



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT CASE NO. 709 OF 2014

CUTE KITCHEN LIMITED
PLAINTIFF/RESPONDENT

VERSUS

REGINA SABINA MUTUKU T/A FIGURE EIGHT HEALTH CLUB
DEFENDANT/APPLICANT

RULING

1. The genesis of this matter stems out of the landlord/tenant relationship between the plaintiff (landlord) and the defendant (tenant). The plaintiff herein Cute Kitchen limited by a Notice of Motion dated 27th May 2014 made under Order 8 rule 3 and 5, Order 5 Rule (1), Order 40 rules (1), (2), 3 and 4 and Order 51 Rule 1 dated 27th May 2014 seeks the following prayers:-
 - a. Spent
 - b. **THAT this honourable court do grant leave to the plaintiff/applicant herein to file the amended plaint together with the list of statement of witnesses and exhibits annexed to this application.**
 - c. **THAT the amended plaint and annexed statement and list of witnesses and exhibits be deemed duly filed upon payment of the requisite court fees.**
 - d. **THAT the defendant, its servants, agents and or employees be restrained by an order of this honourable court from trespassing and/or interfering with the structural frame of the plaintiff/applicants premises known as Plot No. 209/4549 Tom Mboya Street, Nairobi until this matter is heard and decided.**
 - e. **THAT the defendant/respondent be ordered to deposit the rent arrears accrued now totaling to kshs. 6,058,728.23 and the monthly rent of kshs. 215,057.83 in this honourable court until this case is heard and finalized.**
 - f. **THAT the defendant be restrained by an order of this honourable court from abusing, threatening, intimidating and/or in any way interfering with the lives of the plaintiff directors Dipit Kumar Premchand Chappa and Nikunjekunar Premchand Chheda and their families until this case is heard and finalized.**
 - g. **THAT the defendant pays the costs of this application in any event.**

Initially, the plaintiff herein Cute Kitchen Limited filed the above application in the High Court Nairobi Civil Division. However, **Waweru J.** directed that the same be transferred to this court for hearing and disposal as it dealt with a dispute relating to landlord and tenant. The above application was placed before **Nyamweya J.** on 6th June 2014 who did not certify the application as urgent hence directed parties to take a date in the registry.

2. The matter was listed before me on 10th November 2014 for hearing when the plaintiff's advocate, Mrs. Owino was present while the defendant's advocate was absent. Mrs. Owino submitted that the defendant's advocate had been served but had not appeared or filed any response. To attest to this, she referred the court to the affidavit of service which they had filed. She thus urged the court to grant the plaintiff the orders sought in the Notice of Motion.
3. Having been satisfied that the applicant had been served with the above application but nevertheless, chose not to file any replying affidavit or appear before this court, I allowed the application in terms of prayers 4, 5 and 6 as per the Notice of Motion application and also observed that since pleadings had not closed, the plaintiff did not require any leave to amend the plaint and hence they could amend their plaint without leave. Aggrieved by the above orders, the defendant herein, Regina Sabina Mutuku t/a Figure Eight Health Club filed a Notice of Motion dated 1st December 2014 under Order 40 Rules 7 and Order 51 Rule 1 seeking:-

1. **Spent.**
2. **Spent**
3. **The honourable court be pleased to set aside and/or vacate the orders entered against the defendant/applicant on 11th November, 2014.**
4. **The plaintiff/respondent be ordered to give an account of all monies received/or goods of trade taken and allegedly detained from the defendant/applicant**
5. **Costs of this application be provided for.**

