



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO. 443 OF 2008

PHILAN HOLDINGS LIMITED.....PLAINTIFF

VERSUS

ZABLON MABEA..... 1ST DEFENDANT

TERESIAH MBURU..... 2ND DEFENDANT

KENTMORE COMPANY LIMITED..... 3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 18th June 2013 in which the Plaintiff/Applicant seeks for the following orders:

1. Spent
2. Spent
3. That the honourable court be pleased to set aside and discharge the proclamations of attachment issued by Nathan M. Pala trading as Muhatia Pala Auctioneer on 7th June 2013 against Lovis Place Limited, Café Dully and Selina Patani trading as Biashara Cold House or any other tenant in the suit premises.
4. That the 3rd Defendant's Director, Kennedy Mochere Kaburi be arrested and detained in prison for a term not exceeding six months.
5. That Nathan M. Pala Auctioneer be arrested and detained in prison for a term not exceeding six months.
6. That in the alternative the property of the 3rd Defendant and Nathan M. Pala Auctioneers be attached and sold for disobedience or breach of a court order.
7. That the costs of this Application be borne by the 3rd Defendant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Justus John Bosco Kijirah, a director of the Plaintiff, sworn on 18th June 2013 in which he averred that his advocate extracted the order of this court issued on 19th October 2010 and the same was served upon the 3rd Defendant's managing director Kennedy Mochere Kaburi on 22nd October 2010 by one licensed court process server by the name Kennedy Mugo. He further averred that the 3rd Defendant filed a notice of appeal on 15th October 2010 against the order. He further stated that on 19th October

2010 the 3rd Defendant also filed an application seeking stay of execution of the order which application was dismissed with costs on 13th May 2011. He averred further that on 7th June 2013, one Nathan M. Pala auctioneer issued proclamation of attachment against the three tenants in the suit premises while acting on the instructions of Mr. Daniel Achach the advocate acting on behalf of the 3rd Defendant. He stated that the affected tenants Lovis Place Ltd, Café Dully and Selina Patani trading as Biashara Cold House are rent paying tenants of the Plaintiff and are not in arrears. He further pointed out that on 10th June 2013, his advocates wrote to the said auctioneers bringing to their attention the court order issued on 19th October 2010 and demanding the proclamations cancelled and withdrawn in writing. He added that the said auctioneer was served the court order issued on 19th October 2010 together with a penal notice but that the said auctioneer has refused to withdraw and cancel the proclamations. He also stated that his advocates protested the purported distress for rent in writing to the 3rd Defendant's advocates Achach & Co. Advocates. He stated that the 3rd Defendant, its managing director Mr. Kennedy Mochere Kaburi, the 3rd Defendant's advocate Mr. Daniel Achach and the auctioneer Mr. Nathan M. Pala are in contempt of court and ought to be punished.

The Application is contested. The 3rd Defendant filed the Replying Affidavit of its director, Kennedy Mochere Kaburi, sworn on 13th September 2013, in which he averred that the 3rd Defendant is the registered owner of the suit property known as L.R. No. 209/2566, Moti Building located at Biashara Street, Nairobi, which has several tenants. He further averred that the Plaintiff has disputed the 3rd Defendant's title to the suit property through this suit and obtained injunctive orders against the 3rd Defendant for trespassing, taking possession, selling, alienating, damaging or transferring the suit property. He further averred that during the pendency of the suit, the Plaintiff got tenants into the suit property and started collecting rent from them yet he is not aware of any order allowing this. He further stated that the issue of who should receive rent from the suit property was adjudicated before the Business Premises Rent Tribunal in Tribunal Case No. 229-246 of 2011 in which the Honourable Tribunal ordered that rent be deposited at the Tribunal pending the resolution of the dispute as to ownership by this court. He further stated that despite this order, the tenants have been paying rent to someone else which prompted the 3rd Defendant to instruct auctioneers to proclaim the said tenant's goods to settle the outstanding rent arrears. He denied having been served with any order or penal notice by the Plaintiff. He sought for this court's order that rent be paid into court pending the hearing and determination of this suit.

Both the Plaintiff and the 3rd Defendant filed their written submissions.

The issues arising for my determination are whether the distress for rent by the 3rd Defendant and its agents upon the three named tenants on the suit property is lawful or in contempt of this court's order issued on 19th October 2010 and if so, whether this court should find Mr. Kaburi and Mr Pala in contempt of court with the attendant sanctions.

Before I set out the terms of this court's order issued on 19th October 2010, I will set out the decision of the House of Lords **in the Case of Her Majesty's General (Appellants) v. Punch Limited and Another (Respondents) (2002) UKHL 50** which was cited by the 3rd Defendant in his submissions which is to the following effect:

"... an interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well established, soundly-based principle. A person should not be put at risk of being in contempt of court by an ambiguous prohibition or a prohibition the scope of which is obviously open to dispute..."

This court's order issued by Lady Justice Sitati on 19th October 2010 was to the following effect:

"That an order of temporary injunction is issued restraining the defendants whether by themselves,

employees, servants, agents or otherwise howsoever from trespassing or taking possession of selling alienating damaging, transferring or otherwise interfering with the property known as L.R. No. 209/2566 pending the hearing of this suit”

This order clearly restrains the 3rd Defendant from “otherwise interfering” with the suit property. I believe that the 3rd Defendant by instructing its auctioneers to levy distress for rent upon the tenants in occupation of the suit property was in fact “interfering” with the suit property which is clearly in breach of the above order issued by this court. This court is not bound by any decisions of the Business Premises Rent Tribunal.

The 3rd Defendant highlighted the Court of Appeal decision in **Ochino & Another vs. Okombo & 4 Others (1989) KLR 165** as follows:

“that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.”

The 3rd Defendant has denied ever having been served with the stated order of this court. However, the Plaintiff maintains that Mr. Kennedy Mochere Kaburi, the managing director of the 3rd Defendant was served with the order personally by one Kennedy Mugo, a licenced court process server. To prove this, the Plaintiff relied on the Affidavit of Service of the said Kennedy Mugo sworn on 18th June 2013, a copy of which they annexed. It is also evident that the 3rd Defendant’s advocates were in court when Lady Justice Sitati delivered the ruling in which the order was issued. Overall, I am convinced that the 3rd Defendant was duly served with the order and was also fully aware of its existence. I find that Mr. Kaburi was in breach of the court’s order when he instructed his auctioneers to levy distress on the tenants in the suit property. In light of this, I will allow prayer no. 3 of this Application.

I will however, not allow prayers no. 4-7 of this Application for the sole reason that the Plaintiff has not demonstrated any diligence in having this long outstanding suit heard and determined expeditiously. It is noteworthy that this suit did come up on a Notice to show cause why the suit should not be dismissed for want of prosecution. The Plaintiff has been enjoying interim orders herein while the suit remains dormant. The longer that the suit remains unheard, the more likely there are that conflicts shall arise between the parties as in the case with this Application. For this purpose, I decline to order the committal to jail of Mr. Kaburi and Mr. Pala and direct the Plaintiff to expedite the setting of this suit down for hearing within the next 60 days from today’s date, failing which this suit is liable to be dismissed without any further notice.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 29TH DAY OF JANUARY 2016.

MARY M. GITUMBI

JUDGE