



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC MISCELLANOUS APPLICATION NO. 105 OF 2013

RAPID COMMUNICATIONS LIMITED.....PLAINTIFF

VERSES

KANUBHAI S. PATEL..... DEFENDANT

RULING

The Application

The Applicant has filed an application by way of a Notice of Motion dated 30th May 2014, seeking orders that the ruling of this Court given on 28th May, 2010 be varied. The ground for the application is that this Court did not have sight of the Applicant's Further Affidavit sworn on 7th February, 2014 and filed on even date, together with the annexures appurtenant thereto. The Applicant in its supporting affidavit sworn on 30th May 2014 by its Advocate, Gichuki Waigwa, states that when the Applicant's earlier application dated 31/10/2013 came up for hearing on 24/1/2014, this Court gave leave to the Applicant to file a Further Affidavit on matters of rent and the Nairobi County Government enforcement notice.

Further, that the Further Affidavit was to be filed by the Applicant within 14 days, and the said affidavit sworn on 7th February, 2014 was filed on the same day. The Applicant averred that it has paid the due rent upto and including May, 2014. The deponent annexed a copy of the said Further Affidavit and of the receipt evidencing filing of the same, as well as copies of a banker's cheque and cheque deposits as evidence of payment of rent.

The Response

The Respondent filed a replying affidavit to the said application sworn on 6th June 2014, wherein he admitted that the Applicant filed and served a Further Affidavit in this matter on 7th February 2014 but stated that the Applicant had not given the true position in the said affidavit. He averred that as of 6th December 2013, the Applicant's arrears rose to Kshs.1,200,000/= after the Applicant failed to remit rent for October, November and December 2013, and that it is only after the Applicant faced the risk of its goods being distrained that it settled the rent arrears. That further, the cheque issued by the Applicant on 23rd January 2014 in settlement of rent for January 2014 was dishonoured upon presentation and as a result, rent for January 2014 was paid on 27th February 2014.

The Respondent further stated that rent for February 2014 was only paid on 25th March 2014, and that when rent for March and April 2014 was not paid as well, he instructed Messrs Valley Auctioneers to visit the Applicant's premises and distress for rent, and that the rent was paid only after the said auctioneers threatened to distress for rent. The Respondent annexed copies of cheques and cash deposits,

and of his correspondence with the stated auctioneers as evidence.

The Respondent averred that in the premises, the Applicant did not come to Court with clean hands, and that this Court was right in its ruling on 28th May 2014 when it concluded that the Applicant had not been meeting its end of the bargain as it had been failing to remit the rent on time, and was therefore undeserving of the Court's relief of injunction. Further, that that the Court's failure to note the Further Affidavit filed by the Applicant on 7th February 2014 did not occasion a failure of justice as to warrant a review of the Court's ruling.

The Issues and Determination

I have considered the Applicant's application, and the affidavits filed by the parties. The issue that has to be determined is whether the ruling delivered by this Court on 28th May 2014 is amenable to review. The provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. Order 45 Rule 1 (b) of the Civil Procedure Rules spells out conditions that must be met in an application for review of a decree or order as follows:

- i. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
- ii. mistake or error apparent on the face of the record,
- iii. or for any other sufficient reason,
- iv. the application must be made without unreasonable delay.

The main ground raised by the Applicant's pleadings is that this court made an error which is apparent on the face of the record, when it found that the Applicant had not filed a Further Affidavit to show payment of the rent due, as that affidavit was filed on 7th February 2014. The relevant finding in this Court's ruling of 28th May 2014 in this regard was as follows:

“ I therefore find that even though the Applicant has established a *prima facie* case, it is not deserving of the injunction sought as it has not brought any evidence to show that it has been meeting its part of the bargain in terms of payment of rent. The prayer for an injunction in the Applicant's summons dated 31st October 2013 is therefore denied, and the each party shall bear their costs of the said summons.”

The Applicant attached a copy of the said Further Affidavit filed on 7th February 2014 and sworn by Rohit Mediratta on the same date, which I have perused. It was stated therein that the Applicant had paid a total of Kshs 1,800,000/= as rent due by January 2014, and copies of cheques and bank deposits of the said payments were attached to the affidavit. The Respondent has in its replying affidavit to the present application also confirmed the payment of rent albeit after delay and upon threats of distress on the Applicant.

It is thus evident that there was an error on the face of the record of the ruling of 28th May 2014, as the Court was not seized of the Further Affidavit filed by the Applicant on 7th February 2014 that provided evidence of payment of rent. In the circumstances the Applicant is entitled to the order for review of the said ruling. I accordingly set aside and vary the order in the said ruling denying an injunction to the Applicant and the order as to costs.

In reviewing and varying the orders given in the ruling of 28th May 2014, I have taken into account the other findings in the said ruling, particularly that the tenancy therein is a controlled tenancy and that the one year term of the lease between the Applicant and Respondent has since expired. I have also taken into account the evidence by the Respondent in the application herein as to the late payment of rents by the Applicant. The orders as varied will therefore give both parties the opportunity to undertake the necessary actions required under the law in this regard. I accordingly vary the order given in the ruling of this Court

delivered on 28th May 2014 as follows:

1. That the Respondent, his servants and/or agent be and is hereby restrained for a period of six months only from evicting the Applicant from the premises known as L.R. No. 1870/VI/86/3, along Cedar Road, Off Lentana Road, Westlands, Nairobi, and only on condition that the Applicant pays the monthly rent due on the 1st day of the month with effect from 1st September 2014. Upon default by the Applicant the injunction orders shall lapse.
2. The costs of the Applicant's summons dated 31st October 2013 and Notice of Motion dated 30th May 2014 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____1ST____ day of ____August____, 2014.

P. NYAMWEYA

JUDGE