



REPUBLIC OF KENYA



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**Growthpoint Warehousing EPZ Limited v Export Processing Zones Authority & another
(Environment & Land Case E034 of 2023) [2024] KEELC 4428 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4428 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E034 OF 2023**

CA OCHIENG, J

MAY 30, 2024

BETWEEN

GROWTHPOINT WAREHOUSING EPZ LIMITED PLAINTIFF

AND

EXPORT PROCESSING ZONES AUTHORITY 1ST DEFENDANT

TOP NEW KNITWEAR MANUFACTURING EPZ LIMITED . 2ND DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 2nd October, 2023 where it seeks the following Orders:-
 - a. Spent
 - b. Spent
 - c. An interim injunction against the Defendant/Respondents, his agents, surrogates, assigns and or his representatives, restraining them from trespassing, leasing out and transferring and or interfering with property LR No. 18474/59 pending the hearing and determination of the suit;
 - d. The Offer Letter issued by the 1st Respondent/Defendant to the 2nd Respondent/Defendant dated 14th August, 2023 be hereby set aside/stayed/revoked/rescinded/voided and the Respondents be restrained from leasing out and/or transferring and or interfering with property LR No. 18474/59;
 - e. The 1st Defendant/Respondent do issue and or release instruments in favour of the Plaintiff/Applicant for Plot LR No. 18474/59;
 - f. Any other Order(s) which the Honourable Court may deem fit and just to grant in the circumstances;



- g. The costs of this Application be borne by the Respondents.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Martin Gaiti. It contends that on 13th June, 2014, the 1st Respondent handed to it, plots being LR Nos. 18474/58, 59, 60 and 61 respectively, following its compliance with the conditions set out in the Letters of Offer and the Applicant took possession thereof. It claims, it has completed payment of the Lease Premiums on LR Nos. 18474/59, 60 and 61 but only received a Lease Instrument for LR No. 18474/61. It confirms that, it has been diligently paying its annual service charges and licensing fees as has been invoiced to it by the 1st Defendant. It contends that despite completing the payment of the Lease Premiums, the 1st Defendant has refused and or neglected to issue it, with a Lease for LR No. 18474/59 and this has frustrated it, to mobilize funds for development despite commencing excavation, which has financial setback of Kshs. 13,000,000.
 3. The Plaintiff explains that the 1st Defendant has now issued a Letter of Offer to the 2nd Defendant for the lease of property LR No. 18474/59 and are now threatening to dispossess it. Further, the 2nd Defendant has commenced acquiring approvals from NEMA who are currently conducting an Environmental Impact Assessment on the operation of the 2nd Respondent on Plot LR No. 18474/59. It reiterates that it acquired the suit plot for valuable consideration and injected a substantial amount of money into it, from 2014 towards licensing, maintenance and development. Further, the 1st Defendant would unjustly enrich itself should the 2nd Defendant be allowed to occupy LR No. 18474/59 while the Plaintiff is still in possession. It avers that, there is a subsisting Agreement between the 1st Defendant and itself.
 4. The 1st Defendant opposed the Application by filing a Replying Affidavit sworn by Andrew Njuru, its Assistant Manager where he contends that it is the Plaintiff who has frustrated the terms of the Letter of Offer. He explains that the 1st Defendant executed a Letter of Offer dated the 10th February, 2014 with the Plaintiff for the lease of LR No. 18474/59 and highlights the terms of the said Letter of Offer. He confirms that the Plaintiff settled the first instalment of the Lease premium in the amount of US\$ 20,000, upon acceptance of the offer of the premium. Further, the Plaintiff settled the second instalment of the lease premium in the amount of US\$ 30,000 on 27th February, 2015, one year after the acceptance of the offer.
 5. He insists that the Plaintiff has only settled part payment of the third instalment of the Lease Premium in the amount of US\$ 23,156.39. Further, that the Plaintiff was required to complete all payments for the lease premium by 10th February, 2015 but made the last payment of US\$ 1,400 on 9th December, 2022. He states that the Plaintiff not only had a Lease for property LR No. 18474/59 but also other properties being LR Nos. 18474/58, 60 and 61 respectively. Further, that as at 24th March, 2023, the Plaintiff had rent and service charge arrears with respect to LR No. 18474/58 – 61 amounting to US \$ 75, 242.30 as well as water arrears of Kshs. 321,615.14.
 6. He reiterates that the Plaintiff's failure to settle the aforementioned arrears was a breach of the terms of the Letters of Offer. He denies that the Plaintiff was not issued with leases and insists that vide a letter dated the 1st July, 2014, the Plaintiff was issued with Leases for LR No. 18474/58 - 61 but the Plaintiff opted to withhold all the Leases issued to it, except for LR No. 18474/61. He avers that after the meeting held on 9th January, 2023, the 1st Defendant decided to issue the Plaintiff with notices of termination for LR Nos. 18474/58 and 59 for non-development within 24 months as stipulated in the Letter of Offer. Further, that the Plaintiff has not come to court with unclean hands.
 7. The 2nd Defendant opposed the Application by filing a Replying Affidavit sworn by Johnstone Musyoki Ndeti, its Shipping Executive where he denies the Plaintiff's averments and contends that the



2nd Defendant acquired its license according to the Export Processing Zone Regulations 1991, upon establishing the infrastructure facilities required by the Authority. He explains that, upon entering into the aforementioned Letter of Offer, the 2nd Defendant has undertaken great development and/or investments on the said property where it currently occupies as it conducts development of the property pursuant to the terms and conditions of the Lease Agreement dated the 14th August, 2023 as required to be done within 24 months.

