Airworks Kenya Limited v Kenya Aerospace Limited & another (Environment & Land Case E164 of 2022) [2023] KEELC 927 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELC 927 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E164 OF 2022

OA ANGOTE, J

FEBRUARY 9, 2023

BETWEEN

AIRWORKS KENYA LIMITED ..... PLAINTIFF

AND

KENYA AEROSPACE LIMITED ..... 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. Before this Court for determination is the Plaintiff's (hereinafter 'Applicant's') notice of motion dated May 9, 2022 and brought under order 40 rule 1 and 2 of the *Civil Procedure Rules*, 2010. The Applicant is seeking the following orders:

    a. That the 1st defendant (hereinafter 'respondent') through his authorized agents Garam Investments Auctioneers (the 2nd Respondent) be restrained from proclaiming or attaching the Applicant's goods in the office space it has rented on AIS building on L.R. No. 209/11964 pending the hearing of this suit.

    b. That costs of this application be provided for.

2. The application is based on several grounds and the affidavit of Eric Mutinda Kivindu, the Applicant's Accounts Manager, who stated that the Applicant has been the 1st Respondent's tenant since March 12, 2018 and that sometime in May 2021, the Applicant and the 1st Respondent had debt settlement negotiations to deal with outstanding rent that was owed to the 1st Respondent.

3. The Applicant's manager deponed that following the negotiations, the parties executed a Debt Settlement Agreement on May 15, 2021 where they agreed that amongst other things the Applicant would surrender space measuring 21,351.7 square feet and keep the space measuring 3,221.5 square feet and that the debt owing from the surrendered space would be settled during the term of the current

lease (for the space that was retained) failure to which it would be treated as a commercial debt and not rent arrears.

4. It was deponed by the Applicant's representative that the Applicant took up the new space on 1st July 2021 and has been paying rent as and when it falls due and that by June 2022, the 1st respondent had raised rent invoices worth USD 68,946.52 while the applicant had made payments amounting to USD 175,000.

5. It is the applicant's case that the excess amount was to go towards settling the debt as per the Debt Settlement Agreement; that the 1st Respondent raised service charge invoices worth Kes 1,121,000.82 as at April 2022 and that the Applicant paid Kes 1,690,889 for the same period.

6. According to the Applicant's manager, despite this being the case, the 1st respondent has instructed the 2nd respondent to levy distress for rent arrears; that the 1st Respondent is seeking to levy distress for amounts captured in the Debt Settlement Agreement which should be recovered as a debt and not rent arrears and that the Respondents should be restrained from attaching its goods as it is up to date with rent and service charge for the space it currently occupies.

7. The application was opposed by the respondents. It was deponed by the 1st Respondent's director that the 1st respondent agreed to lease the Applicant space totalling 24,572.2 square feet for a term of six years beginning January 1, 2018 and that the agreement provided for the mode of paying rent and service charge.

8. It was deponed by the 1st Respondent's director that pursuant to mutual discussions between the parties, the applicant agreed to surrender 18,077 square feet in consideration for diminution of rent effective 1st June 2018; that the Applicant agreed to surrender a further 2,079 square feet effective 1st June 2020 and a further 1,195.75 square feet effective 1st July 2021 and that the 1st Respondent also agreed to a downward review of the rent for the space measuring 3,221.50 square feet effective 1st July 2021.

9. The 1st Respondent averred that the Debt Settlement Agreement as exhibited by the Applicant was incomplete as it left out the part containing the default clause. The 1st Respondent stated that the amount owed as at April 2021 was USD 453,110.61 and that it was acknowledged by the Applicant who agreed to settle the debt contemporaneously with the current payable rents.

10. According to the 1st Respondent, as per the agreement, any default in making the monthly payments would render the agreement null and void and would entitle the 1st Respondent to embark on debt recovery proceedings and that the Applicant failed to make the agreed monthly remittances in May, June, August, October and December 2021 as well as February 2022 thus voiding the Debt Settlement Agreement.

11. It was deponed that on 11th March 2022, the 1st Respondent issued the Applicant with a demand notice for outstanding rent amounting to USD 415,295.80; that the notice was not honoured leading the 1st Respondent to levy distress through the 2nd Respondent and that owing to the Applicant's persistent breach, the rent arrears as at May 6, 2022 stood at USD 382,952.80 while the service charge arrears stood at Kes 82,086.30.

12. In conclusion the 1st Respondent's director stated that the Applicant had not met the legal requirements for grant of an injunction and that granting the injunction would be prejudicial to the 1st Respondent as it is owed substantial amounts of money by the Applicant.