4. The above application was supported by a supporting affidavit from the defendant herein Regina Sabina Mutuku where she deponed that on 26th November 2014 she was served with an order issued by the honourable court on 14th November 2014 ordering her to deposit in court the alleged rent accrued totaling **kshs. 6,058,728.83** and further to deposit monthly rents of **kshs. 215,057.23** in court with effect from the current month, on the 6th day of each succeeding month until the suit herein is finalized. That she was also ordered to desist from abusing, threatening, intimidating and interfering with the lives of the directors of the plaintiff and their families pending the hearing and determination of the suit. She further deponed that upon perusal of the said order contended that the orders were obtained based on material non disclosure, falsehoods and misrepresentation of facts to the honourable court as she was not a tenant in the suit premises herein. (knows as Plot No. 209/4559) Tom Mboya Street, Nairobi.
5. The defendant further contended that she was forcefully and illegally evicted from the suit premises on 8th November 2013 by the plaintiff a fact which was willfully withheld from the court; that the plaintiff illegally took her goods of trade worth over kshs. 8 million pursuant to a purported levy of distress and to date has never given an account of how they sold the goods and how much was realized from the sale. She further contended that due to the harsh conditions imposed upon her, her business was unable to operate smoothly so she handed over the key to the premises sometime in the month of March, 2013. Hence she contended that she was never served with the Notice of Motion application dated 27th May 2014 giving rise to the orders and was therefore not aware of any court proceedings to this effect.
6. The defendant further contended that she was not aware of subsequent proceedings and neither were her former advocates on record. She further contended that upon perusal of the court file she noted that documents were addressed to be served upon a law firm that did not represent her in this matter and there was no Notice of Change of Advocates filed and served to confirm the same. She therefore contended that the matter proceeded in her absence irregularly, and that the orders herein were obtained irregularly and ought to be set aside as they constitute gross abuse of the court process. The defendant further contended that if the orders issued herein are not set aside and stay granted as sought, she stands the risk of the orders issued on 14th November 2014 being executed against her and that such execution may be effected against her any time now thereby occasioning her irreparable loss and prejudice. She further contends that unless the said orders are stayed, she may be cited for contempt since out of the plaintiff's illegal maneuvers, she has lost everything in the business and is unable to pay the monies as ordered by the court, which monies are in any event not owing.
7. The plaintiff in response to the defendant's application filed a replying affidavit dated 5th

December 2014 through its director **Dipitkumar Premchand Chheda** and acknowledges the fact that they indeed filed the application against the defendant dated 27th May 2014 by which time the defendant was in their premises as a tenant. He however denied that they evicted the defendant from the suit premises on the 8th November 2013 or at all. The plaintiff vide the said replying affidavit inter alia contended that:-

