



Malo Malo BBQ Swahili Cuisine v Captain Real Estate Co Ltd (Land Case E289 of 2024) [2024] KEELC 7388 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7388 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E289 OF 2024
MD MWANGI, J
OCTOBER 31, 2024**

BETWEEN

MALO MALO BBQ SWAHILI CUISINE PLAINTIFF

AND

CAPTAIN REAL ESTATE CO LTD DEFENDANT

RULING

(In respect to the Plaintiff's Applicant's application dated 15th July 2024 seeking an order of temporary injunction restraining the Defendant from interfering with the Plaintiff/Applicant's possession and use of the 2080 square feet space on Lana Plaza as conference facilities 2 and 3 at the rooftop of the said building and the common areas)

Background

1. The Plaintiff commenced its suit by way of the plaint dated 15th July 2024. In the plaint, at paragraph 3 thereof, the Plaintiff acknowledges that the Defendant is the registered owner of all that property known as L.R No. 3734/423, within Kilimani in the Nairobi City County (hereinafter referred to as 'the suit property').
2. It is the Plaintiff's case that by a letter of offer dated 28th April 2023, the Defendant agreed to lease to it the commercial space on Lana Plaza erected on the suit property measuring approximately 2080 square feet as conference 2 and 3 at the rooftop of the said building with part corridors, staircases, lobbies and toilets otherwise known as common areas.
3. The Plaintiff asserts that the salient terms and conditions in their agreement as set out in the letter of offer were that the lease was to be for a term of six years beginning immediately after the lapse of the fit-out period. The fit-out period was agreed to be between the 1st May, 2023 and 31st June 2023.
4. According to the Plaintiff, the monthly rent payable was as follows: -



- a. 1.7.2023- 30.06.2025 – Kshs.208,000/-
 - b. 01.07.2025 – 30.06.2027 – Kshs. 228,000/-
 - c. 01.07.2027 – Kshs.30.06.2029 – Kshs. 251,680/-
5. The Plaintiff was to pay a refundable security deposit of Kshs. 991,839/- as security for the due performance of the lease obligations at the commencement of the lease.
 6. The Plaintiff states that it met all the conditions precedent and further expended the sum of Kshs. 32,509,000/- in the improvement of the subject premises with the approval of the Defendant during the fit-out period. The Plaintiff further states that it subsequently continued paying rent incurring no arrears at any one time until the Defendant suddenly declined to accept rent payments from it. By then the Plaintiff alleges that it had paid rents amounting to Kshs. 2,564,633/-.
 7. The Plaintiff alleges that the Defendant was not keen on implementing the contract with it as contemporaneously negotiating with a third party over the same space it had agreed to lease to the Plaintiff. It refused to grant the Plaintiff unhindered access to the premises to enable it commence its business. This was despite the fact that the Plaintiff was promptly paying the rent at all times.
 8. The Plaintiff avers that the Defendant eventually served it with a letter dated 2nd October, 2023 purporting it to be a notice of intention to terminate the offer in respect of the subject premises on the grounds that the common areas had not leased to it for commercial purposes. This according to the Plaintiff was misguided in view of the explicit terms of the letter of offer. The Plaintiff asserts that the purported notice by the Defendant was a decoy after the Defendant got another offer from a different company supposedly interested in all the residential units including the rooftop.
 9. The Defendant offered the Plaintiff an alternative on the 3rd floor of the same building but the Plaintiff declined since the rooftop was what it had negotiated for and was what was ideal for the Plaintiff's business. The Plaintiff accuses the Defendant of breaching their agreement aforesaid by;
 1. Failing to abide by and comply with the letter of offer as regards the purpose of the main area and common areas;
 2. hindering access by the Plaintiff to the premises whereas the Defendant continues to accept rent from the Plaintiff; and
 3. Negotiating with the third parties on the subject premises with a view of demising the subject premises to third parties in violation of the law and in bad faith.
 10. Apparently the Plaintiff and the Defendant later on agreed and jointly appointed Getso Consultants Limited to carry out a valuation for purposes of the Defendant compensating the Plaintiff. The consultant according to the Plaintiff arrived at the figure of Kshs. 36,323,249.91 as the overall cost incurred by the Plaintiff improving the subject premises.
 11. The Plaintiff asserts that the Defendant has even after the joint valuation declined to abide by the outcome of the valuation and has instead offered to pay the Plaintiff the paltry sum Kshs. 3,939,067/- as compensation.
 12. The Plaintiff avers that as a consequence of the actions by the Defendant and in spite of the Plaintiff paying rent to the Defendant, it has not been able to utilize the premises as intended. It has been greatly inconvenienced and as a result suffered financial loss which it has particularized as costs of improvement at Kshs. 36,323,249.91 and rent paid but not utilized at Kshs. 2,564,633/- totaling Kshs. 38,887,882.91/-.



