



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 75 OF 2014

RAMESH DOLATRAM WANZAH T/A RAJ PAL SUPPLIES.....1ST
PLAINTIFF/APPLICANT

LIBRA CAFÉ LIMITED.....2ND PLAINTIFF/APPLICANT

VERSUS

PUNDAMILIA FARMERS CO-OPERATIVE SOCIETY LTD.....1ST
DEFENDANT/RESPONDENT

PATRICK NGANGA MBURU T/A VIRMAR AUCTIONEERS...2ND
DEFENDANT/RESPONDENT

JOSEPH WANYOIKE NGARUIYA.....3RD DEFENDANT/RESPONDENT

RULING

Coming up before me for determination are two applications as follows:

1. Plaintiffs' Notice of Motion dated 12th July 2013 (the "Plaintiffs' Application") seeking breaking orders to allow them to re-occupy their trading premises on L. R. No. 209/138/44 (hereinafter referred to as the "suit property") in enforcement of the orders of this court made on 27th June 2013; and,
2. 1st and 3rd Defendants Notice of Motion dated 19th July 2013 (the "Defendants' Application") seeking the following orders:
 - a. Stay of the court's orders made on 27th June 2013;
 - b. Review and set aside ruling and orders issued on 27th June 2013; and
 - c. That the suit against the Defendants be dismissed for want of the Defendant's legal capacity over the suit property after its transfer to Discovery Technologies Limited which is not a party in this suit.

I will first address the Defendants' Application. It is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Nelson Ndungu Wainaina, the Chairman of the Board of Directors of the 1st Defendant, sworn on 19th July 2013 in which he averred that the 1st Defendant sold the suit property on 29th April 2011 to Discovery Technologies Ltd which is not a party to these

proceedings. He attached a copy of the title deed to the suit property bearing the name of Discovery Technologies Limited as the registered proprietor. He further averred that the Plaintiffs voluntarily vacated the suit property way back in June 2011 and have remained out of the premises to date. He further indicated that the suit property was handed over to its stated new owners in vacant possession and that the entire building had no tenants at all. He further stated that the court was not informed of these developments when it issued the orders of 27th June 2013 which should be set aside or reviewed.

The orders that the Defendants seek to be set aside or reviewed were issued by Justice Hatari Waweru on 27th June 2013 when he allowed the Plaintiffs' Application dated 21st November 2011 to which the Defendants filed no response in spite of being duly served. The orders issued were as follows:

1. "That orders be and are hereby granted compelling the 1st and 3rd Defendants to reinstate the Plaintiffs in their trading premises on the suit property;
2. That the OCS Kamukunji Police Station and/or any other officer under him be and is hereby directed to ensure compliance with order 1 above.
3. That costs be in the cause."

As mentioned earlier, the Plaintiffs' Application seeks breaking orders to allow them to re-occupy their trading premises on the suit property in enforcement of the orders of this court made on 27th June 2013. It is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1st Plaintiff, Ramesh Dolatram Wanzah, sworn on 12th July 2013 in which he averred that prior to June 2011, they were tenants occupying the suit premises from where they had run their businesses for over 20 years. He further indicated that on 17th and 19th June 2011, the Defendants levied illegal distress against them leading them to file this suit seeking orders restraining the Defendants from evicting them from the suit property. He further averred that on 25th June 2011, in blatant disobedience of court orders, the Defendants levied further distress on them, evicted them and removed doors from their shops and completely fenced off the suit property. He further stated that on 27th June 2013, this court issued lawful orders compelling the Defendants to reinstate them into the suit property which the Defendants have failed to do. He further stated that the police told them to obtain breaking orders to assist them to gain access to the suit property hence this Application.

From the foregoing, it emerges clearly that while on the one hand the Plaintiffs are asking this court to issue a breaking order to enable them enforce this court's earlier orders issued on 27th June 2013 reinstating them to the suit property, the 1st and 3rd Defendants are seeking to have those same orders set aside or reviewed on the basis that the suit property belongs to a different entity which now owns the suit property. Where a court is to consider whether or not to review its earlier order, the applicable law is to be found in **Order 45 rule 1(1) of the Civil Procedure Rules, 2010** which provides as follows:

"Any person considering himself aggrieved by ... an order ... but from which no appeal has been preferred 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 the order was 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 ... order, may apply for a review ... to the court which ... made the order without unreasonable delay."

While this suit was filed on 21st June 2011, according to the copy of title deed produced by the Defendants, the suit property was transferred by the 1st Defendant to a company known as Discovery Technologies Limited on 29th April 2011 which is about 2 months earlier. This fact appears not to have been brought to the court's attention at all until the filing of the Defendants' Application which is before me for determination. Had the Defendants brought this matter to the attention of the court through its response to the earlier Plaintiff's Application dated 21st November 2011, the court is likely to have made a different decision than the orders it issued on 27th June 2013. However, in the absence of the Defendants' participation in that Application, the court proceeded to issue the orders of 27th June 2013.

While this qualifies as a “new and important matter” for purposes of the above cited legal provision, it cannot be said that the Defendant was not aware of it by the time the court issued the orders. The Defendant was duly served but failed to participate in the application. I will however take note that even by the time the suit was filed, the suit property did not belong to the 1st Defendant. I am of the view that had the Plaintiffs conducted due diligence, they could have determined this position and enjoined the right parties in this suit. Hence, it is also true that by the time the court issued its orders on 27th June 2013, the suit property belonged to another entity which was not a party to this suit. In the circumstances, I find that the orders issued on 27th June 2013 cannot stand and must therefore be set aside. I do so order. In light of this, I hereby dismiss the Plaintiffs’ Application.

I also allow the Defendants’ Application in terms of prayer no. 3 and dismiss the other prayers. Costs shall be in the cause.

SIGNED AND DELIVERED IN NAIROBI THE 24TH DAY OF OCTOBER 2014.

MARY M. GITUMBI

JUDGE