



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.302 OF 2017

JACKSON MUTUGI MWANGI.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED..... 1ST DEFENDANT

JOSEPH MUNGAI GIKONYO

T/A GARAM INVESTMENTS..... 2ND DEFENDANT

RULING

1. The Application before this court is triggered by paragraph 6 of this Court's ruling delivered on 15th February 2019 which reads;

The Bank resisted the application through a replying affidavit by Jane Gathuita sworn on 19th September, 2017. She is the Credit Administrator of the Bank. One of the things she does in the affidavit is to attach to it a schedule of Rent collection of the charged property for the period March 2016 to February 2017. On the basis of that collection, the Respondent gives an explanation of the amounts realized and applied towards the debt (see paragraph 13 of the affidavit). The Plaintiff does not react to that schedule or explanation by way of affidavit. This Court takes that silence by the Plaintiff as an acceptance that the schedule represents a true account of the Rental income from the property. The question of accounts has therefore been addressed.

2. The current Notice of Motion seeks two main orders being;

i. THAT pending the hearing and determination of this Application *inter-partes*, this Honourable Court be pleased to issue an order restraining the Defendants by themselves or their agents and assigns from selling, offering for sale, transfer or in any way disposing all that property known as L.R. No. 9042/587 (I.R.72111)

ii. THAT this Honourable Court be pleased to review, vary or set aside its Ruling and Order made on 15th February 2019 by Honourable Mr. Justice F. Tuiyot dismissing the Plaintiff's Notice of Motion dated 20th July 2017.

3. Through a Notice of Motion dated 20th July 2017 the Plaintiff sought, *inter alia*, an order restraining the Defendants by themselves or their agents and assigns from selling, offering for sale, transferring or in any way disposing all that property known as L. R. No. 9042/587 (I.R 72111) pending the hearing and

determination of the suit. One of grounds upon which the application was founded was that the intended sale was fraudulent and illegal because the 1st Defendant's appointed agent had failed or refused to account for rent collected from the suit premises. The Plaintiff's case was that the monthly rental income exceeded the monthly instalment for the term loan.

4. It is in Paragraph 6 of the ruling of 15th February, 2019 that this court considered that ground. That portion of the ruling has been reproduced at the beginning of this decision. The essence of the finding is that on the basis of the material before court, how the rental income had been realized and applied towards the debt had been explained by the schedule of rent collection annexed to an affidavit sworn on behalf of the 1st Defendant and because there was no answer to it by the Plaintiff.

5. In the current application the Plaintiff has brought to the attention of Court two affidavits filed on 12th January 2018 and 30th October, 2018 respectively which were a reaction to the issue of rent collection. And I must concede that I did not see the said affidavits at the time of preparing the decision of 15th February 2019 and I did not consider their contents.

6. There is therefore an error apparent on the face of the record that makes for a case of considering a review of the impugned decision. It is also noted that the current motion was brought just 20 days after the ruling. That was prompt and satisfies one of the requirements of a review application which is that it shall be brought without undue delay.

7. The more substantial question must now be what are the appropriate orders to be made upon consideration of the evidence in the two affidavits that had been overlooked?

8. On this the Plaintiff appears to take two but related positions. The first is that it is essential that the Court rehears the Notice of Motion dated 20th July 2017 to enable the Court render itself on the question of accounts. And second the ruling and order made on 15th February 2019 be reviewed.

9. On its part the 1st Defendant, through a replying affidavit of Roseline Kivuva sworn on 12th March 2019, asserts;

THAT the Plaintiff's query of accounts of rent received was sufficiently countered by the 1st Defendant vide their affidavits sworn by Jane Gathuita on 19th September, 2017, Roseline Kivuva on 20th February, 2018 and Sylvester Ndung'u on 20th February, 2018, the entirety of which the Plaintiff failed to sufficiently prove in his submissions or otherwise, warrants the orders for injunction. Annexed hereto and marked RK-I are the affidavits.

10. What the 1st Defendant is really saying is that even if duly considered that contents of the two affidavits do not change the outcome of the application.

11. This court has taken into consideration the application, the response and arguments made by counsel herein. Three issues fall for determination:

(a) Has the 1st Defendant failed or refused to render an account of rent collected from the said premises?

(b) If the answer to (a) is in the affirmative, is that sufficient reason to stop the 1st Defendant from exercising its statutory power of sale?

(c) Is the Plaintiff entitled to an order compelling the 1st Defendant and/or its agent to supply the Plaintiff with a schedule of rent?

12. In the affidavit of Jane Gathuita of 19th September 2017 she makes the following explanation on the collection of rent from March, 2016 to February, 2017;

i. In response to Paragraph 6 of the affidavit, as per the schedule annexed 'JG – 5' in paragraph 12 above, it is clear that:

a. When the agents took over in March, 2016 the rent collectible from the property was Kshs.1,742,200 and not Kshs.2,590,000 as alleged. This was the highest amount of projected rent collectible over the period. After deductions for the Plaintiff's utility bills and incidentals bills, the 1st Defendant recovered Kshs.1,114,742 only.

b. In April 2016, the rent collectible was Kshs.1,742,200. The 1st defendant recovered Kshs.450,000 only.

c. In May 2016, the rent collectible reduced to Kshs.1,723,200 due to a vacancy in unit 23. The 1st Defendant recovered Kshs.550,000 only.

d. In June 2016, the rent collectible was Kshs.1,723,200. The 1st Defendant recovered Kshs.650,000 only.

e. In July 2016, the rent collectible was Kshs.1,777,025. The 1st Defendant recovered Kshs.600,000 only.

f. In August 2016, the rent collectible was Kshs.1,767,025. The Defendant recovered Kshs.104,593 only.

