



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU, MURGOR, JJA)

CIVIL APPEAL NO. 260 OF 2015

BETWEEN

NOVA INDUSTRIES LIMITED APPELLANT

AND

KABANSORA LIMITED RESPONDENT

(An Appeal from the Ruling and Order of the High Court at Nairobi (Mutungi, J) dated 10th September, 2013

in

ELC. H.C.C.C. NO. 1545

JUDGMENT OF THE COURT

1. This is an appeal from the ruling and order of the Environment and Land Court at Nairobi (J. M. Mutungi, J) given on 10th September 2015 dismissing, with costs, the appellant's application for interlocutory injunction.
2. In its suit commenced by a plaint that is pending hearing and determination before the Environment and Land Court, the appellant asserts that it has been in occupation, since 1980, of an Industrial Godown situated on the respondent's property known as L.R. No. 209/4276 Nairobi under a tenancy agreement that runs to 31st December 2017. The appellant asserts in that suit that the respondent has, in breach of the tenancy, illegally and maliciously threatened to eject it from the property. It seeks relief by way of a permanent injunction to restrain the respondent from trespassing, evicting, dispossessing or interfering with its possession of the premises and for a declaration that the notice issued to the appellant by the respondent to vacate the premises is illegal, null and void.
3. Alongside the plaint, the appellant filed, under a certificate of urgency, a notice of motion under Order 40 of the Civil Procedure Rules seeking a temporary restraining order to prevent the respondent evicting it from the premises. That application was supported by an affidavit sworn by John K. Mangeli, the Managing Director of the appellant, setting out how the appellant got into, and continued in possession of the premises under extended leases with the respondent and how the respondent abruptly sought to terminate the tenancy and to demand that the appellant vacates the premises allegedly on the ground that it had damaged the property.

4. The respondent has contested the suit. It asserts in its defence and counterclaim that it is justified in serving the notice to terminate the tenancy; that the appellant is in breach of the terms of the tenancy by reason of repeatedly damaging the drainage system, failing to undertake repairs of damage caused to the drainage system, and causing damage to the internal wall of the premises leading to long term structural damage. It has, in its counterclaim sought relief against the appellant in the form of special as well as general damages.

5. In opposition to the application for temporary injunction, the respondent filed a replying affidavit sworn by Leon N. Nyachae, the Property Manager of the respondent, deposing that the appellant had failed to keep the premises in a reasonable state of repair; that the appellant had caused repeated damage to the drainage system in the premises and damaged an internal wall and had occasioned structural damage to the premises. It was also deposed that the Nairobi City County had issued notices on 16th and 25th February 2015 to the appellant to undertake repairs.

6. On hearing the application for temporary injunction, the Judge found that there was no legal requirement for the respondent to have required the appellant to remedy any breach before issuing a termination notice. The Judge was not satisfied that the appellant had established a prima facie case with a probability of success and accordingly dismissed the application with costs in the ruling the subject of this appeal delivered on 10th September 2015.

7. Before us, the appellant, through learned counsel Stanley Kingara, complains that the Judge erred in relying on letters of 26th January 2015 and 17th March 2015 that purportedly demonstrated damage occasioned to the premises; that those letters were not exhibited to the respondent's replying affidavit and the appellant did not have an opportunity to address the Judge on them. Furthermore, counsel argued, the Judge fell into error in taking the view that Section 114 of the ITPA was not applicable having failed to appreciate that the tenancy was created under the regime of the repealed ITPA and the Registration of Titles Act. According to counsel, this is a proper case for this Court to interfere with the exercise of discretion by the lower court.

8. Opposing the appeal, learned counsel for the respondent, Mr. Gabriel Mwangi, conceded that the two letters of 26th January 2015 and 17th March 2015 on which the Judge relied were not part of the respondent's replying affidavit. Nonetheless, counsel submitted that this Court should not interfere with the exercise of discretion by the lower court as there was evidence that the appellant is in breach of its obligation to maintain the premises in a state of repair. That in any case, even if the Judge was wrong in his finding that a prima facie case was not established, the appellant did not demonstrate that it would suffer irreparable loss if the injunction was declined. Further, the balance of convenience favoured the refusal of the application.

9. We have considered the appeal and the submissions by counsel. The grant or refusal of a temporary injunction involves the exercise of discretion. [**Giella vs. Cassman Brown & Co Ltd [1973] EA 358**]. The circumstances under which this Court may interfere with the exercise of discretion are circumscribed. In **Mbogo and Another vs. Shah [1968] EA 93** this Court stated:

“...that this Court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

10. As already indicated, the substantive suit between the parties is yet to be heard and determined by the High Court and we must therefore restrain ourselves from expressing concluded views that might embarrass the trial court. That said, some of the issues that will require determination by the trial court include the question whether the respondent was justified in serving a notice of termination of tenancy. The Judge reached a conclusion on that issue based on material, consisting of the letters of 26th January 2015 and 17th March 2015 that were not part of the respondent's replying affidavit. In the Judge's words:

“The [appellant] denied having caused damage to the drainage system by stating that the damage which was outside the godown was in respect to a common area which was not in its exclusive use. The [appellant] however, did not address the damage to the internal wall complained by the Defendant who exhibited a letter dated 26th January 2015 from Structural Engineering Associates highlighting the damage and recommending the demolition and rebuilding of the wall. The Defendant further annexed a letter from Richard Ventures dated 17th March 2015 indicating that there was damage on the wall as well as a quotation of same date putting the repair costs at an estimate of Kshs 958, 970.”

11. In our view, the appellant has justifiably complained that it did not have an opportunity to interrogate those letters or give their input on them. The reliance on those documents by the learned Judge in reaching the conclusion that the appellant had not established a prima facie case with a probability of success without giving the appellant an opportunity to be heard thereon, was in our view, a misdirection on the part of the Judge that resulted in an erroneous decision and a miscarriage of justice.

12. We must therefore interfere with the decision by the learned Judge and allow the appeal by setting aside the ruling and orders of the court given on 10th March 2015.

We substitute therewith an order allowing prayer 3 of the appellant’s notice of motion dated 15th December 2014. Costs of that application will abide by the outcome of the suit in the High Court. The appellant shall however have the costs of this appeal.

Dated and delivered at Nairobi this 6th day of June, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR