



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 422 OF 2012

JACK & JILL SUPERMARKET LTD..... PLAINTIFF

VERSUS

VIKTAR MAINA NGUNJIRI..... DEFENDANT

PRELIMINARY RULING

1. The Plaintiff in this suit was a long-standing tenant in the suit premises running a supermarket therein. In the year 2006 or thereabouts the Defendant purchased the premises. The Plaintiff has pleaded in its plaint filed in court on 28th August 2012 that the Defendant acknowledged the Plaintiff's tenancy and subsequently served it with a notice to terminate the tenancy on 27th August 2007 under provisions of the *Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap 301*.

2. The Plaintiff further pleaded that it duly filed a reference with the *Business Premises Rent Tribunal* (the *Tribunal*) vide *Nairobi BPRT Case No. 795 of 2008*; that in March 2009, with the connivance of the *City Council of Nairobi* and while the tribunal case was pending, the City Council served upon the Defendant notices for massive repairs of the premises; that under the guise of complying with the said notices the Defendant attempted to evict the Plaintiff from the premises; that on 27th March 2009 the Plaintiff challenged the said notices by judicial review vide *Nairobi HC Misc. Application No 185 of 2009*; that while granting leave to institute the judicial review proceedings, the court ordered that the leave do operate as a stay of any further implementation of the said notices; that notwithstanding the said stay, and having been personally served with the same, the Defendant commenced "gradual demolition" of the premises on 8th May 2009; and that the Defendant was therefore cited for and found to be in contempt of court on 16th February 2011 and fined a sum of KShs 200,000/00, which he paid.

3. The Plaintiff has further pleaded that on 6th August 2012, in total defiance of the aforesaid court order, the Defendant descended on the suit premises and commenced further demolition; that the Plaintiff therefore went back to the BPR Tribunal with a fresh complaint and that on 10th August 2012 the Tribunal ordered that the Defendant should install "scaffolds" in the areas it had already unlawfully demolished; that instead of complying, the Defendant commenced further demolition of the remaining portions of the premises which he had been ordered to secure by scaffolding; and that on 21st August 2012 the Defendant brought a bulldozer to the premises with the clear intention of intimidating the Plaintiff into vacating the premises.

4. The Plaintiff therefore came to this court by the present suit. He sought two main reliefs as follows

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“(i) An order of permanent injunction restraining the defendant, either by himself, his agents, servants and or representatives from evicting, demolishing, hoarding, excavating, scaffolding, intimidating the Plaintiff and its customers, or in any other way interfering with the Plaintiff’s tenancy, quiet possession, use and enjoyment of the premises known as *Jack & Jill Supermarkets* comprised in L.R. No. 209/869, Race Course Road/Temple Road.

(ii) The Defendant be ordered to restore the premises comprised in L.R. No 209/869 Race Course/Temple Road to its original state as contained in the original plan prior to the illegal demolition conducted by the Defendant.”

5. Together with the plaint the Plaintiff filed a **notice of motion dated 29th August 2012** in which it sought temporary injunctions pending hearing and determination of this suit to restrain the Defendant from “trespassing on, wasting, excavating, constructing on, alienating or otherwise interfering with or dealing with” the suit property. That application was opposed by the Defendant by replying affidavit filed on 12th September 2012. No interim injunction pending disposal of the application was granted.

6. On 17th September 2012 the court (Odunga, J) directed in effect that the application be canvassed by way of written submissions with option to highlight. The Plaintiff’s submissions were filed on 9th October 2012 while those of the Defendant were filed on 10th October 2012. On 22nd October 2012 the Plaintiff filed supplementary submissions. The matter was fixed for highlighting on 1st November 2012. Apparently it was not listed. It was fixed for mention before the Duty Judge for 8th November 2012 but the Judge did not sit. The parties then appeared to have gone to sleep.

7. The matter was subsequently fixed for mention before the Duty Judge on 28th May 2013. On that day Mr. Apopo for the Plaintiff informed the court that submissions had been filed in respect to the notice of motion dated 24th of August 2012. He sought a date for ruling. Ms Migiro for the Defendant however informed the court that the application had been overtaken by “certain recent events that were in the news”. Learned counsel explained that those events were that the suit premises were demolished and that there was no interim injunction in place when this happened. Mr. Apopo conceded that indeed the premises were demolished. He stated further that the supermarket of the Plaintiff ran in the premises was thereby destroyed and looted. He sought time to take instructions as to what to do next. The matter was fixed for mention on 4th June 2013.

8. On that date Mr. Apopo stated that the Plaintiff wanted a ruling on the application dated 24th August 2012. He reiterated that the premises were demolished, and that there was no interim injunction in place in this suit at the time the demolition took place. On her part, Ms Migiro stated again that the application had been overtaken by the event of demolition of the premises. She pointed out that there was no prayer of reconstruction of the premises in the application and that therefore a ruling on the application would be an exercise in futility. I then reserved the matter for a preliminary ruling on whether the court should prepare and deliver a ruling on the notice of motion dated 24th August 2012.

9. That application was clearly intended to preserve the suit premises pending disposal of the suit. The suit premises, it is common ground, have been demolished before disposal of the application. There are thus no longer any suit premises to be preserved. There is no prayer for the reconstruction of the premises in the application. It is doubtful that such a relief can be granted in an interlocutory application even if there were such a prayer. That relief is sought in the plaint.

10. I have carefully perused the record of the court. I have not found any application for interim injunction pending disposal of the application. I cannot understand why such interim injunction was not sought.

11. As already observed, the order sought in the notice of motion dated 24th August 2012 was intended to preserve the suit property pending disposal of the suit. That suit property no longer exists because it was recently and completely demolished. There was no interim injunction sought to preserve the property pending disposal of the application. As the suit premises no longer exist, what would the order sought in the application preserve? Writing a ruling on the application would be an exercise in futility. The court has not the time to spend on that kind of exercise. I therefore decline to write a ruling upon the application which has clearly been overtaken by events. I so direct.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF JUNE 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE 2013