction.

This is therefore not a clear case for the orders of specific performance and declaration sought to issue, in light of the outstanding issues as to the required approvals and the structural integrity of the Plaintiff's building. In addition in light of the risks that may be presented by the said building, any temporary injunction granted will only be conditional upon the Plaintiff taking the necessary steps to rectify any defects that are existing. I accordingly grant the following orders arising from the foregoing reasons:

1. The Defendant either through itself, its servants or agents be and is hereby restrained for a period of six months from the date of this ruling from evicting the Plaintiff; terminating the offer of lease to the Plaintiff; disposing of, alienating, reclaiming and/or taking over the premises constructed and occupied by the Plaintiff situated in L.R No. 209/13080 Wilson Airport, Nairobi, and/ or interfering with the Plaintiff's peaceful occupation of the said premises pending the hearing of this suit and/or until further orders, and subject to the following conditions:
  - a. That the Plaintiff shall pay the Defendant the rent due according to the terms and mode of payment specified in clauses 5 and 6 of the Defendant's letter of offer of lease dated 24<sup>th</sup> January 2007 and as accepted by the Plaintiff on 30<sup>th</sup> January 2007.
  - b. The Plaintiff shall within 30 days of the date of this ruling initiate discussions with the relevant officer of the Defendant on the architectural, structural, and other modifications that need to be instituted on the buildings constructed on the suit property, and shall within six months of the date of this ruling undertake the said architectural, structural, and other modifications as shall be agreed upon between the Plaintiff and Defendant.
2. Upon default of any of the conditions in Order 1 hereinabove the injunction order herein shall automatically lapse.
3. Parties shall be at liberty to apply.
4. The costs of the Plaintiff's Notice of Motion dated 17<sup>th</sup> February 2014 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_\_26<sup>th</sup> \_\_\_\_\_ day of \_\_\_\_\_January\_\_\_\_\_, 2015.

**P. NYAMWEYA**

**JUDGE**