- a. The defendant is misusing the process of the court by filing different applications by different advocates every time wherever she is asked to pay lawfully owed rent arrears.
 - b. The present Advocates Achach & Company Advocates are wrongly on record, as Ochich J. O & Company Advocates have been the latest on record and have not officially withdrawn from this case, nor is there a notice of appointment of an additional advocate to represent the defendant.
 - c. That the advocates on record Ochich J. O & Company Advocates were served with the application dated 27th May 2014 on 6th June 2014 but they declined to sign for it and in addition the applicant (defendant) in person was served with the said application at her new gymnasium at Park Towers on the same date.
 - d. That by 6th June 2014 the defendant had locked the premises and disappeared but on investigation the plaintiff found out that she had opened another gymnasium under a new name Pent House Gymnasium at View Park Towers, 21st Floor University Way so he directed the process server who served her. The plaintiff thus maintains the defendant was served with the application dated 27th May 2014.
 - e. That before the defendant absconded from their premises, the file in which the plaintiff had filed the application disappeared from the court registry and they could not find it to prosecute the application. They had to write several letters to that effect to the deputy registrar.
 - f. That on 23rd June 2011 the plaintiff's former advocates on record **Tariq Khan & Associates** wrote to the defendant demanding rent arrears, and the defendant on receiving the demand letter approached the plaintiff seeking the plaintiff's indulgence as she claimed to be going through financial difficulties and promised to pay the outstanding rent arrears.
 - g. On 16th September 2011 the defendant through the firm of Mutisya Ngala & Company Advocates wrote to her advocates stating that they were unable to pay the rent arrears outstanding and that the defendant would issue post dated cheques payable commencing the month of October 2011.
 - h. That by the defendant's admission rent due for the months of June, July, August, September and October 2011 was standing at kshs. 728,231/= and the defendant had only given two cheques totalling to kshs. 121,900/= which prompted the plaintiff to instruct M/s Janen Marpa Agencies to levy distress against the defendant and that after proclamation by Janen Marpa Agencies, the defendant filed a reference number 766 of 2011 at the Business premises Rent Tribunal to stop the levy of distress which suit was on the 27th June 2012 dismissed with costs and in addition, the Business Premises Tribunal ordered the defendant to pay the undisputed rent to the plaintiff.
 - i. That the defendant has since her dismissal of her reference by the Business Premises Tribunal never paid any rents and the plaintiff had not refused to accept any rent from the defendant as alleged.
 - j. That the defendant had filed an application under certificate of urgency in this matter on the 16th April 2013 and in the supporting affidavit thereof at paragraph 13 had deponed that she was ready and willing to deposit rent in this honourable court but to date the defendant has never paid any rents and or deposited any rents in court or at the tribunal.
 - k. That on 26th July 2012 the plaintiff filed a suit number ELC No. 379 of 2012 seeking to evict the defendant/respondent from the suit premises for being in rent arrears then of kshs. 1,786,962/= but the suit has to date not been heard.
 - l. The plaintiff states that when the plaintiff filed the application dated 27th May 2014 the defendant absconded from the premises to evade paying the rent arrears and the plaintiff indeed had to seek and obtain a breaking order to enable the auctioneers to get access to the premises for purposes of levying distress and thus denies the plaintiff forcibly evicted the defendant.
8. The defendant in response to the above averments by the plaintiff filed a supplementary affidavit dated 16th December 2014 whereby she reiterated that the firm of Ochich J. L O & Associates had

neither been on record nor represented her in this matter and that, there had never been a Notice of Change of Advocates from Billy Amendi & Co. Advocates to Ochich J. L. O & Associates, hence the reason they declined to receive service of the application dated 27th May, 2014. The defendant averred that she was never served with the Notice of Motion application dated 27th May 2014. The defendant further deponed that her current advocates on record are properly on record as they duly filed the notice of change of advocates dated 1st December 2014 but due to an oversight in their office the clerk failed/forgot to serve the plaintiff which was an inadvertent mistake on their part.

9. The defendant further contended that the goods proclaimed were of a market value of kshs. 3,929,720 and as such sufficient to repay all the alleged rent arrears owed. The plaintiff however had the goods auctioned at a price far below the market price. The defendant contended that in the said proclamation her tools of trade alone amounted to kshs. 3,700,000 and hence the sale of the proclaimed goods should have been sufficient to satisfy the alleged rent arrears of kshs. 4,553,323.45/=.
10. Additionally, the defendant contended that the orders granted by this honourable court were obtained by material misrepresentation, falsehoods and withholding of material facts by the plaintiff who failed to notify the court that they had levied distress and proclaimed all her tools of trade as well as forcefully evicted her from the premises.
11. When the above application came before **Gacheru J.** on 13th December 2014 she directed that the same be argued by filing written submissions. Both parties have now duly filed their written submissions and I have read them. After analyzing the defendant's application and supporting affidavit, the plaintiff's replying affidavit and annexures, the defendant's supplementary affidavit together with the parties written submissions, the only issue for determination by this court is whether the defendant has presented evidence before this court to warrant the setting aside of the ex parte orders granted by this court on 10th November 2014.
12. As I have already stated above, the defendant has all along contended that she was not served with the plaintiff's application dated 27th May 2014 which led to the granting of ex parte orders on 10th November 2014. The plaintiff on the other hand, contended at paragraph 8 of its replying affidavit that the defendant's advocates and herself were served. Paragraph 8 is as follows:-

“THAT the advocates on record Ochich TLO & Company Advocates were served with the application dated 27th May 2014 on 6th June 2014 but they declined to sign for it and in addition the applicant in person was served with the said application at her new gymnasium View Park Towers on the same date.”