13. The Plaintiff prays for judgment against the Defendant for;
 - a. A permanent injunction restraining the Defendant from interfering with the Plaintiff's quiet occupation and improvements on the suit property;
 - b. A permanent injunction restraining the Defendant from entering, repossessing and leasing to third parties or dealing in the premises and improvements thereon or acting in any manner prejudicial to the Plaintiff's interests;
 - c. General damages for breach of contract/undertaking;
 - d. General damages for loss of business;
 - e. In the alternative, compensation of Kshs. 38,887,882.91;
 - f. Costs of the suit;
 - g. Any such other or further orders as the honorable court may deem appropriate to grant.
14. Alongside the Plaintiff, the Plaintiff filed the Notice of Motion under consideration seeking orders of temporary injunction against the Defendant pending the hearing and determination of this suit.
15. The Defendant responded to the Plaintiff's application vide the replying affidavit sworn by one LAN XIAO sworn on 29th July 2024. The Defendant opposes the Plaintiff's application accusing the Plaintiff of breaching the terms of the letter of offer. The Defendant asserts that the Plaintiff/Applicant failed and or refused to avail its final plans of its intended partitions and alterations for approval. The letter of offer expressly provided that the lessor's prior consent of the lessee's final plans was required before the lessee erected any such partitions, fixtures and fittings on the suit property.
16. The deponent further deposes that the Plaintiff attempted to monopolize common areas to the exclusion of other tenants contrary to the provisions of clause 14(d) of the letter of offer. The Defendant's offer of the 3rd floor was in good faith and meant towards finding a solution of making the common areas accessible to all tenants in the building.
17. It is a Defendant's case that the Plaintiff continued to occupy the premises after the lapse of the fit-out period without paying rent and service charge for 3 months. Following the breach of terms of the letter of offer by the Plaintiff, the Defendant terminated it vide its letter dated 2nd October 2023. The reasons for terminating the offer were spelled out as;
 - a. Failure to avail fit out plans for approval within the agreed timelines;
 - b. Failure to finalize the fit outs within the agreed timelines occasioning delay; and
 - c. Unilaterally using the common areas for business purposes to the detriment of other lessees.
18. While conceding that the parties engaged a common quantity surveyor, the deponent lists the breakdown of sums expended as hereunder;
 - a. Preliminaries - Kshs.115,202.37
 - b. Enclosed space - Kshs.1,555,324.94
 - c. Open space -Kshs.648,722.50
 - d. Builders work in connections to service –Kshs.100,000/-
 - e. Services installation - Kshs.250,000/-