13. The Applicant's Accounts Manager filed a supplementary affidavit in which he acknowledged that the Debt Settlement Agreement provided debt recovery mechanisms in the event of default; that the Applicant executed the agreement on June 16, 2021 while the 1st Respondent executed it on November 12, 2021 and returned it to the Applicant on 17th November and that on the same date, the 1st Respondent raised invoices for July to December 2021.

14. It was averred that the Applicant cannot be held to be in breach of a contract that had not been duly executed; that the 1st Respondent's letter dated 11th March 2022 was for USD 78,136.82 and not USD 415,295.80 as stated by the 1st Respondent and that they had paid the 1st Respondent a total of USD 190,000 between July 1, 2021 and May 9, 2022, with USD 68,946.50 being rent for the occupied space and USD 121,053.50 being for debt settlement.

15. The Applicant's manager deponed that the invoice raised by the 1st respondent was for April to June 2022 for which the Applicant had paid; that the debt owed to the 1st Respondent cannot be recovered by relying on the provisions of the *Distress for Rent Act* as there was no operational lease for the spaces that the Applicant had surrendered and that six months had lapsed between the surrendering of the spaces and the levying of distress.

16. It is the Applicant's case that the amounts owed with respect to those spaces could only be recovered as a debt and not rent arrears and that the debt could only be recovered by way of debt recovery proceedings.

Submissions

17. Relying on section 5 of the *Distress for Rent Act* and the case of *C.Y.O Owayo v George Hannington Zephania Adudat/A Aduda Auctioneers & another* [2007] eKLR, the Applicant submitted that the amounts owed for rent that was unpaid when the Applicant was occupying all the spaces were captured in the Debt Settlement Agreement to be settled as a civil debt.

18. It was submitted that since the spaces were surrendered, there were no rental payments due and no rentals arrears for which distress could be levied.

19. Relying on section 3(1) of the *Distress for Rent Act* and the *C.Y.O Owayo case* (supra), the Applicant's counsel argued that the Debt Settlement Agreement treated the amounts owed as a civil debt rather than rent arrears; that the jurisdiction of the *Distress for Rent Act* was ousted and that the 1st Respondent's recourse in case the Applicant defaulted on the agreement was to institute debt recovery proceedings and not levy distress as there were no rent arrears.

20. It was argued that the validity of the agreement was premised on the current lease and a breach of the agreement could only be determined once the lease expires and that the Applicant had established a prima facie case with a probability of success as it has a right to peaceful occupation of the area it occupies.

21. It was further argued by the Applicant's counsel that damages would not be an adequate remedy because if the Applicant's goods are attached, all of its business would ground to a halt. In conclusion it was submitted that the balance of convenience was in favour of the Applicant as the rent for the space it occupies has been paid and the debt owed to the 1st Respondent can be recovered by way of a civil suit.

22. The Respondents' counsel filed their submissions on September 29, 2022. Counsel submitted that the rent was owed to the 1st Respondent as the landlord and that the letter dated March 11, 2022 had erroneously indicated the amount owed as USD 78,136.82 but was properly indicated in the statement of account as USD 415,295.80.

23. Submitting on the issue of *Distress for Rent Act*, the Respondents relied on Section 3 (1) of the said Act and the cases of John Nthumbi Kamwithi v Asha Akumu Juma [2018] eKLR and Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] eKLR.

24. It was submitted by the Respondents' counsel that as per the Debt Settlement Agreement, the Applicant was required to pay accumulated rent arrears in respect of the space it retained. On the issue of when the agreement was signed, the Respondents submitted that the effective date was 15th May 2021.

25. The Respondents' counsel submitted that while the agreement gave it discretion to institute debt recovery proceedings, those provisions did not oust its right to levy distress under Clause 4.17.1 of the lease. Additionally, it was argued, Section 5 of the *Distress for Rent Act* is not applicable in the present case as the lease between the parties is still operational.

26. It was based on the foregoing that the Respondents concluded that it was entitled to levy distress and that the Applicant had not established a prima facie case.

27. Relying on the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR, the Respondents submitted that the Applicant had not demonstrated that it would suffer irreparable harm. The Respondents argued that the Act provides for payment of damages in case of wrongful distress.

28. The Respondents also relied on the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR to argue that the balance of convenience tilted in favour of the 1st Respondent as it is owed USD 382,952.80 in rent arrears and Kes 82,000 in service charge arrears by the Applicant. It therefore stands to suffer greater loss if the injunction is granted.

29. In conclusion, the Respondents' counsel submitted that the injunction being an equitable remedy should not be granted as the Applicant had come to court with unclean hands by initially failing to disclose the default clause in the Debt Settlement Agreement.

Analysis and Determination

30. Based on the foregoing, the issue that arises for determination is whether an injunction restraining the Respondents from attaching the Applicants goods should be issued.

