REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 156 OF 2018

LYDIA NYANCHANA OTTARA.....APPLICANT

VERSUS

ALEX M.G.....RESPONDENT

R U L I N G

1. On 31/5/2018 the Applicant, LYDIA NYANCHAMA OTTARA filed a Notice of Motion under certificate of urgency and disclosed to be premised on the overriding objectives and interest powers of the court as well as Order 40 Rule 1 and prayed for orders that:-

i) THAT service of this application in the first instance be dispensed with and the application be heard exparte.

ii) THAT a temporary injunction does issue directing the Defendant to release to the Plaintiff her household and business goods i.e. fridge, sofa set, chips drier and gas cooker.

iii) Any other relief that this Honourable Court may deem fit and just to grant.

iv) Cost be provided for.

2. The application was grounded on the alleged fact that the Respondent had auctioned the Applicants goods contrary to the law and inequitably because the Applicant was a lactating mother with one month old baby with nowhere else to go. The illegality was alleged to be due to lack of notice and on arrears it is alleged that rent had been paid. On that application no evidence of distress nor evidence of payment of rent was ever exhibited at all.

3. The Notice of Preliminary Objection faults the application is fatally defective for having not been brought in compliance with the Civil Procedure Act and the Rules while the Replying Affidavit was to the effect that the Applicant is in huge arrears of rent including unpaid electricity bills and that sometimes in May 2018 parties discussed and agreed that the Applicants moves into a smaller house and that some of her bulky items be kept by the Respondent which the Respondent still keeps not pursuant to distress for rent but on agreement. To that Replying Affidavit no rebuttal was ever filed and it thus stands uncontroverted.

4. When the matter was placed before the Judge *exparte*, the court declined to grant any orders *exparte* and gave three reasons then ordered that the Respondent be served for hearing *interpartes* later The Respondent was apparently served and he responded to the Application by filing both Replying Affidavit and a Notice of Preliminary Objection.

5. When parties appeared in court, it was directed that the preliminary objection and the Replying Affidavit be urged as opposition to the Application and a single determination rendered.

6. Ms. Abonyo Counsel for the Applicant put forth very brief arguments to the effect that the distress was unlawful because notice was not served and that the Applicant had been issued with some but not all receipts for rent paid. The counsel relied on the provisions of Order 3 Rule 1 and the decision in Joseph Kibowen Chenjor vs William Kisera in opposition to the preliminary objection and to contend that the institution of the matter by a Notice of Motion was valid and proper because, to her, a plaint is just one of the modes to institute proceedings.

7. For the Respondent, Mr. Obara Advocate argued pointed out to court that the fact that the Applicant remains a tenant, had not been evicted, and stressed the fact that the goods were never distained but kept upon an agreement were not contested including the existence of rent arrears.

8. On the Preliminary Objection, the counsel submitted that there was no suit before the court to merit an injunction as the matter ought to

have been instituted by a plaint but was not so instituted. He pointed out that there was nothing to show distress and sale and the fact that the Respondent had admitted to be keeping the goods not pursuant to distress but to an agreement to enable the Applicant move into a smaller house.

9. He urged the court not to issue orders in vain and contrary to the law on pleadings. For those reasons sought that the application be dismissed.

Issues

10. Having read the documents filed and heard the counsel for the parties, what is before the court and which must be determined preliminarily is whether or not there is in existence a suit upon which the court can give a temporary injunction. If I find that there is a suit, then I will proceed to determine whether on the materials availed the court can grant to the Applicant the mandatory injunction sought.

The Propriety of the suit

11. Lawyers are lawyers because they apply the law as their only tool of trade. The only reason lawyers are retained by member of the public is the understanding that they are trained in the law and are therefore well equipped with knowledge and skill not only to advice but also package the client's claim in a manner that bring out the legal basis, thereof and then proceeds to isolate the appropriate remedies benefitting and available in law.

12. For that reason, lawyers cannot escape the demand that they comply with legal requirements in their duty to the litigating public and the court.

13. In this matter, the application as prescribed is scanty on facts and cannot even be said to clearly define what the cause of action the Applicant seeks to litigate before court. That state of affair is clearly the natural outcome of the failure by the Applicants counsel to comply with the law on pleadings.

14. That a plaint is not the only way to institute proceeding, cannot be disputed. However it is the known and ordinary way to institute ordinary civil proceedings and a departure is only allowed where the law under the Rules or other statutory provisions prescribe an alternative mode.

15. As vaguely drafted, the plaintiff is either suing for a breach of contract or upon tort of trespass, detinue or conversion. Those are causes of action that must be brought by way of plaint so that the details are set out in compliance with the provisions under Order 3 Civil Procedure Rules. That the Applicant did not do. Instead she opted to file a miscellaneous application by a Notice of Motion.

On the facts pleaded, I do find that a Notice of Motion was never the mode to institute the claim and that the same has not been properly brought. Being improperly so brought the court must say that it is underserving of taking judicial time and other resources in being kept alive. It cannot be sustained but must be struck out.

16. However, the Applicants' advocate has cited to court the decision by the High Court, Nativo J, in ***Joseph Kibomen Chemjor vs C Kisera [2013]*** to challenge the preliminary objection that this suit is incompetent. On that citation the advocate exhibited gross lack of candor if not evasion in that she opted to avail to court only 5 of the 10 pages of the decision with the hope that the court would be persuaded by the observations at pages 4 & 5 thereof that a plaint is not the only way to file a suit while feigning oblivity to the ubiquity and omnipresence of that decision all over the internet including a hand telephone set majority of literate Kenyans now walk with all the time. Despite her conduct, even the copy availed to court was clear on the editors notes, at the top of the decision, that there having been cited to court no provision of law permitting such a suit by an originating summons in a miscellaneous application, the suit was held to be incompetent. I have read the decision cited and I can only say that the same is of no assistant to the Applicant's case. That decision is affirmative that a suit commenced otherwise or contrary to the mode prescribed is incompetent and must be struck out.

17. In doing so, I have not forgotten the dictates of Article 159(2) d that the old defeatist approach to litigation which over emphasized procedural technicalities need be discouraged. I am however, aware that, that provision as much as it discourage courts from being too over technical has not rendered other statutory and subsidiary legislations otiose[1].

18. Instead the constitution recognizes the statutes and other sources of law and such can only be disregarded where they are contrary to the constitution[2]. Additionally, litigation, including filling of documents need to be done in a structure and organized manner and that is the part 1 understand to be played by Procedural Statutes like the Supreme Court Act, Appellate jurisdictions Act and Civil Procedure Act together with the Rules made there under. Those rules are well known to be the handmaids of justice and have not been rubbished or thrown out of the window by the arrival of article 159 (2) d of the constitution.

19. I do find that the matter is incompetent and therefore I order it struck out with costs.

20. I have however, all along in this ruling agonized whether this is a matter where a litigant trusting on the knowledge and expertise of an advocate in matters of law should be burdened with costs and I doubt that would be just. Rather, I think that there is those rare instances where an advocate should be called upon to show cause why such costs should be paid by the counsel rather than the client. For that reason I direct that the Applicants' advocate being the particular counsel at A.T. Oluoch and Company Advocates who drafted the paperwork shall attend court and show cause why the costs in this suit should not be paid by the counsel. That shall be done on 12/7/2018.

Dated and **delivered** at **Mombasa** this **25th** day of **June 2018**.

P.J.O. OTIENO

JUDGE

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[1] **Peter O. Anam & Others vs Constituency Development Fund Board [2011] eKLR**

[2] **Article 2(4)**