



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 8 OF 2019

STEPHEN GITAHL.....PLAINTIFF/APPLICANT

VERSUS

RACHEAL OTWOMA.....1ST DEFENDANT/RESPONDENT

JACKTON OTWOMA.....2ND DEFENDANT/RESPONDENT

CHARLES JAMES KARANI T/A

JAKACHA AUCTIONEERS.....3RD DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant has filed a notice of motion dated 13th May, 2019 seeking for orders that:-

1. Spent

2. Pending the hearing of this application interpartes a temporary order of injunction do issue restraining the 1st, 2nd respondents, heir, agents and or assigns from occupying the premises on block 1/59 namely Mid-West Fries. (The prayer is spent).

3. The 3rd respondent be and is hereby ordered by a grant of a mandatory order of injunction to return all the goods/property illegally attached from the suit premises on 11/5/2019.

4. An order of mandatory injunction do issue commanding the 1st and the 2nd respondent to immediately reopen the suit premises on block 1/59 Kakamega Town is known as Mid-West Fries pending the hearing of this application interpartes.

5. Pending the hearing of this suit the 1st and 2nd defendants jointly and severally be restrained by a temporary order of injunction from interfering with the applicant's use and occupation of the suit premises situate on block 1/59 Kakamega Town otherwise known as mid-west fries.

6. Costs hereof be provided for.

2. The respondents on the other hand have filed a notice of motion dated 20/5/2019 seeking that the suit herein be dismissed on the grounds that it is frivolous, discloses no reasonable cause of action and it is otherwise an abuse of the process of the court.

3. Both applications were urged together. For ease of reference the applicant in the application dated 13/5/2019 will be referred to as the applicant while the others will be referred to as the 1st, 2nd and 3rd respondents.

4. The application dated 13/5/2019 is based on the grounds on the face of the application and is supported by the affidavit of the applicant. The grounds in support of the application are that the applicant was a tenant to the 2nd respondent. The 1st respondent was an agent for the 2nd respondent. That on the 11th May, 2019 the 3rd respondent who is an auctioneer attached the applicant's property at his business premises purportedly executing an order of the Business Premises Rent Tribunal dated 27th February, 2019. The applicant contends that he was not in any rent arrears at the time of attachment. That he was not issued with a notice before the said attachment. That the execution of the purported orders of 27/2/19 was done contrary to the provisions of section 14 (1) and (2) of the Landlord and Tenant (Shops, Hotels and

Catering Establishments) Act Cap 301. That there were no warrants of attachment and sale. Neither was there a decree upon which the 3rd respondent would act on as the tribunal cannot by dint of section 14 make orders capable of execution by itself. That the 3rd respondent carted away the applicant's property from his premises on the same day of the distress on 11/5/19 which is contrary to the provisions of section 4 of the Distress for Rent Act. That the tribunal has no jurisdiction to give orders that are executable immediately hence the orders of 27/2/19 were made ultra-vires the powers of the tribunal. Further that the goods attached included tools of trade and perishable goods.

5. The application for the 1st and 2nd respondents dated 20/5/2019 is based on the grounds that the suit is nugatory in that the orders sought have been overtaken by events in that the plaintiff has been evicted from the premises. That there is no longer landlord/tenant relationship. That there is already a new tenant in the premises who is not a party to these proceedings. That the court lacks the requisite jurisdiction to entertain the claim. That the plaintiff's pleadings do not disclose any claim against the 2nd defendant. That the claim has no chance of success and is otherwise an abuse of the court process.

6. The 2nd and 3rd respondents' application was supported by the affidavit of the 1st respondent in which she deponed that the tenancy relationship with the applicant was terminated as per the consent by the parties of 27/2/19. That the applicant did not adhere to the terms of the consent as a result of which he was evicted from the premises and there is now a new tenant in the premises. The 1st respondent annexed a copy of a receipt issued to the new tenant. She stated that the applicant has an owing electricity bill of Ksh. 136,670.94.

7. The 1st respondent filed documents that indicated that she and the applicant had a case before the Business Premises Rent Tribunal in which they recorded a consent on the 27/2/2019 in the following terms:-

1. The tenant shall clear all the outstanding arrears of rent.
2. The tenant shall pay a monthly rent of Ksh. 20,000/= on or before the 5th day of each month in advance to the firm of Abok Odhiambo & Co. Advocates.
3. The tenant shall pay the landlord costs of the reference which shall be agreed.
4. That in default of compliance with the above order the landlord shall be at liberty to evict the tenant without further orders of the Tribunal.

