



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&LC NO. 32 OF 2014

(FORMERLY H.C. CIVIL SUIT NO. 1 OF 2014

SARGO NGETICH & CO. ADVOCATES.....PLAINTIFF/APPLICANT

VS.

SEDCO CONSULTANTS LTD.....DEFENDANT/RESPONDENT

RULING

Introduction.

The application before the honourable court for determination is dated 23rd Day of January 2014. The same is brought pursuant to Articles 56(i), 159(2)(b) and 165(3) and (5) of the Constitution of Kenya 2010, section 1A,1B (I) (a), 3A and 63(e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 40 Rule 1 (a) (b) and 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law. The instant application is seeking the following substantive prayers, (to wit).

- a. *That this honourable court do issue a temporary injunction restraining the respondent from attaching applicants office assests which are their tools of trade pending the hearing of this application inter partes.*
- b. *That the Honourable Court be pleased to make a declaration that the Respondent attachment of the applicants property is illegal.*
- c. *This Honourable Court do issue a permanent injunction restraining the Respondent from levying distress for rent against the plaintiff.*
- d. *This Honourable Court be pleased to issue an order that this matter be transferred to Business Rent Tribunal when it resumes its sitting.*

The application is founded on the grounds on the face of it and further supported by the Supporting Affidavit sworn by Kennedy Korir Sargo on 23rd January 2014 and Further Supporting Affidavit sworn on the 4th Day of April 2014.

Plaintiff's /Applicant's Case

The plaintiff/applicant, *vide* its application dated 23rd January 2014 has stated that the Respondent instructed an auctioneer to levy distress against him for arrears of rent Ksh.209,502.95. It is stated further that the said debt of Kshs.209,502.95 is the debt owed to the Respondent by Danroh Securities. It is contested that the said arrears of rent is highly erroneous and unfounded as the applicant has diligently

paid the rent when due. It is stated that as per the records the plaintiff/applicant has paid the quarterly rent for January to March 2014. The plaintiff/applicant in its affidavits sworn by **Kennedy Korir Sargo** deposes that on or about 1/8/2012 the plaintiff/applicant trading as Sargo & Ngetich Co. Advocates entered into a lease agreement with the Co-operative Bank of Kenya and that the plaintiff/applicant has diligently paid the rent when it became due. The plaintiff/applicant vide its supporting affidavit sworn by Kennedy Korir Sargo has deposed further that the Respondent has attempted to subject the applicant with the intention of inducing or compelling the applicant to pay rent owed by the former tenant Danroh Securities information which the applicant is not associated with.

It is deposed further that associating the plaintiff/applicant with the said Danroh Securities Ltd is arbitrarily and was decided by the Respondent without the plaintiff's/applicant's consent. In its further supporting affidavit sworn on 4th April 2014, by the said Kennedy Korir Sargo, the plaintiff/applicant has denied being privy to the letter dated 6th day of June 2014 purporting to create a contractual obligation between the plaintiff/applicant and Danroh Securities Ltd. And finally, the plaintiff/applicant has deposed that it will suffer irreparable loss and damage if the auctioneer's levy distress against the applicant.

Defendant's/Respondent's Response.

The Respondent is opposed to the instant application vide the Replying Affidavit sworn by **Alfred Buruch** on 18th Day of March 2014. It is deposed that the instant application is baseless and therefore an abuse of the court process. It is deposed that through an inter-agreement between Sargo Ngetich and Danroh Security, Danroh agreed to hand over the space to Sargo. It is deposed further that the foregoing arrangement was acceptable on the condition that Sargo takes over the arrears of Danroh of which was formalized by a letter dated 4th June 2012 written by Sargo to the respondent confirming acceptance of the said condition and that the said arrears due to the Respondent by Danroh Security as at June 2012 was 102,822.95. It is deposed that the Respondent later entered a lease agreement with the applicant (Sargo Ngetich) which copy in triplicate was sent to the applicant for execution on 4th July 2012. The Respondent through Alfred Buruch, swears that the applicant has constantly refused to clear the outstanding arrears owing to them and that the instant application has been filed in bad faith, with the sole intention of delaying justice to the detriment of the Respondent since this matter would have purely been presided over by the Business Rent Tribunal and not this Honourable Court. The instant application was argued by way of written submissions.

