



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 330 OF 2012**

**EUNICE WANGUI KIRAGU.....PLAINTIFF**

**VERSUS**

**MARY ADHERA ADHAYA .....DEFENDANT**

**RULING**

***(Review; principles to be applied; plaintiff being tenant of premises owned by defendant; defendant wishing to sell the property; plaintiff suing that the sale cannot proceed because of the lease and filing an injunction to stop the sale; injunction allowed; review; grounds for review; grounds being independent of each other; lease agreement not having covenant to stop a sale; lease being registered meaning that any purchaser would take over the property subject to the lease; sale of the property will not therefore affect the lease; no reason to bar the sale; application for review allowed on the ground of sufficient reason)***

1. The application before me is that dated 25 November 2014 filed by the defendant. It is an application brought pursuant to Order 45 Rule 1(1) (b) , and Order 5 Rule 1 , of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. It is an application seeking to review orders made on 25 July 2014. Before I delve into the application, I think it is prudent that I set down the circumstances leading to this application.

2. This suit was commenced by way of plaint on 20 December 2012. The plaintiff is a lessee of the land parcel Nakuru Municipality Block 10/152 which belongs to the defendant. The lease agreement was entered into on 16 June 2009 for a period of about 10 years. The lease is set to expire on 31 December 2018. On the suit land, the plaintiff has established a school by the name of Hill Valley Academy which has about 350 students. The plaintiff has claimed to have invested over Kshs. 10 Million in the property. It is averred that in violation of the lease agreement, the defendant gave the plaintiff notice to vacate and has gone further to advertise the property for sale in the Daily Newspapers. The plaintiff holds the opinion that if sold, she will suffer loss. In the suit, the plaintiff sought orders for a declaration that her lease is set to expire on 31 December 2018 and for an order of perpetual injunction restraining the defendant from offering the suit property for sale until 31 December 2018.

3. Together with the plaint, the plaintiff filed an application for injunction, seeking to restrain the defendant from offering for sale the suit land pending hearing and determination of the case.

4. The defendant donated a Power of Attorney to her daughter, Pamela Akinyi Jura. She filed a Replying Affidavit to oppose the application for injunction. It was averred inter alia that the defendant was forced to sign the lease agreement and at that time, she was made to believe that the rent would be Kshs.

125,000/= per month and only came to learn later that the rent is Kshs. 12,000/= per month. It was further averred that the defendant has a heart condition whose treatment is expensive. It is for that reason that the defendant wished to sell the suit property. It was further averred that the defendant has illegally sublet the premises without permission, and that she is subletting at a higher rent than she pays the defendant. It was averred that this was in breach of contract.

5. The application for injunction was considered by my predecessor, the Honourable Justice Waitaha. The learned judge was of the view that although the lease did not allow for subletting, it could be inferred from the pleadings that the defendant was aware that the suit property was being sublet as she had been collecting rent directly from the sub-tenant. She was also of opinion that as owner, the defendant has all the right in the world to dispose of her property as she deems fit within the law but ought to give the plaintiff enough time to look for alternative premises to relocate her school. The learned Judge was of the view that the balance of convenience lay in favour of the plaintiff. An injunction was therefore issued stopping the defendant from selling the property pending hearing and determination of the case. The plaintiff was however directed to furnish an undertaking as to damages within 90 days.

6. In this application, the defendant has raised the following grounds in support of her application for review being :-

*(i) That there are new facts that the court did not consider in the making of its ruling.*

*(ii) That the plaintiff has not paid rent since the filing of this case and has sublet the premises.*

*(iii) That it is only fair and just that the orders granted be reviewed and set aside.*

*(iv) That the plaintiff has not paid rent since the filing of this case and has sublet the premises (which I note is similar to ground (ii) above).*

7. The supporting affidavit is sworn by Pamela Akinyi Jura. She has averred that the injunction is highly prejudicial since the plaintiff has leased out the property to other lessees who have erected permanent structures on the land. It is averred that the plaintiff is likely to adversely deal with the property as the case pends in court. It is further averred that the plaintiff has come to court with unclean hands.

8. The plaintiff has opposed the application by filing a replying affidavit. She has inter alia deponed that she is up to date with rent payments and annexed evidence of payment. She has asserted that she is a bona fide tenant. She has also questioned the locus of Pamela to file the application.

9. Both counsel for the applicant and respondent, filed written submissions which I have considered. In his submissions, Mr. Kipkoech, learned counsel for the applicant, submitted inter alia that the defendant has been prejudiced by the injunction. He submitted that the defendant is old and widowed suffering from a terminal illness and is prejudiced by the order. He reiterated that the plaintiff has sublet the premises contrary to the terms of the lease and law relating to tenancy. He pointed at Section 3A and Section 80 of the Civil Procedure Act, and Order 45 of the Civil Procedure Rules as permitting a review. He submitted that review may be allowed "for any sufficient reason." He submitted that there are sufficient reasons why the injunction order should be reviewed because the applicant is an elderly widow in constant need of medical care. He submitted that unless reviewed, the defendant might die before the determination of the case. He submitted that all which the respondent stands to lose is business and profits which cannot be compared to the loss that may be occasioned to the defendant. He also submitted that the respondent has not been paying rent.