8. The documents show that on the 10/5/19 the auctioneer, the 3rd respondent, filed an application under certificate of urgency before the Chief Magistrate's Court Kakamega Misc. Civil Application No. 28 of 2019 seeking the court to direct the OCS Kakamega Police Station to provide security to the applicant when effecting the Kakamega Business Tribunal Case No. 140 of 2018 consent order given on 27/2/19 against the plaintiff. The auctioneer was also seeking leave to distrain any other distrainable property found within the premises of the plaintiff herein. The applicant alleged that the plaintiff had rent arrears of Ksh. 40,000/= and that he had failed to comply with a proclamation dated 7/4/2019 and consent order dated 28/2/2019. The orders were granted by the court on the same day, 10/5/2019. The order of the Chief Magistrate and the proclamation were attached to the application.

9. The applicant on his part denied that he was in rent arrears at the time of execution. He attached statements to show that he had no rent arrears owing. He contended that his application is challenging the process used to evict him. That there is a new tenant is evidence that there was a scheme to evict him from the premises.

10. Both applications were argued by Miss Mburu appearing for the applicant, Mr. Abok appearing for the 1st and 2nd respondents while Mr. Getanda appeared for the 3rd respondent. Miss Mburu argued that the statements that they have attached to the application show that the applicant did not owe any money when the auctioneers moved in to execute. That the execution was carried out in contravention of section 14 of Cap 301. That there was no orders for eviction when the applicant was evicted. That the advocates costs had not been determined. That it is only the auctioneers fees that were owing at the time of eviction but that the auctioneer had moved in late.

11. Mr. Abok on his part argued that the provisions of section 14 Cap 301 are not in mandatory terms. That the consent order was for the applicant to pay rent by 5th of every month. That the same allowed the 2nd respondent to evict the applicant if the consent terms were not adhered to. That at the time of eviction he was in arrears of Ksh. 58,000/=. That the applicant was served with notices by the auctioneer. That the documents filed do not show payment of rent. That the application has been overtaken by events as there is a new tenant on the premises who is not a party to the suit. That the orders sought cannot thereby be effected. That this court has no jurisdiction to entertain the matter as it is the Environment and Land Court that has the requisite jurisdiction.

12. Mr. Getanda on his part argued that the auctioneer followed the due process. That he issued a proclamation which the applicant failed to comply with. That a notification was then issued. That the sale was properly conducted.

13. In the main suit the applicant is seeking for:-

- (a) Declaration that the distress for rent levied on 11.5.2019 was not only premature but illegal and hence null and void ab initio.
- (b) That the tribunal exceeded its powers in making orders that are deemed executable immediately contrary to the provisions of section 14 (1), (2) of Cap 301.
- (c) That the tenancy agreement between the plaintiff and 1st and 2nd defendants is still in force.

(d) General damages for wrongful distress for rent.

(e) Costs of the suit.

14. The applicant is therefore challenging the process that was used to evict him from the premises. He contends that the process did not comply with the provisions of section 14 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The section provides as follows:-

“(1) A duly certified copy of any determination or order of a Tribunal may be filed in a competent subordinate court of the first class by any party to the proceedings before such Tribunal or by the Tribunal, and on such copy being filed and notice thereof being served on the Tribunal by the party filing the same such determination or order may, subject to any right of appeal conferred by or under this Act, be enforced as a decree of the court.

(2) The Tribunal shall, upon being served with a notice under subsection (1) of this section, or upon its own filing of such copy in the court, transmit to the court its record of the proceedings before it, and the same shall be filed by the court along with the certified copy of the determination or order.”

15. The applicant is also contending that the execution did not comply with section 4 of the Distress for Rent Act, Cap 293 that requires a notice to be issued over distrained goods for a period of 10 days.

16. It was argued that this court has no jurisdiction to hear and determine the matter. The Court of Appeal in **Co-operative Bank of Kenya Limited –Vs- Patrick Kangethe Njuguna & 5 Others, Eldoret Civil appeal No. 83 of 2016 (2017) eKLR** it was held that matters involving mortgages, charges, collection of dues and rents fall within the civil jurisdiction of the High Court and not the Environment and Land Court. In the premises this court is seized of the matter.

17. The application by the defendants dated 20/5/2019 is made under Order 2 rule 15 (1) (b) and (d) of the Civil Procedure Rules that provides that:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

(a) It discloses no reasonable cause of action or defence in law; or

(b) It is scandalous, frivolous or vexatious; or;

(d) It is otherwise an abuse of the process of the court.”