8. He reiterates that the Plaintiff does not have an arguable case as there is no right infringed by the 1st and 2nd Defendants. Further, that it has no legal or equitable right to interfere with the 2nd Defendant's rights over the property as per the Letter of Offer dated the 14th August, 2023. He avers that the 2nd Defendant as an innocent leaseholder should be in occupation of the said parcel of land, uninterrupted since the signing of the Letter of Offer, which is effective as of September 01, 2023 and runs for a period of 50 years.
9. He states that the executed Letter of Offer dated the 14th August, 2023 in favour of the 2nd Defendant in relation to LR No. 18474/59 is proof of possession, hence it is the Plaintiff who should be restrained from interfering with the 2nd Defendant's activities on the said land. He reaffirms that the 2nd Defendant's occupation of LR No. 18474/59 is justified and as such, there is no basis thereof upon which an order for eviction of the 2nd Defendant from the suit land can issue. Further, as the rightful lessee, the 2nd Defendant is entitled to enjoy the rights and privileges associated with such a leasehold, which includes exclusive use, possession and enjoyment thereof without interference by any third party.
10. The Plaintiff filed a Supplementary Affidavit sworn by Martin Gaiti where he reiterates his averments. He insists that the Plaintiff paid all the premiums and highlighted the various payments the Plaintiff had made.
11. The 2nd Defendant filed a Supplementary Affidavit sworn by Andrew Njiru where he reiterated his averments and insisted that the Plaintiff had not excavated the suit land as claimed. He disputed some of the documents the Plaintiff had annexed, confirmed certain payments that the 2nd Defendant received. He reaffirmed that there is no subsisting lease between the parties as alleged by the Plaintiff.
12. The Application was canvassed by way of written submissions.

Analysis and Determination

13. I have considered the instant Notice of Motion Application including the respective Affidavits, annexures and rivaling submissions and the only issue for determination is whether the Plaintiff is entitled to an order of interlocutory injunction restraining the Defendants from leasing, trespassing or interfering with land parcel LR No. 18474/59.
14. In line with the principles established in the case of *Giella v Cassman Brown & Company Limited* (1973) EA 358, I will proceed to analyze whether the Plaintiff is entitled to the orders as sought in the instant Application.



15. As to whether the Plaintiff has established a prima facie case to warrant the orders of interlocutory injunction as sought, I will further rely on the definition of the same as articulated in the case of *Mrao Ltd v First American Bank Limited* (2003) K.L.R. 125 where the Court described it as follows:-

“..... 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.”
16. The Plaintiff claims that despite completing the payment of the Lease Premiums, the 1st Defendant has refused and or neglected to issue it with a Lease for LR No. 18474/59 and this has frustrated it, to mobilize funds for development. It explains that the 1st Defendant issued a Letter of Offer to the 2nd Defendant for the lease of property LR No. 18474/59, that is threatening to dispossess it. It insists that it acquired the suit land for valuable consideration and injected a substantial amount of money into it, from 2014 towards licensing, maintenance and development of the said Plot LR No. 18474/59. Further, the 1st Defendant would unjustly enrich itself should the 2nd Defendant be allowed to occupy LR No. 18474/59 while the Plaintiff is still in possession and there is a subsisting Agreement, between the 1st Defendant and itself.
17. The 1st Defendant opposed the Application and insisted that the Plaintiff did not complete the payment of premiums as set out in the aforementioned Letter of Offer. Further, it failed to take possession of the suit land since 2014 nor develop it and had service charge and water bill arrears. It confirmed that it issued the Plaintiff with termination notice as set out in the Letter of Offer, after which it terminated the Lease for the suit land and issued a fresh Letter of Offer to the 2nd Defendant. The 2nd Defendant confirmed having a Letter of Offer/Lease Agreement dated 14th August, 2023 in respect to the suit land with a lease term of 50 years. It further confirmed paying the lease premium, taking possession of the suit land and in the process of obtaining all the necessary approval licenses.
18. Looking at the documents presented, I note that there is already a subsisting Agreement between the 1st and 2nd Defendants which was signed before the commencement of the suit. Further, the Plaintiff did not pay the full premium within the requisite times as stipulated in the Letter of Offer. The Plaintiff further never developed the suit land as set out in the Letter of Offer. The Plaintiff now seeks orders of injunction to restrain the Defendants from the suit land as well as cancellation of the Agreement between the Defendants. It is trite that injunctive remedies are equitable remedies. Further, a party seeking orders of injunction must come to court with clean hands. But from the explanations tendered, it seems the Plaintiff was the one responsible for the delay. Further, there is already a new Agreement between the Defendants in respect to the suit land. At this juncture, I opine that orders the Plaintiff is seeking against the Defendants are futile as they will not only amount to eviction orders as against the 2nd Defendant but there is also a subsisting Agreement between Defendants which the Plaintiff has no control over. From the photographs annexed to the 1st Defendant's Further Affidavit, it is evident that the suit land is vacant with no development nor excavation whatsoever. In the circumstance, I find that the Plaintiff has not established a prima facie case as against the Defendants to warrant the orders sought.
19. In further associating myself with the decision *Nguruman Ltd. v. Jan Bonde Nielsen* CA No. 77 of 2012, where the Court of Appeal held that, in instances when a party has failed to establish a prima facie case, the court need not proceed to make a determination of the other two limbs on injunction, I will hence decline to deal the said other two limbs.
20. In the foregoing, I find the Notice of Motion dated the 2nd October, 2023 unmerited and will dismiss it.



21. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH DAY OF MAY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ms. Muchiri for Ms. Kipsira for 1st Respondent

Ms. Mukobi for Plaintiff/Applicant

Court Assistant – Simon

