



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 26 OF 2014

WAKENYA PAMOJA SACCO SOCIETY LTD PLAINTIFF

VERSUS

KEBIRIGO PARISH CONSUMERS SOCIETY LTD 1ST DEFENDANT

ELIJAH MOGENI T/A ELIMONYACO AUCTIONEERS 2ND DEFENDANT

RULING

1. Sometimes in the year 1989, **Diocese of Kisii Kenya, East Africa** filed a suit against the 1st defendant herein in the High Court of Kenya at Kisii namely, Kisii HCCC No. 325 of 1989(hereinafter referred to only as **HCCC NO.325 of 1989**) claiming a sum of Kshs. 251,474.80 which, it claimed to have advanced to the 1st defendant. The 1st defendant filed a statement of defence in which it admitted the debt and pleaded for time to arrange for payment.
2. Judgment was subsequently entered in favour of **Diocese of Kisii Kenya, East Africa**(hereinafter referred to only as “**the diocese**”) against the 1st defendant in the sum of Ksh. 251,474.80 plus cost and interest. A decree was thereafter drawn up and sealed by the court for execution. The 1st defendant did not satisfy the said decree and following an application for execution by the diocese, an attachment was levied against the 1st defendant’s parcel of land known as **LR No. West Mugirango/ Bonyamatuta/1051** (hereinafter referred to as “**the suit property**”). At a public auction that followed that attachment, the diocese was declared the highest bidder. The 1st defendant was aggrieved by the sale of the suit property and applied to the court to set it aside but its application was dismissed by Wambilyanga J. The diocese was thereafter registered as the owner of the suit property and in that capacity, it leased the suit property to the plaintiff herein for a term of 5years and 6 months with effect from 1st January, 2010 on terms and conditions that were set out in the said lease.
3. In the meantime, the 1st defendant that was dissatisfied with the ruling of Wambilyanga J. preferred an appeal against the same to the Court of Appeal, in Kisumu Civil Appeal No. 95 of 2010(hereinafter referred to only as “**the appeal**” where the context so admits). The court of appeal in a judgment that was delivered on 4th October, 2013 allowed the 1st defendant’s appeal and set aside the ruling by Wambilyangah J. on the grounds among others that; the decree pursuant to which the suit property was sold to the diocese was irregular.
4. Following the said judgment by the Court of Appeal, the 1st defendant through its advocates Bosire Gichana & Co. Advocates wrote to the plaintiff herein claiming a sum of Ksh. 800,000/= as outstanding rent arrears from the year 2008 to the year 2013. When the plaintiff did not come forth with the payment, the 1st defendant through its said advocates instructed the 2nd defendant to levy distress against the plaintiff for the recovery of the said sum of Ksh. 800,000/= which distress was levied by the 2nd defendant on 20th December, 2013. It is this distress for rent that prompted

this suit.

5. The plaintiff filed this suit against the defendants on 3rd February, 2014 seeking;
 - a. **A declaration that the plaintiff is the rightful holder of lease in respect of Land Parcel No. West Mugirango/Bonyamatuta/1051.**
 - b. **A declaration that the proclamation by the 2nd defendant of the plaintiff's movable property on Land Parcel No. West Mugirango/Bonyamatuta/1051 is illegal and unlawful.**
 - c. **A permanent injunction to restraining the defendants either by themselves, their agents and/or servants from entering upon, trespassing onto and/or otherwise interfering and/or dealing howsoever with the plaintiff's properties and tools of trade on the premises in land Title No. West Mugirango/Bonyamatuta/1051.**
 - d. **Such further and/or other relief as the honourable court may deem fit and expedient to grant.**
 - e. **Costs of the suit to be borne by the defendant.**

In its plaint, the plaintiff averred that it has never entered into any contract or agreement for lease with the 1st defendant with respect to the suit property on the basis of which the 1st defendant can demand rent from it. The plaintiff averred that it has been paying rent for the suit property to the diocese in accordance with the lease agreement between them that I have referred to above and that no rent is due and payable by it to the diocese. The plaintiff termed the 1st defendant's demand for rent and subsequent distress for rent as unlawful and malicious. Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 3rd February, 2014 under Order 40 rules 1, 2A and 9 of the Civil Procedure Rules seeking:-