19. The deponent has attached the project costs report and marked it as 'CRE3'.
20. The figure of Kshs. 33,654,000.10, according to the deponent was for sums allegedly used by the Plaintiff in procuring furniture and other items for use in the premises.
21. The Defendant after the valuation report wrote cheques totaling Kshs.3,939,067/- and delivered them to the Plaintiff's advocates. Kshs. 2,669,249.81 was for works done on site whereas Kshs. 1,266,816.46 was a refund of deposit paid by the Plaintiff. The Plaintiff accepted the payments which essentially were a buyout of its investment on the suit property.
22. Despite accepting the payments, the Plaintiff has filed this application seeking injunctive orders against the Defendant. The deponent states that the Plaintiff is not entitled to the remedy of an injunction as it has approached the court with unclean hands. Its application therefore amounts to an abuse of the process of court. The Defendant/Respondent asserts that it has fully refunded the Plaintiff the monies spent in improving the property and the deposit paid. The Plaintiff should not therefore be allowed access to the suit property. There is no relationship with the Defendant anymore.
23. The Plaintiff filed a further affidavit sworn by one, Sophia Athman Abubakar, a director affirming its position in the plaint and in the Notice of Motion application. She cites frustrations by the Defendant during the fit-out period the only reason being that the Defendant had secured a new tenant thereby impeding the Plaintiff's access to the suit property and hampering its ability to complete the fit-outs. The Defendant further failed to guarantee the Plaintiff security during the fit-out period.
24. The Plaintiff alleges that it shared out its detailed plans with the Defendant on 3rd October, 2023 for the intended restaurant in compliance with the Defendant's request. It is the Plaintiff's claim that the Defendant indeed confirmed that the plans were in line with their agreement on 23rd October, 2023.
25. The Plaintiff insists that the valuation by the joint consultant assessed the figure due to the Plaintiff at Kshs. 36,323,249.91 being the overall project cost.
26. The Plaintiff further states that its advocates returned the cheques drawn in its favour by the Defendant to the Defendant's advocates on 6th August, 2024.

Court Directions

27. The court's directions were that the application be canvassed by way of written submissions. Both parties complied and the court has had the opportunity to read the submissions which now form part of its record.

Issues for Determination.

28. This sole issue for determination in this matter is whether the Plaintiff's application meets the threshold for the grant of orders of temporary injunction pending hearing and determination of the main suit.

Determination.

29. Both parties in this case are in agreement that the principles guiding the issuance or otherwise of an order of temporary injunction are as spelt out in the case of *Giella –v- Cassman, Brown & Co. Ltd.* (1973) E.A. 358.
30. The conditions as spelt out are that:
 - a. The Applicant must demonstrate a prima facie case;



- b. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which might not be adequately compensated by an award of damages; and
- c. If the Court is in doubt, it will decide the Application on a balance of convenience.
31. In the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [CA No.77 of 2012](#) (2014) eKLR, the Court of Appeal while upholding the decision in the *Giella* case was explicit that the three conditions must be applied as separate, distinct and logical hurdles which are to be surmounted sequentially; one after the other. The Court of Appeal held that;
- “In an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
- These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.
32. The import of the above finding is that if a prima facie case is not established, the court need to go further to consider whether the Applicant has established irreparable injury that he would suffer if the order of temporary injunction is not granted.
33. In the case of *Mrao Ltd vs First American Bank of Kenya Ltd* (2003) eKLR, the Court of Appeal defined a prima facie case in the following words:
- “... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
34. In order to establish whether the Plaintiff has demonstrated a prima facie case, the court is called upon to look at the material presented before it on their face value without conducting a mini trial.
35. In the *Nguruman* case (*supra*) the Court defined irreparable injury as follows;
- “On the 2nd factor, that the Applicant must establish that “he might otherwise” suffer irreparable injury which cannot be adequately remedied damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate prima facie, the nature and extent of the injury.
- The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstratable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation of whatever amount will never be adequate remedy.”
36. In this case, whereas the Plaintiff/Applicant may have surmounted the 1st hurdle on establishing a prima facie case as defined in the *Mrao Ltd* case; it flatly fails on the second hurdle. The Plaintiff has admitted to negotiating with the Defendant whereby both parties agreed to commission a quantity



surveyor to assess and quantify the loss suffered by the Plaintiff. The quantity surveyor indeed came up with a definite figure.

37. Therefore, whereas the Plaintiff may have suffered injury; the injury is not irreparable.
 38. The injury is in the form of financial loss that has been assessed and quantified. It is injury that is measurable; indeed quantifiable with reasonable accuracy. It is injury that can be adequately be compensated by an award of damages. It is injury or harm of such a nature that monetary compensation will be an adequate remedy.
 39. The Plaintiff's application does not therefore meet the threshold for the grant of an order of interlocutory/ temporary injunction.
 40. I dismiss it with costs to the Defendant.
- It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2024.

M.D MWANGI

JUDGE

In the Virtual Presence of:-

Ms. Kamanja h/b for Mr. Abdullahi for the Plaintiff/Applicant

Ms. Njoroge for the Defendant/Respondent

Court Assistant: Yvette

M.D. MWANGI

JUDGE