18. The principles under which our courts may strike out suits are well settled. The rule is that where a party establishes that the suit raises a triable issue then the matter should be allowed to proceed to hearing – See **Dhanjal Investments Ltd –Vs- Shabaha Investments Limited Civil Appeal No. 232 of 1997 (1997) eKLR**.

19. As to what amounts to a triable issue was stated by the Court of Appeal in **Job Kilach –Vs- Nation Media Group Ltd, Salaba Agencies Ltd and Michael Rono (2015) eKLR** where it was held that: -

“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

20. In **D. T. Dobie (Kenya) Ltd –Vs- Joseph Mbaria Muchina & Another (1982) KLR 1** it was held that:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of a case before it.”

21. A pleading or action is said to be frivolous when it is without substance is groundless or is fanciful – See **Trust Bank Ltd –Vs- Amin Company Ltd & Another (2000) KLR 164** (cited in **Kiranga Estates Limited –Vs- National Bank of Kenya Ltd (2017) eKLR**).

22. The procedure for execution of decrees from the Business Premises Rent Tribunal is set out in section 14 of the Act. The section requires for a party in the tribunal case to file the determination of the tribunal in a subordinate court for it to be adopted as a judgment of the court. The 1st respondent who was the party in the tribunal case did not file the determination with the court for adoption. The respondents therefore evicted the applicant without a decree of a subordinate court. The question then is whether the respondents could lawfully evict the applicant without the adoption of the determination of the tribunal by a subordinate court, even though there was a consent order that allowed the eviction of the applicant without reference to the tribunal.

23. Mr. Abok argues that the provisions of section 14 are not mandatory. Miss Mburu on the other hand tended to argue that the provisions are mandatory or rather that the section provides the procedure that ought to be followed in executing decrees from the Business Premises Rent Tribunal. She further argued that the Business Premises Rent Tribunal has no powers of execution of its own orders. The arguments by Miss Mburu are not without substance. Whether the applicant was lawfully evicted is a triable issue in the case.

24. The plaintiff is seeking for declarations that his eviction was unlawful/unprocedural, that his tenancy agreement with the 1st and 2nd respondents is still in force and is seeking general damages for unlawful distress of rent. The plaintiff has sued the people who evicted him. That there is a new tenant in the premises does not make the suit nugatory. Whether the plaintiff is entitled to the reliefs that he seeks is a triable issue.

25. In the foregoing I find that the plaintiff's case raises triable issues. The suit cannot be described as frivolous or an abuse of the process of the court. It ought to be heard on its merits. There is no merit in the application by the respondents dated 20/5/2019. The same is thus dismissed with costs to the plaintiff.

26. In Prayers 3, 4 and 5 the applicant is seeking for injunctive orders against the 1st and 2nd respondents. For the applicant to succeed he has to satisfy the requirements set out in **Geilla –Vs- Cassman Brown & Co. Ltd (1973) EA 358**. He has to establish a prima facie case with a probability of success, demonstrate that he will suffer irreparable loss or damages that cannot be adequately compensated by an award of damages if interlocutory injunctive orders are not granted and, if the court is in doubt, to decide the application on a balance of convenience.

27. Prayer 3 seeks to compel the 3rd respondent to return goods attached from the suit premises. The same has been overtaken by events as the goods have already been sold. The order cannot thereby issue.

28. Prayer 4 is seeking to have the 1st and 2nd respondents to re-open the premises pending the hearing of the application inter partes. The order cannot issue at this stage as it was meant to operate pending the hearing of the application inter partes.

29. Prayer 5 seeks to restrain the 1st and 2nd respondents from interfering with the applicant's use and occupation of the premises pending the hearing of the suit. The applicant is no longer in occupation of the premises. There is no prayer for him to be reinstated into the premises pending the hearing of the suit. The court cannot restrain the respondents from interfering with the applicant's use and occupation of the premises when he is not in such use and occupation of the premises.

30. The upshot is that the plaintiff/applicant's prayers for injunction cannot issue as framed. The application dated 13/5/2019 is dismissed in its entirety with costs to the defendants/respondents.

Delivered, dated and signed in open court at Kakamega this 21st day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Malala & Miss Mburu for the plaintiff/applicant

Mr. Obido holding brief for Abok for the defendants/respondents

Parties:

Plaintiff/Applicant - present

Defendants/Respondents - absent

Court Assistant - George