10. For the respondent, Mr. Ikua, learned counsel, submitted that according to Order 45 there needs to be discovery of new matter to support an application for review. He submitted that the issue of subletting was raised in the previous application for injunction. On the complaint of non payment of rent, counsel submitted that this does not hold water as there is proof that rent is being paid. On the issue of locus, he submitted that Pamela Akinyi has no locus standi since there is another power of attorney donated to one Geoffrey Adhaya Adera.

11. I have considered the matter. This is an application for review and Order 45 applies. Order 45 Rule 1 is drawn as follows :-

**1. Application for review of decree or order [Order 45, rule 1.]**

(1) *Any person considering himself aggrieved—*

(a) *by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

(b) *by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

(2) *A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.*

12. It will be observed from the above provisions, that a review may be based on the following :-

(i) *On discovery of new and important matter or evidence which was not within the knowledge of the applicant at the time the decree was passed despite exercise of due diligence.*

(ii) *On account of some mistake or error apparent on the face of the record,*

(iii) *Or for any other sufficient reason.*

13. In his submissions, Mr. Ikua inter alia submitted that the applicant has not proven any new information to warrant a review. However, my view of Order 45 Rule 1 is that a review is not confined only to situations where there is discovery of new matter. A review application may be entertained under the separate head of “sufficient reason.” The ground of sufficient reason is not tied to the two other grounds and is not to be construed ejusdem generis to the preceding grounds. This was affirmed by the Court of Appeal in the case of ***Kimita & Another vs Wakibiru (1986) KLR 578***. It held that the third ground, “any other sufficient reason” is not necessarily confined to the kind of reason stated in the two preceding heads, namely error and discovery of new evidence, and neither do these heads form a genus or class of things which the third general head could be analogous to.

14. The holding in the case of ***Kimita & Another vs Wakibiru*** was upheld in the more recent decision of the Court of Appeal in the case of ***Mbogoh vs Muthoni & Another (2006) 1 KLR 199***.

15. The only basis upon which this review is being sought is that the order of injunction is prejudicial to the applicant. I think that the applicant seeks to come under the head of “sufficient reason” for it is not claimed that there is discovery of any new matter or that there is an error apparent on the face of the record. The court in assessing an application for review has wide discretion whether to allow or reject the same. But as in all other discretions, the same must be exercised judiciously.

16. The ruling sought to be reviewed was based on an application for injunction which allowed the same on the balance of convenience test. It was thought that it was more convenient to have the applicant on the premises rather than have her risk being ejected. It cannot be said there is a problem with the approach that was taken. But looking at the application for injunction, I note that the same was founded on the fear that if the suit property was sold, the plaintiff risked being ejected from the premises. On my part, I do not think that this risk exists. The plaintiff holds a lease agreement that is due to expire in 2018. I have seen

that the said lease was registered. Given this position, the existence of the lease constitutes a recognized interest such that any person who purchases the property takes over the terms of the lease. The lease once registered is carried together with the property. If it was a lease of less than 2 years, it would be an overriding interest in terms of Section 28 (f) of the Land Registration Act, 2012; but here we have a stronger interest because it is already registered.

17. I do not think that the fact that there is a lease subsisting on a property bars the owner from disposing it. There is no bar, unless the lease agreement requires that there be consent of the lessee, and such consent is denied. Such situation is covered by Section 54 of the Land Registration Act, which is drawn as follows :-

*Section 54 : Registration of Leases*

*(1) Upon the registration of a lease containing an agreement, express or implied, by the lessee that the lessee shall not transfer, sub-let, charge or part with possession of any of the leased land leased without the written consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the consent of the lessor, verified in accordance with this Act has been produced to the Registrar.*

18. If the lease agreement does not contain such covenant as is espoused by Section 54 above, there would be no bar to the lessor selling the property. As I have said, it is only that the person purchasing the land, will purchase it subject to the existing lease, and will be bound by the terms of agreement of the existing lease. This is because the interest contained in the lease is already registered and it is carried forward despite a change in proprietorship.

19. The applicant herein of course wishes to sell the property as she no longer needs it. She instead wants to convert it into money to enable her continue her treatment. Since the plaintiff's lease is registered, it is protected, and as I have said, the lease will subsist despite the change in proprietorship.

20. I therefore hold the view that there are sufficient reasons to allow this application for review and vary the order of injunction. I vary the order of injunction to the extent that the defendant is permitted to dispose of the property if she is so minded to do. The effect of this is that the plaintiff may continue utilizing the premises under the terms of the lease, but the defendant is free to dispose of the property if she so wishes. In other words, the plaintiff remains the tenant of the defendant under the same terms and the only thing I have permitted the defendant to do, which the earlier order of injunction did not allow her to do, is to sell the property, if she desires to do so. Any new owner will take over the lease on the same terms entered into between the plaintiff and defendant. It should not be construed that by this ruling, I have given leeway to the defendant to evict the plaintiff. The lease continues under the same terms but the defendant is at liberty to sell the property.

21. On costs, I think it is best that I make no orders as to costs.

22. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 17<sup>th</sup> day of May, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of : -**

Mr.Langat holding brief for Mr. Ogolla for defendant/applicant.

No appearance on part of M/s Ikua Mwangi & Co. for plaintiff respondent.

CA: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**