- i. **Spent**
- ii. **Spent**
- iii. **THAT pending the hearing and determination of this suit, the Honourable Court be pleased to grant an order of injunction restraining the defendants/respondents by themselves or through their agents, servants, employees and/or any other person acting under the defendants/respondents instructions from attaching or in any manner dealing with the applicant's movable properties over rent arrears in respect of the premises on the parcel of land known as LR No. West Mugirango/Bonyamatuta/1057(the suit property).**
- iv. **That the Honourable Court be pleased to declare that the proclamation of the applicant's movable property on 20th December 2013 by the 2nd respondent is illegal and unprocedural.**
- v. **Such further and/or other orders be made as the court may deem fit and expedient.**
- vi. **Costs of this application.**

6. The application was supported by the affidavit sworn on 3rd February, 2014 by Nelson Gichaba Simba, the chairman of the plaintiff. In the said affidavit, Nelson Gichaba Simba stated that the plaintiff entered into a lease agreement with the diocese on 1st January 2010 under which the diocese leased the whole of the suit property together with the building standing thereon to the plaintiff for a term of five (5) years and six (6) months commencing on 1st January 2010. He stated that prior to the preparation and execution of the said agreement; he conducted a search on 12th January 2010 on the title of the suit property to confirm the owner thereof which search confirmed that the diocese was the owner of the suit property. It is on the strength of that confirmation that the plaintiff proceeded to execute the lease agreement that was duly registered and a certificate of lease issued in favour of the plaintiff.
7. He stated further that he was surprised to receive a letter dated 14th November 2013 from the firm of Bosire Gichana & Co. Advocates demanding from the plaintiff on behalf of the 1st defendant an alleged outstanding rent arrears of Kshs. 800,000/=. He stated that attempts through their advocates on record to engage the 1st defendant in negotiations through their said advocate with a view to resolve the issue amicably did not bear fruit and the 1st defendant proceeded to instruct the 2nd defendant to levy distress against the plaintiff to recover the said amount. He reiterated the contents of the plaint that the plaintiff has been paying rent as and when it falls due to the diocese

- and as such it has no outstanding rent due and payable in respect of the suit property.
8. The plaintiff's application was opposed by the 1st defendant through grounds of opposition dated 19th February, 2014 and replying affidavit sworn on 11th March 2014 by its chairman, Benson Maoga Ondieki. In his affidavit, Benson Maoga Ondieki stated that the diocese had acquired title to the suit property fraudulently and that the said title was nullified by the Court of Appeal. He stated that although the Court of Appeal nullified the transfer of the suit property to the diocese on the 4th of October 2013 and restored the property to the 1st defendant, the plaintiff has failed to pay to the 1st defendant accrued rent due for the suit property for the years 2008 to 2013 amounting to Ksh. 800,000/=. He contended that since rent is due and payable by the plaintiff to the 1st defendant, the demand that was made upon the plaintiff by the 1st defendant to effect payment of the same and the subsequent distress that was levied by the 2nd respondent when the plaintiff failed to come forth with the payment were lawful and proper. He contended that it was not necessary for the 1st defendant to have the suit property registered in its name following the nullification of the diocese's title before demanding rent. He stated that the 1st defendant is entitled to the rent for the suit property and in default of payment; it is entitled to levy distress for the recovery of the same.
 9. When the application came up for hearing before me on 19th February 2014, the parties agreed that the same be argued by way of written submissions. Both parties filed their written submissions and the same are on record. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition and replying affidavit filed by the defendant in opposition to the application. Finally, I have considered the written submissions filed herein by the respective advocates for the parties. The principles upon which this court proceeds on applications for temporary injunction are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**, an applicant for a temporary injunction must demonstrate that he has a prima facie case with a probability of success against the respondent and that unless the injunction is granted; he stands to suffer irreparable harm that cannot be compensated in damages. If the court is in doubt, the application would be determined on a balance of convenience. The plaintiff's claim against the defendant is essentially based on privity of contract. The plaintiff has contended that since it has no lease agreement with the 1st defendant, there is no basis upon which it can become liable to the defendant for rent more particularly when it has paid the agreed rent to the diocese that was the registered proprietor of the suit property at the material time and with which they had a lease agreement.
 10. The 1st defendant on the other hand has contended that the diocese obtained title to the suit property fraudulently and that its title was nullified by the Court of Appeal in a judgment that was delivered on 4th October 2013 in civil appeal No. 45 of 2010 aforesaid. The 1st defendant has contended that the said judgment automatically restored its title to the suit property together with all rights associated therewith. The 1st defendant argued that it was not necessary to enforce the said judgment and have the suit property restored to its name as the owner thereof before demanding rent and levying distress for the recovery thereof.
 11. I am satisfied on the material before me that the plaintiff has established a prima facie case against the defendants with a probability of success. It is not in dispute that, at all material times the diocese was the registered proprietor of the suit property. It is also not in dispute that the diocese entered into a lease with the plaintiff in respect of the suit property for a term of 5 years and 6 months. The said lease was duly registered against the title of the suit property and the plaintiff was issued with a certificate of lease. By virtue of the said lease agreement, the plaintiff was a tenant of the diocese for the period between the year 2010 and 2013 in respect of which the 1st defendant has claimed from the plaintiff a sum of Ksh. 720,000/= as rent arrears. The plaintiff was not a tenant of the 1st defendant during this period and as such was not liable to pay any rent to the 1st defendant.
 12. While I am in agreement that the 1st defendant obtained a judgment in his favour against the diocese which effectively nullified the title of the diocese over the suit property, this judgment did not put the 1st defendant on the shoes of the diocese so as to clothe it with the legal capacity to