Plaintiff's/Applicant's Submissions

The Plaintiff's/Applicant's advocates M/s Chepseba Lagat & Associates, filed their written submissions dated 2nd day of February 2015 and submitted that **section 150 of the Land Act, No. 6 of 2012**, this Honourable Court has the jurisdiction to hear and determine this matter and as such prayer No. 5 is abandoned and that the matter should proceed before this honourable court. It is submitted that the applicant is a tenant in the premises known as Co-Operative Bank House in Eldoret situated on L.R No. 7/105 Co-operative Bank House.

It is counsel's submissions that the tenancy agreement between the Applicant and Respondent was made on 1/8/2012 and the applicant has been a tenant since then to date and adhering to the tenancy agreement. It is submitted that the alleged rent arrears of Kshs.209,502.95 are not due from the applicant but are due from Danroh Security the former tenant to the respondent. It is submitted that there was no inter agreement between the applicant and the respondent and that the purported letter marked AB 1 is denied by the applicant. It is further submitted that the applicant is not in any rent arrears at all and that there is no express indication between the applicant and Danroh Security regarding payment of their debt at all.

It is submitted further that the respondent attachment of the applicant's property is illegal and not founded at all since (a) there is no nexus between the Applicant and Danroh Security at all, (b) there is no document indicating that indeed the applicant is a guarantor for Danroh Security and (c) there is no document indicating that indeed the applicant agreed to take over the debt owed to Respondent by Danroh Security. It is argued that assuming that it is true that the plaintiff/applicant guaranteed to pay debt owed

by Danroh Security to the Respondent, levying distress was not the best option at all and that the proper procedure was to file a suit claiming for the due amount, get judgment and execute. It is submitted that the application before the honourable court is meritorious and has satisfied the conditions and/or principles for grant of an injunction as set out in the case of *Giella vs. Casman Brown & Co. Ltd (1973)E.A 358.*

Respondent's Submissions

Apparently the respondent did not file their written submissions.

Determination

In view of the instant application for injunction the substantive issue(s) for determination may include and not limited to;

1. ***Whether the plaintiff has established the threshold for injunction as set out in the land mark case of Giella vs. Cassman Brown (1973) E.A 358-361.***
2. ***Whether the Honourable Court has jurisdiction to grant orders sought.***

In the foregoing *Cassman Brown case* the learned judge Spry, the Vice President of the Court of Appeal of the East Africa at pg 360, held as follows;

“I will begin by stating briefly the law as I understand it. First, the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially (Sargent v. Patel (1949), 16 E.A .C.A 63). The Condition for grant of an injunction are now, I think, well settled in East Africa. 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. (E.A Industries vs. Trufoods, [1972] E.A 420)”

Principles in Giella vs. Casman Brown.

In view of the foregoing holding, the plaintiff/applicant seeking an injunctive order is required to demonstrate that; one, has a *prima facie* case with a probability of success against the defendant, two, stands to suffer irreparable loss and harm unless orders sought are granted and three, in the event of doubt, the court is to decide the matter on a balance of convenience.

Prima Facie Case With A Probability of Success

In the case of *Habib Bank AG Zurich vs. Eugene Marion Yakub Civil Application Number Nairobi 43 of 1982.* Unreported, Madan, Law and Potter JJA. held that;

“Probability of success means the court is only to gauge the strength of the plaintiffs case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.” (See GV Odunga “Digest on Civil Case Law & Procedure” at pg 393)

In the case of *Francis Jumba Enziano and Others vs. Bishop Philip Okeyo and Others Nairobi High Court Civil Case Number 1128 of 2001(Unreported)* Ringera J. (as he then was) reiterated as follows;

The settled principles for grant of an injunction are, first that the applicant must show a prima facie case with probability of success at the trial and if the court is in doubt it

should decide the application on a balance of convenience...” (See GV Odunga, ibid at pg 402)

It has been held that in an application for injunction the procedure followed is to decide issues by affidavit and such applications are meant to effect a speedy and effective remedy to a person aggrieved by a clear breach by another party and where the dispute turns on a question of fact about which there is a conflict of evidence the courts will genuinely decline to interfere and leave the matter to be determined through a hearing by evidence. ***(See R v. Fulham Tribunal Ex Parte Zerek [1951]2 KB1).***

In the instant application, the lease agreement that is being relied upon by the Respondent to levy distress for rent against the applicant is disputed. In their replying affidavit the Respondent at paragraph 10 deposed as follows;

“THAT we then entered a lease agreement with Sargo Ngetich which copies were sent them in triplicate for their execution on the 4th July 2012. (Annexed herein is a copy marked AB3)”

The purported said lease agreement referred to paragraph 10 above bears the Respondent’s letter head and is dated 4th July 2012 and addressed to Mr. Kennedy Ngetich Sargo and Sargo & Co. Advocates. It reads in part;

“We write further to discussions and meetings with SEDCO CONSULTANTS LTD staff regarding your wish to lease premises in L.R No. 7/105. We now set below a summary of the principal terms on which we will recommend to the Land Lord to grant you a lease...”

