IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC NO. 321 OF 2014

TRADELINE EXPRESS LIMITED …………………………TENANT/APPLICANT

VERSUS

MBURUNGAR LIMITED & ANOTH..…………………………...…...1ST RESPONDENT

LITTLE VINYARD AUCTIONEERS…………………………………..2ND RESPONDENT

RULING

The matter coming up for determination is the Notice of Motion dated 18th March 2014 brought by the Tenant/Applicant herein Trade line Express Limited. The applicant has sought for the following Orders:-

a. *That the Court be pleased to issue an order restraining of the Respondents , their servants, employees or agents from attaching, selling, disposing off or in any other manner dealing with the goods of the Tenant/Applicant.*

b. *That the Court be pleased to issue an order restraining the 1st Respondent its servants , employees of agent from arbitrarily and unlawfully levying distress, evicting the Tenant/Applicant or in any other manner whatsoever harassing, threatening and/or interfering with the Tenant/Applicant's quiet possession of the premises known as showroom No.2 on the ground floor LR No. 37/147 (Brunei House) situated along Witu Road, Nairobi wherefrom the Tenant carries out its business until the hearing and final determination of Business premises Rent Tribunal case No. 949 of 2012.*

c. *That costs of this application be provided for.*

The application was supported by the grounds stated on face of the application and by the supporting Affidavit of **Njama Wambungu.** These grounds are:

i. *The applicant is a Tenant of the landlord/Respondent in all that premises known as showroom No.2 on the ground floor of LR No.37/147 (Brunei House) situated along Witu Road, Nairobi.*

ii. *That there is a pending Reference in the Business Premises Rent Tribunal Nairobi, case No. 949 of 2012 involving the same parties, premises and issues in dispute.*

iii. *That there is an order by Honourable R A Oganyo infavour of the Tenant restraining the landlord/Respondent from levying distress against the Tenant until the hearing and final determination of Business P remises Rent Tribunal case No.949 of 2012.*

iv. *That the landlord /Respondent has blatantly and in breach of the law defied the said orders of the court and has levied distress against the Tenant.*

v. *That the goods of the Tenant/Applicant have been proclaimed by the 2nd Respondent acting on instructions of the landlord /Respondent.*

vi. *That if the Tenant's goods are attached, the Tenant is likely to suffer immense loss and damage.*

vii. *That it is in the interest of justice and fair play that the Tenant's application herein be allowed in the circumstances of this case.*

Njama Wambungu , the Managing Director of Tenant/Applicant swore a Supporting Affidavit and averred that the Applicant has been a tenant of the Respondent in all that premises known as showroom No.2 on the ground floor of LR No. 37/147 (Brunei House) situated along Witu Road, Nairobi wherefrom the tenant carries out its business. He further averred that there is already a pending reference in the Business Premises Rent Tribunal case No. 949 of 2012 involving the same parties, premises and issues in dispute. He further averred that the Landlord/Respondent abruptly and unprocedurally increased the rent payable despite the fact that there is a pending case in the Business Premises Rent Tribunal. It was his contention that on 12th February, 2014, he received a demand letter from the Respondent's lawyer demanding that the increased rent be paid threatening eviction and other consequentials. He further contended that since the Tribunal was not sitting, his advocate filed a Misc. Application No. 60 of 2014 and on 22/1/2014, the Court issued a restraining Order and restrained the Respondent from increasing rent, threatening and/ or interfering with the tenant's quiet possession until Business Premises Rent Tribunal case No. 949 of 2012 is fully heard and determined. He further averred that the above orders are valid and still in force and the same have not been varied or reviewed and that the 1st Respondent was defying Court orders. It was his contention that the Respondents have made good their threat and have levied distress for rent as they have instructed the 2nd Respondent and on its part 2nd Respondent has proclaims goods of the applicant with the intention of attaching the same. It was his apprehension that if the tenant's goods are attached, the same will affect the tenant's business negatively. He therefore urged the court to order the Respondents to cease from unlawfully levying distress from the tenant.

The application is vehemently opposed, **Anthony Manuche Wanywa** the Property Manager, of the 1st Respondent Company swore a Replying Affidavit and averred that the Order issued by in Business Premise Rent Tribunal case No. 949 of 2012 was to the effect that the Landlord was restrained from ***"increasing rent, unlawfully harassing, threatening*** "but the landlord later issued the Plaintiff with proper and lawful Notice to increase rent which was issued under Section 4(2) of Cap 301.

He further averred that the applicant did not file a Reference at the **Business Premises Rent Tribunal** as provided by Section 6 of Cap 301 and therefore the said Notice took effect on 1st January, 2014. It was the Respondent's contention that the existence of Business Premises Rent Tribunal No. 949 of 2012 did not bar the 1st Defendant from increasing the rent in respect of the subject premises but only barred it from doing so unlawfully. It was in respect of the expiry of the said Notice that the Respondent issued a demand letter to the applicant on 13th January, 2014 and the applicant started to engage the 1st Respondent with a view to having the rent issues resolved and the pending tribunal case withdrawn . The deponent contended that the Notice issued on 28th October, 2013 was lawful and in compliance with the provisions of Cap 301 and the 1st Respondent has not contravened the Tribunal Order. The Respondent therefore alleged that the applicant's application is frivolous, misconceived and an abuse of the court process as the Notice to increase rent was lawful. It was further contended that Misc. Application No. 60 of 2014 was dismissed on 10th February, 2014 and the applicant misled the Court that the Order was still existing and he is therefore not entitled to the discretionary Order in his favour at this stage. The

Respondent urged the court to dismiss the application with costs.