31. The principles for granting an injunction were set out in the case of Giella v Cassman Brown & Co. Ltd (1973) EA 358 as follows:

> " 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."

32. The Court in Mrao Ltd v First American Bank of Kenya Ltd& 2 Others [2003] eKLR defined a prima facie case as follows:

> " In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

33. In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal elaborated on the above principles as follows:

> "We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation."

34. The Applicant has argued that an injunction restraining the Respondents from attaching its goods should be issued. The crux of its case is that it is has a right to peacefully occupy the 3221.5 square feet space because, firstly, it is up to date with the rent and service charge payments for the said space; and secondly, the amounts it owes the 1st Respondent can only be recovered as a civil debt and not rent arrears as per the Debt Settlement Agreement.

35. This position is denied by the 1st Respondent who argued that according to the Debt Settlement Agreement, the Applicant was required to pay accumulated monthly rents failure to which the agreement would be voided. The Respondents stated that the agreement was voided and they rightfully levied distress based on the current lease.

36. Nothing in the Debt Settlement Agreement expressly or implicitly states that the debt owed shall be treated as a civil debt. At Clauses G and H of the agreement, the money owed is referred to as the outstanding accumulated rent which was to be paid contemporaneously with the current rent. The payment plan is set out in Clauses 1 -4 of the Debt Settlement Agreement as follows:Between May 2021 and September 2021, the Applicant was required to pay the 1st Respondent USD 15000 per month.Between October 2021 and March 2022 it was supposed to pay USD 20,000 per month.Between April 2022 and April, 2023 it was to pay USD 30,000 per month.And finally, between May 2023 and December 2023 it shall pay USD 7,100 per month."

37. The Applicant has argued in its supplementary affidavit that it could not be reasonably expected to honour the invoices that were raised on 17th November as the agreement was executed on/around the same date.

38. I find that the Applicant is trying to clutch at straws with this argument. In its initial affidavit, it stated that the agreement was entered into on 15th May 2021. Additionally, the copy it attached to the initial affidavit is dated 15th May 2021.

39. Having established that the agreement was in force since May 2021, I find, prima facie, that the Applicant was required to pay USD 15000 per month from then till September 2021. As its documentation shows, it made three USD 15000 payments within that period and on the following dates: 19th July 2021, 27th May 2021 and 18th September 2021.

40. Therefore, in total, it made payments worth USD 45000 while it was required to have made payments worth USD 75,000. From the documentation, it clear that the payments were not made monthly as stipulated in the agreement.

41. The Applicant has argued that it has paid for the space it occupies and that extra monies went into paying the debt owed. Nothing in the agreement details this as the payment plan.

42. In the period between October 2021 and March 2022, the Applicant was required to pay the 1st Respondent USD 20,000 per month. As per its documentation, it paid a total of USD 80,000 within that period. Again, the payments were not made on a monthly basis and there was a total shortfall of USD 40,000 that was required to be paid within that period.

43. The Applicant was therefore clearly in breach of the agreement. Clause 5 of the agreement (which the Applicant initially omitted from its documents) provides that in the event of default in the agreement monthly remittances, the agreement would be rendered void and the lessor may embark on debt recovery proceedings.

44. Based on the foregoing, I find that the Applicant has failed to demonstrate a clear and unmistakable right that ought to be protected by the Court. The Applicant has argued that the agreement has ousted the Respondents' right to levy distress. However, the Applicant has clearly breached the agreement that it is seeking to rely on.

45. According to Clause 5 of the agreement, such breach could render the agreement void. It reads: The Lessee further acknowledges and agrees that any monthly default in remittance of the foregoing amounts to the lessor as stipulated under Clause 1 to 4 above may render this Agreement null and void and the Lessor may at its own discretion upon the Lessee's default embark on debt recovery proceedings as its recourse.

46. Indeed, the reading of the agreement does not show that the same ousted the landlord/tenant relationship that existed between the parties. The Applicant was under an obligation to pay the rent for the space it was occupying and what it had surrendered.

47. From the conduct of the 1st Respondent, it can be concluded that the 1st Respondent is treating the agreement as voided. The Applicant cannot therefore argue that a right exists while the agreement on which the said right is founded has, prime facie, been voided by his own conduct

48. In the absence of such a right, the applicant has failed to establish a *prima facie* case with a probability of success and is therefore not entitled to an injunction. Further, an injunction being an equitable remedy should not be granted where the applicant has approached the Court with unclean hands.

49. For those reasons, the application dated 9th May 2022 is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF FEBRUARY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Vutsotso holding brief for Mr. Mugalo for Plaintiff/Applicant

No appearance for Defendants/Respondents

Court Assistant – June