In light of the above caption, it is quite clear that the said document is not a lease agreement as alleged by the Respondent. This, to me, it appears to be a letter of offer of which the applicant was required to accept the offer granted to them and thereafter, the respondent would have **‘recommended to the Land Lord to grant the applicant a lease’**. It is not evident as to whether the applicant accepted the said offer. It is not evident as to whether the respondent did later recommend to the Land Lord and a lease thereafter given to the applicant. Up to this juncture, it goes without saying that the applicant has indeed established a *prima facie* case with a probability of success and hence the need for an order for injunction.

Irreparable Harm

This is the second factor to be considered in granting and or denying an injunction. In the case of ***Francis Jumba Enziano and Others vs. Bishop Philip Okeyo and Others Nairobi High Court Civil Case Number 1128 of 2001(Unreported)***, supra., the learned Judge Ringera J. (as he then was) noted that ***“...an interlocutory injunction will not normally be granted unless the applicant can show an irreparable injury which cannot be adequately compensated by damages”***

The plaintiff/applicant has deposed that on 16th January 2014, the respondent instructed an auctioneer to levy distress against her for arrears of rent Ksh.209,502.95. The foregoing distress is premised on the contested lease herein. More so the applicant has deposed that the proclaimed tools for distress for rent are tools of trade being a law firm and hence the intended attachment will be unlawful. It is my view that the applicant has demonstrated that it may suffer irreparable harm given the fact its tools of trade is at risk of being attached for distress for rent.

Balance of Convenience

In ***Francis Jumba Enziano and Others vs. Bishop Philip Okeyo and Others***, ibid, the learned judge Ringera J. (as he then was) noted that, ***“The golden Rule in applications for injunctions is to maintain status quo”***. It is therefore in the interest of justice that the status quo be maintained. In my view.

Jurisdiction of the Court

In its replying affidavit the respondent at paragraph 15 has deponed as follows;

“That the instant application has been filed in in bad faith, with the sole intention of delaying justice to the detriment of the Respondent since this is a matter that should purely be presided over by the business rent tribunal and not this honourable court.”

Initially, the plaintiff/applicant filed this suit in the High Court, Being Civil Suit No. 1 of 2014. It was later transferred to this court and given a new number, being E&LC No. 32 of 2014. In the instant application the plaintiff/applicant had sought an order to the effect that; **“This Honourable court be pleased to issue an order that this matter be transferred to Business Premises Rent Tribunal when it resumes.”** (See prayer (e) on the face of the application.) However, the plaintiff/applicant appears to have retracted the foregoing position whereby the applicant’s advocates in their written submissions submitted that by dint of the provisions of **section 150 of the Land Act, No. 6 of 2012** the Honourable court has jurisdiction to entertain and determine this matter and hence the foregoing prayer (e) is abandoned.

Section 150 of the Land Act, states as follows;

“150. Jurisdiction of the Environment and Land Court;

The Environment and Land Court established in the Environment and Land Court Act is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

On the other hand **section 13 of the Environment and Land Court Cap 12A Laws of Kenya**, stipulates that;

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

- a. interim or permanent preservation orders including injunctions;*
- b. prerogative orders;*
- c. award of damages;*
- d. compensation;*
- e. specific performance;*
- f. restitution;*
- (g) declaration; or*
- (h) costs.”*

It was noted by the Court of Appeal in Caledonia Supermarket Ltd v Kenya National Examination Council (2000) EA 352, which decision was relied upon by Kasango J. in Moses N. Gitonga & Another vs George Gatheca Kinyanjui & Another, (2014) eKLR and Odunga J. in R. vs Business Premises Rent Tribunal & Another ex parte Davies Motor Corporation Limited (2013) eKLR that the Business Premises Rent Tribunal does not have jurisdiction to grant orders of injunction. The right forum to seek an injunction is therefore in this Court even though there are references filed by the Applicant pending in the said Tribunal.