The parties herein consented to dispose of the Notice of Motion by way of written submissions. I have now carefully considered the dispositions herein, the relevant laws, and the Written Submission and I make the following laws findings;

The applicant herein has sought for restraining Orders. The orders sought by the applicant are equitable relieves which are granted at the discretion of the court. However, the said discretion must be exercised judicially.(See **Hasmukh Khetshi ShahVs Tinga Tranders ltd, Civil Appeal No. 326 of 2002 (2002) KLR**

Since the applicant herein has sought for injunctive relief, it had a duty to establish the laid down principles to warrant the grant of such Orders. The said conditions/principles have been laid down in several judicial pronouncements. In the case of **Kibutiri Vs Kenya Shell, Nairobi High Court , Civil Case No. 3398/1980 (1981) LR 390** the court held that:-

"The conditions for granting of a temporary injunction in East Africa are well known and these are; 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". **See E A Industries Vs Trufoods (1972) EA 420.**

Has the applicant herein established the above conditions?.

Firstly, the applicant has to establish that he as a prima facie case with probability of success. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125,** The Court of Appeal described prima-facie case as:-

> "***A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".***

In the instance case, there is no doubt that the applicant had filed a Reference at Business Rental Premises Tribunal Case being No. 949/2012 and obtained restraining orders. The above Orders were issued against Brunei Investment Ltd, Further, the applicant filed Misc. Application No. 60 of 2014 and obtained temporary restraining orders on 22nd January, 2014 as per annexture marked **" c"** . However, the said Misc. Application No.60 of 2014 was dismissed on 10th February, 2014 by the Chief Magistrate Court at Milimani Commercial Court. Subsequently, the applicant filed this suit on 18th March 2014, simultaneously with the instant Notice of Motion. The applicant stated that one of the grounds in support of its application was that the Order that had been issued by the Chief Magistrate's Court was still existing and valid and that it had never been varied or reviewed. However, that was misleading averment as the misc. Application No.60 of 2014 had been dismissed by 18th March 2014 when this suit was filed. The Respondent therefore had not contravened any Court Order. The applicant herein who is seeking an equitable remedy chose to give misleading information to Court to obtain interim orders and that not does augur well for an party who is seeking equitable remedy. In the case of **Jane Achieng onyango Vs Giro Commercial Bank, Kisumu High Court Civil Case No. 339 of 1999,** the Court held that:

" Injunction being an equitable remedy , the party seeking it must come to court with clean hands".

Has the applicant herein come to court with clean hands?. The applicant chose to mislead the court and I find that hold that it did not come to court with clean hands and is undeserving of equitable remedy.

But assuming the applicant did not mislead the court, has it established that it has a prima facie case with probability of success?. There is no doubt that the applicant is a tenant of the 1st Respondent herein. It is evident that the 1st Respondent gave the applicant a Notice to increase Rent. The said Notice is dated 28th October, 2013. That was in accordance with Section 4(2) of Landlord and Tenant (*shops, hotels, and catering establishment*) Act Cap 301 which states as follows;

The applicant was required vide Section 6(1) of the said Cap 301 to notify the 1st Respondent on whether it would comply with the Notice or not. The applicant was required to file a Reference if it was not going to comply with the Notice and said Reference would have automatically stayed the Notice. The applicant chose not to file any Reference and therefore the Notice took effect after the expiry of the period given.

The applicant alleged that it did not file any Reference at Business Premises Rent Tribunal because there was no Chairman at that period. However, there was an already existing ***Business Premises Rent Tribunal*** Case **No. 949 of 2012**, and applicant should have filed the said reference in the already existing Business Premises Rent Tribunal Case. The 1st Respondent submitted that it had only been restrained from **increasing rent *unlawful.*** However, the 1st Respondent later regularized the process and issued a proper Notice. That being the position, I find that the applicant herein ought to have pursued its claim at Business Premises Rent Tribunal and not file another claim in this Court. The court finds that the applicant has not established that it has a prima facie case with probability of success.

On the 2nd issue on whether the applicant will suffer irreparable damages which would not be compensated by an award of damages, I find that the amount of money being sought to be recovered is quantifiable. In the event that the applicant succeeds in the trial, then the Respondents can be ordered to compensate the applicant by way an award of quantifiable damages. See the case of **American Cynamid Co. v Ethycon Ltd (1975) 1 All ER 504**, where the Court held:

" If damages in the measure recoverable at common law would be an adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff claim appear to be at that stage".

On the issue of convenience, balance the court is not in doubt and I would not wish to deal with that condition.

Having now carefully considered the applicant Notice of Motion dated 18th March, 2014, I find it not merited. The same is hereby dismissed entirely with costs to the Respondents.

It is so ordered.

Dated, signed and delivered this **11th day of July , 2014**

L.GACHERU

JUDGE

In the Presence of:-

Mr Nyamweya for the Plaintiff/ Applicant

Mr Muturi for the Defendants/Respondents

Kamau: Court Clerk

L.GACHERU

JUDGE