However in their affidavit of service sworn by one John Patrick Onyango on 22nd July 2014 annexed to the replying affidavit as “DPCI” the said process server deponed:-

“That on the 17th day of July 2014, I received copies of Notice of Motion dated 17/7/2014 and coming up for hearing on 24th July 2014 from the firm of N. A Owino & Company Advocates with instructions to effect service upon the firm of Ochich TLO & Co. Advocates summit house 4th Floor, Moi Avenue P. O Box 79367-00200 advocates for the defendant herein.”

Quite clearly this was not service in respect of the Notice of Motion dated 27th May 2014 which came for hearing on 10th November 2014 when the orders sought to be set aside were granted. I have perused the court record and have come across the affidavit of service sworn by one **Peter O. Adhiambo** on 6th June 2014 where he depones that he served the application dated 27th May 2014 both on Ochich TLO & Associates and the defendant though none of them acknowledged service.

13. In the defendant's supplementary affidavit, the defendant has deponed at paragraph 4 that:-

“That the firm of Ochich TLO & Associates has neither been on record nor represented me in this matter as to my knowledge, there has never been a Notice of

Change of Advocates from my erstwhile advocates on record, the firm of Billy Amendi & Company Advocates to Ochich TLO & Associates, hence the reason they declined to receive the application dated 27th May 2014 as indicated in paragraph 8 of the replying affidavit.”

It is not clear from the court record how the law firm of Ochich TLO & Associates who the plaintiff alleges to have served with the application dated 27th May 2014 came to be on record for the defendant and the assertion by the defendant that they were not on record for her cannot be ignored. In the application to reconstruct the court file dated 5th June 2014 by the plaintiff all annexed court documents prior to 27th May 2014 show that the law firm of Billy Amendi & Company Advocates, was the firm on record for the defendant and it is equally unclear why they were not served with the plaintiff’s application dated 27th May 2014 and the application for reconstruction.

In the case of **Moses Omolo Atieno & Another –vs- John Njong Osingo [2015] eKLR Okong’o J.** while considering an application to set aside an order for alleged non service held:-

“Where a party demonstrates that he was not served with an application that was heard by the court in his absence or that no notice was given to him of the date when the application was to be heard, on an application to set aside an order made ex parte in such application, the court has no discretion in the matter. Such order is irregular and the aggrieved party is entitled to have it set aside ex debito justitiae.”

In the instant case, there is doubt whether or not the defendant was actually served with the application dated 27th May 2014 that resulted to the granting of orders by this court on 10th November 2014 and I will in the interest of justice resolve the doubt in favour of the defendant as it would be against the rules of natural justice to condemn a party without hearing them.

14. The dispute between the parties herein revolves around a landlord/tenant relationship and from the pleadings, there seems to be a real tussle as to the amounts owed by the defendant to the plaintiff and the amounts realized by the plaintiff when some of the defendant’s properties were auctioned following levy of distress and there is therefore need for the matter to be fully ventilated such that each party has a chance to urge their case.
15. The upshot from all that I have discussed and evaluated is that I exercise my discretion to set aside and vacate the orders that I granted in favour of the plaintiff ex parte on 10th November 2014. I grant leave to the defendant to file a response to the plaintiff’s application dated 27th May 2014 within 21 days from the date of this ruling with liberty to the plaintiff to file a supplementary affidavit within 14 days of being served with the defendant’s replying affidavit and/or response, if need be. The parties thereafter will take a date for the hearing of the plaintiff’s application dated 27th May 2014 at the court registry.
16. The costs of the defendant/applicant’s application dated 1st December 2014 shall be in the cause.

Ruling dated and signed at Kisii this 11th day of November 2015.

J. M MUTUNGI

JUDGE

Ruling delivered at Nairobi this 11th day of December 2015.

S. OKONG’O

JUDGE

In the presence of:

Mr. Owino for the plaintiff

Miss Chege for the defendant

S. OKONG'O

JUDGE