enforce contracts that the diocese had entered into; rather it only restored the 1st defendant's title to the suit property and gave it the power to assert its rights over the same. In my view the 1st defendant should have proceeded first to enforce the Court of Appeal decision by having the suit property restored to its name. Thereafter, it could call upon the occupants of the suit property such as the plaintiff to either enter into a new lease with it or vacate the premises. The 1st defendant cannot demand and levy distress for rent that has not been agreed upon between it and the plaintiff. It is not clear to me from the material on record as to the basis on which the alleged rent arrears of Ksh. 800,000/= is being claimed from the plaintiff. A part from the lease that was made between the plaintiff and the diocese which provided for an annual rent of Ksh.120,000/= for the suit property, I am unable to find any support for the annual rent of Ksh.180,000/= that the 1st defendant is claiming from the plaintiff from the year 2010 to the year 2013.

13. There is also no material that would support the 1st defendant's claim for the sum of Ksh. 80,000/= which it sought as rent arrears for the year 2008. The 1st defendant's submission that the plaintiff was its tenant in the suit property prior to the fraudulent acquisition of the property by the diocese has no basis in the pleadings on record. There is no reference in the 1st defendant's replying affidavit to an earlier tenancy between the 1st defendant and the plaintiff before the diocese came into the scene. Whereas there is no doubt that the 1st defendant may be entitled to receive rent for the suit property being the undisputed owner thereof following the aforesaid decision of the Court of Appeal, it has no right to demand and levy distress for rent that has not been agreed upon. In the absence of any evidence that the name of the 1st defendant has been restored in the register of the suit property as the owner thereof in place of the diocese and that the plaintiff had agreed to be the 1st defendant's tenant on the suit property and to pay to the 1st defendant the rent in respect of which distress has been levied, I am in agreement with the plaintiff that the distress that was levied upon it by the 2nd defendant on the instructions of the 1st defendant was unlawful.
14. The next issue to consider is whether the plaintiff would suffer irreparable harm which cannot be compensated for in damages. From the inventory of the goods that the 2nd defendant has proclaimed, it appears that the 2nd defendant has levied distress on the plaintiff's office furniture and equipment such as computers and printers. The removal of these items from the plaintiff's premises will no doubt interfere with the plaintiff's business. I am satisfied that the plaintiff stands to suffer irreparable harm unless the orders sought are granted.
15. The upshot of the forgoing is that the plaintiff has satisfied the conditions for granting interlocutory injunction. In addition to the injunction, the plaintiff has sought a declaration that the proclamation that was made by the 2nd defendant against its movable properties was illegal and unprocedural. This is one of the reliefs that the plaintiff has sought in the plaint. If the court was to grant it at this interlocutory stage, it would have granted a final order without a hearing. The declaration is therefore not available to the plaintiff for now. It will have to await the hearing of the suit. I will therefore allow the plaintiff's application dated 3rd February, 2014 in terms of prayer 3 thereof save that the parcel of land to which the injunction shall attach is LR No. West Mugirango/Bonyamatuta/1051 and not LR No. West Mugirango/ Bonyamatuta/1057. The plaintiff shall have the costs of the application. Before I conclude this ruling, I would like to state for the avoidance of doubt that the orders issued herein should not be construed to be giving the plaintiff the license to continue paying rent to the diocese which has since been declared by a court of law to have acquired the suit property irregularly. The same shall also not entitle the plaintiff to continue in occupation of the suit property beyond the lease period that it had agreed upon with the diocese.

Delivered, Signed and Dated at Kisii this 17th day of April, 2015.

S.OKONG'O

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the defendants

Mr. Mobisa Court clerk

S.OKONG'O

JUDGE