“In any event the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act does not oust the jurisdiction that this court is granted to hear and determine the dispute herein under Article 162(2) of the Constitution and section 13 of the Environment and Land Act, even though it will defer a matter to the Business Premises Rent Tribunal when it is appropriate to do so.”

In the instant case the initial position of the plaintiff/applicant was that this matter be transferred to the Business Premises Rent Tribunal when it resumes its sitting. However the plaintiff/applicant now feels that this matter should now be dealt with by this court. **Section 12 of the Land Lord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya** states as follows;

“12. (1) A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power –

- (a) to determine whether or not any tenancy is a controlled tenancy;***
- (b) to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;***
- (c) to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;***
- (d) where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;***
- (e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of***

possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;

(f) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;

(g) where the landlord fails to carry out any repairs for which he is liable -

(i) to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;

(ii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;

(ii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;

(h) to permit the levy of distress for rent;

(i) to vary or rescind any order made by the Tribunal under this Act;

(j) to administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the Tribunal considers relevant regarding rents and terms or conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the Tribunal;

(k) to award costs in respect of references made to it, which costs may be exemplary costs where the Tribunal is satisfied that a reference to it is frivolous or vexatious;

(l) to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent

(m) to require a tenant or landlord to attend before the Tribunal at a time and place specified by it, and if such tenant or landlord fails to attend the Tribunal may investigate or determine the matter before it in the absence of such tenant or landlord;

(n) to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal”

While section 15 of the said Cap 301 provides as follows;

“15. (1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the High Court:

Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

(2) In hearing appeals under subsection (1) of this section, the court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers

conferred on it by or under any written law.

(3) (Deleted by 2 of 1970, s. 13.)

(4) The procedure in and relating to appeals in civil matters from subordinate courts to the High Court shall govern appeals under this Act:

Provided that the decision of the High Court on any appeal under this Act shall be final and shall not be subject to further appeal.”

As much as the applicant had suggested that this matter be transferred to the Business Premises Rent Tribunal when it resumes, it is not clear as to when it will resume and or whether it has resumed. Be that as it may in view of the provisions of **paragraphs (a) and (h) of section 12 of the foregoing Cap 301**, it is apparently clear that this matter can be competently dealt with by the Tribunal in view of the dispute herein which revolves around distress for rent. And by dint of the provisions of **section 15(1) of the said Cap 301**, the High Court, in this sense being the Environment and Land Court by virtue of **Article 162(2) of the Constitution**, can only entertain this matter substantively at the appellate level.

It follows therefore that by dint of the provisions of **section 13 of the Environment and Land Court Act, Cap 12A and sections 12 and 15 of the Land Lord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya** as read together with **Article 162(2) of the Constitution of Kenya 2010** this Honourable court having the status of the High Court of Kenya, can only exercise its jurisdiction on matters arising out of disputed rent pursuant to the provisions of Cap 301 on appellate jurisdiction and its decision on the same is final. In other words it is an Apex court in so far as the matters related to rent disputes are concerned and lacks original jurisdiction thereof.

Be that as it may in light of the decision by court of Appeal in the case of **Caledonia Supermarket Ltd v Kenya National Examination Council (2000) EA 352**, as cited by Nyamweya J. in the case of **Antony Muli t/a Mutembei Mathoka General Store v Kilalani Farmers Co-operative Society Ltd**, this honourable court's jurisdiction in this matter is only limited on granting of an injunction bearing in mind that Business Premises Tribunal as established under **section 11 of the Land Lord and Tenant Act (Cap 301)** lacks jurisdiction to grant the same.

Orders Sought

The applicant in the instant application appears to be asking the honourable court to grant final orders. Looking at prayers (c) and (d) the applicant is asking the honourable court to make a final declaration to the effect that the respondent's attachment of the applicant's property is illegal and that a permanent injunction be issued restraining the respondent from levying distress for rent against the plaintiff. The foregoing orders can only be granted after this matter has been heard and determined by the Tribunal. As noted earlier what the Honourable court can do at this stage is to grant a temporary injunction restraining the respondent from levying distress for rent against the applicant pending the hearing of this matter by the Tribunal. Consequently, the honourable court grants a a temporary injunction restraining the respondent from levying distress for rent against the applicant pending the hearing of this matter by the Tribunal and the matter is hereby transferred to the tribunal. In the alternative the plaintiff to file a claim before the tribunal within the next 30 days. Orders accordingly.

Dated and delivered at Eldoret this 23rd day of October, 2015.

ANTONY OMBWAYO

JUDGE