



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 478 OF 2012
MOLO GROUP SERVICES SAVING AND CREDIT
CO-OPERATIVE SOCIETY LTD..... PLAINTIFF
VERSUS
1. SAMUEL CHEGE KURIA
2. TIMOTHY CHEGE
3. SAID SALAM alias SHAHID NUSHEEN
MOHAMED..... DEFENDANTS

RULING

1. The **notice of motion dated 19th March 2012** brought by the 3rd Defendant under **Order 45, Rules 1 and 3** of the **Civil Procedure Rules, 2010** (the **Rules**) seeks the main order to review and set aside the ruling and order of 30th January 2013 (Odunga, J). By that order the court overruled the Defendants’ preliminary objections and granted temporary injunction to preserve the subject-matter of the dispute pending disposal of a reference pending before the **Business Premises Rent Tribunal** (the **Tribunal**).

2. The grounds for the application appearing on the face thereof are –

- (i) That the Plaintiff is a stranger to the 3rd Defendant and there is no landlord/tenant relationship between the two.
- (ii) That the Plaintiff “came into existence on 31st December 2010 long after the lease was signed by parties who are not party to this suit”.
- (iii) That the contested lease had already expired when the 3rd Defendant entered into another lease agreement with the 1st and 2nd Defendant.
- (iv) That the injunctive order sought to be reviewed and set aside is not enforceable against the 3rd Defendant “because (the) Plaintiff is not (in) occupation of the suit property” and was thus made in vain.

3. There is a supporting affidavit sworn by the 3rd Defendant. He depones, *inter alia* -

- i. That “it has come to (his) attention that at the commencement of the expired lease the Plaintiff did not exist having been registered on 31st December 2010”, and that therefore it did not have the capacity to enter into a contract.
- ii. That the Plaintiff cannot in law impose itself as a tenant in the 3rd Defendant’s property.
- iii. That upholding the ruling and order of 30th January 2013 “would be a travesty of justice” as it would amount to holding the 3rd Defendant “at ransom”.

4. The Plaintiff has opposed the application by **grounds of opposition dated 25th and filed on 26th April 2013**. Those grounds include -

- (i) That the application is frivolous, vexatious and an abuse of the process of the court.
- (ii) That the issues of law and fact raised in the application are the same as (or similar to) the ones canvassed before Odunga, J.
- (iii) That the 3rd Defendant ought to have appealed, and the present application is an invitation for the court to sit on appeal against its own decision.

No replying affidavit was filed.

5. I have considered the submissions of the learned counsels appearing. No authorities were cited. I have also closely read the ruling of 30th January 2013. In the said ruling Odunga, J considered some two preliminary objections dated 24th October 2012 and 27th November 2012 respectively raised by the 3rd Defendant against the Plaintiff’s suit and application for temporary injunction.

6. The issues raised in the first preliminary objection, as set out in the ruling, were –

- (i) That the court had no jurisdiction to hear the suit “since the Plaintiff is a co-operative society and 1st and 2nd Defendants are its members”.
- (ii) That there is a ***Co-operatives Tribunal*** which adjudicated disputes between members of co-operative societies.
- (iii) That the suit is frivolous, scandalous and an abuse of the process of the court and if allowed to proceed would occasion a travesty of justice.

7. The issues raised in the second preliminary objection were –

- (i) That the Plaintiff is not and has never been a tenant of the 3rd Defendant, and the suit is thus “null and void”.
- (ii) That the Plaintiff’s application was “legally irredeemably defective”.
- (iii) That the suit was filed without the necessary resolution of members or the board.

iv. That the suit is barred by section 6 of the Civil Procedure Act, Cap 16 on account of the matter pending before the BPR Tribunal.

8. It is thus plain that the two main issues now raised by the 3rd Defendant in the present application that is –

- i. capacity of the Plaintiffs when the lease in question was signed; and
- ii. the relationship (or lack of it) between the Plaintiff and the 3rd Defendant

were before Odunga, J and he considered them in the ruling of 30th January 2013.

9. The 3rd Defendant has not demonstrated discovery of any 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 when the order was passed.

10. The present application is an attempt to litigate again issues that have already been litigated and ruled upon. The 3rd Defendant should have appealed.

11. The plea that the order cannot be enforced against him and that the same is a travesty of justice is self-serving and rhetorical.

12. The application is dismissed with costs to the Plaintiff. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF JUNE 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE 2013