g. In September 2016, the rent collectible was Kshs.1,777,025. The 1st Defendant recovered Kshs.247,745 only.

h. In October 2016, the rent collectible reduced to Kshs.1,411,000 when a vacancy arose in unit 21. The 1st Defendant recovered Kshs.200,000 only.

i. In November 2016 the rent collectible was 1,401,000. The 1st Defendant recovered Kshs.200,000 only.

j. In December 2016, the rent collectible was Kshs.1,401,000. The 1st Defendant recovered Kshs.150,000 only.

k. In January 2017, the rent collectible was Kshs.1,401,000. The 1st Defendant recovered Kshs.150,000.

l. In February 2017, the rent collectible was Kshs.1,401,000. The 1st Defendant recovered Kshs.107,631.

m. In March 2017, the rent collectible was Kshs.1,401,000. However, the 1st Defendant did not recover the loan from the rent, as following instructions from the Plaintiff to the tenants; the tenants ceased remitting any rents to the agents. Annexed hereto and marked JG-6 is a copy of the letter dated 1st March, 2017 from the Plaintiff's Advocates to the tenants.

ii. As at March 2017, the rental arrears from the property stood at Kshs.16,792,580. Noteworthy, the arrears were majorly as a result by one Richard Kariuki, a Director of the Plaintiff in Milimani HCC 402 of 2016 alluded to in Paragraph 5 above, and his family. The said Richard Kariuki and his family occupied unit numbers 6, 14, 18, 20, 22 and 29.

iii. As is evident from the schedule of rent collected, the Plaintiff failed to meet his contractual obligations as the monthly rent collected was not sufficient to raise the agreed monthly installment of Kshs.1,675,132.

iv. Moreover, as is evidence from the Plaintiff's letter annexed 'JG-6' above, the Plaintiff interfered with the collection of rent by the agents and diverted the rent to his account, thus continuing to default.

13. In his affidavit of 9th January 2018 the Plaintiff responds as follows:

- i. The agent deliberately mismanaged the collection of rent.
- ii. The 1st Defendant has not given an explanation for the drop of rent collection from Kshs.1,742,200.00 to as low as Kshs.107,631.
- iii. The 1st Defendant has not explained what measures it took in instances where tenants allegedly failed to pay rent.
- iv. The Plaintiff was not notified of vacant units so as to take action towards their occupation.
- v. The letter stopping rent collection by the Bank was written by a third party and this was not brought to the attention of the Plaintiff.

14. That affidavit attracts a response from the 1st Defendant by way of a further affidavit by Roseline Kivuva sworn on 20th February 2018 and an affidavit of Sylvester Ndungu sworn on 20th February 2018. For purposes of the matter before Court the latter affidavit is of relevance. Ndungu is the Managing Director of Homesplus Really Ltd which was the agent of the 1st Defendant for purposes managing and collecting rent over the suit property.

15. In that affidavit he gives a lengthy explanation of the rent collection under the watch of his Company. The Court proposals to abridge that explanation. First, that upon appointment in March 2016 the suit property had a monthly rent collection of Kshs.1,742,000, rent arrears of Kshs.2,367,675 and two tenants had made prepayments of Kshs.15,000 and Kshs.10,000.

16. At that time some tenants had filed complaints against the Plaintiff at the Business Premises Rent Tribunal. That these tenants were rent defaulters, a fact known to the Plaintiff.

17. In addition, some units namely 27, 25, 21 and 23 were vacant during that period. Also, from October/November, 2016 the agents were unable to collect rent from units 19, 24, 25, 26, 27, 28, 20, 21 when they discovered that these were not within the suit property. Lastly, that rent from Units 6, 14, 18, 26, 22 and 29 amounting to a monthly sum of Kshs.1,070,000 were not recovered from members of the family of the late Richard Kariuki, the deceased director of the Plaintiff in HCC No. 402 of 2016.

18. Through an affidavit of 30th October 2018 the Plaintiff responded that he was never notified of any problems of collection of rent. He contends that the 1st Defendant had direct control over the rental income and was entitled to sue tenants for non-payment of rent.

19. The net sum of the affidavit evidence before Court is that one side accuses the other of failing to efficiently and effectively manage the collection of rent while the other attempts to give an explanation for that state of affairs. This is a matter that cannot be fairly resolved by untested evidence and will have to await full trial.

20. What is more clear however is that by the time the Bank appointed its agent to manage and collect rent from the charged property, the Plaintiff had fallen into arrears in the repayment of the debt. Further, that the appointment of the agent was by mutual agreement.

21. Also telling is the letter of 6th September, 2016 from counsel for the Plaintiff to the Bank (annexure to the Plaintiff's affidavit of 27th January, 2017) in which the Plaintiff seeks restructuring of the loan citing, '*inter alia*', difficulty in rent collection due to default by tenants. In the letter the Plaintiff alludes to the fact that rent collection was not optimal. This letter, as one note, was written three months into the time the agent of the Defendant was collecting rent. The letter does not attribute the non-optimal collection to the 1st Defendant or his agent.

22. It is in these circumstances that I cannot say that the Plaintiff has made out a prima facie case that his

default is as a result of mismanagement of the premises and rental collection by the 1st Defendant. For that reason my final view of the application of 2nd July, 2017 would not change. Even after considering the conflicting positions in respect to the rent collection, this Court still reaches the same result that Motion of 20th July 2017 for injunction is without merit.

23. In the end, the Court has reconsidered in the Ruling of 1st February 2019 but still is unable to grant the orders of the Notice of Motion of 20th July, 2017. The effect is that the Notice of Motion of 8th March, 2019 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 9th Day of August 2019

F. TUIYOTT

JUDGE

PRESENT;

Ndolo for Saluny for Plaintiff

Onani for Wahura for 1st Defendant

Nixon: Court Assistant