



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 359 OF 2004

SHEPHERD CATERING LIMITED..... PLAINTIFF

-VERSUS-

NAIROBI HOLDINGS LIMITED.....1ST DEFENDANT

CHIEF LAND REGISTRAR OF TITLES.....2ND DEFENDANT

STEEL SON LIMITED.....3RD DEFENDANT

RULING ON DIRECTIONS

Arising from a Notice of Motion presented before the Court on 11th March, 2009 by the 3rd Defendant seeking summary Judgement against the plaintiff for the delivery of vacant possession of the premises known as L.R. No. 209/361/3 and L.R.No. 209/361/4 Nairobi to the 3rd Defendant among other orders Honourable Justice Mbogholi Msagha after hearing the parties granted the following orders on 12th October, 2011:-

1. **That the plaintiffs case be and is hereby struck out as prayed by the 3rd Defendant/Applicant.**
2. **That the plaintiff/Respondent shall vacate the suit premises within sixty (60) days of today failure of which the 3rd Defendant shall secure an eviction order from court to take possession.**
3. **That the 3rd Defendant/Applicant shall have the costs of this application.**

As I understand this matter these orders by Honourable Justice Mbogholi Msagha are the genesis of the subsequent applications and orders that to some extent have convoluted this matter. Taken at the face value these orders by Hon. Justice Mbogholi Msagha are to the effect that the claim by the plaintiff as against the 3rd Defendant stands determined by the court and that unless the same is set aside and/or varied by the same court or the appellate court the order remains valid and enforceable as a final order of the court on the particular issues.

The record shows that the plaintiff filed a Notice of Appeal to appeal the ruling of Hon. Justice Mbogholi Msagha to the court of appeal on 17th October, 2013 but there is no further information as to what has become of the appeal.

Be it as it may be, it appears that the plaintiff did not comply with Hon. Justice Mbogholi Msagha's order to vacate the suit premises within 60 days from the date of the ruling as the 3rd defendant filed an application dated 20th December, 2011 seeking an eviction order which application was amended on 13th January, 2012. Pending the hearing of this application by the 3rd Defendant the plaintiff filed two applications namely:-

- i. Notice of Motion dated 18th January, 2012 seeking to stay proceedings in this suit and a stay of execution of the orders made by Hon. Justice Mbogholi Msagha on 12th October, 2011.
- ii. Notice of motion application dated 16th January, 2013 seeking to add Pentaville Capital Ltd AS A 4TH Defendant in this suit and separately Pentaville Capital Ltd have case CMCC No. 1351 of 2012 with the 3rd Defendant in the subordinate touching and relating to the same suit property.

Pentaville, the party sought to be enjoined by the plaintiff as party to these proceedings has a lease over the suit property dated 17th January, 2012 and on the basis of this lease has obtained orders in CMCC No. 1351 restraining the 3rd defendant from in any manner interfering with the suit business buildings on L.R. No. 209/361/3 and 209/361/4. Judging from the information on record it does appear the plaintiff was somehow removed from the suit premises on or about 15th January, 2012 such that Pentaville was able to take vacant possession of the suit premises on the 17th January, 2012 and from the information available on record continues to carry on business on the suit premises todate.

In terms of the order given by Hon. Justice Mbogholi Musagha on 12th October, 2011 the plaintiff was to vacate the suit premises within 60 days meaning by 11th December, 2011. As the plaintiff had not as at 11th December, 2011 secured any order varying or staying execution of the said order the 3rd Defendant was in my view at liberty to transact with third parties respecting the use of the suit property on the basis that the plaintiff would comply with the order. The lease in favour of Pentaville Capital Limited is to be viewed from this context.

On 19th January, 2012 when the plaintiff obtained the exparte order of temporary stay of proceedings related to the execution of the orders issued by the court on 1st December, 2011 it does appear from the information on record that the plaintiff had vacated the premises and a third party had acquired an interest in the suit property. The plaintiff however states that they were forcibly ejected from the suit premises on the night of 15th January, 2012.

That I have perused the plaintiff's application presented before the court on 19th January, 2012 and there is no mention and/or reference to Pentaville Capital Ltd on having acquired an interest on the suit premises by virtue of the lease said to have been entered into on 17th January, 2012. Quite evidently at the time the plaintiff's application was presented exparte before Honourable Lady Justice Nyamweya on 19th January, 2012 she would have had no knowledge that a 3rd party had indeed acquired an interest in the suit premises and that the order staying execution of the court order of the court issued on 1st December, 2011 would be incapable of observance.

The subsequent orders issued by Hon. Lady Justice Nyamweya and the orders issued in the CMCC No. 1351 of 2012 gravitate from the after effects of the exparte order issued by Hon. Lady Justice Nyamweya on 19th January, 2012. I am not certain whether the Hon. Judge would have granted the exparte order had the full facts been disclosed to her. Arising from Honourable Justice Nyamweya's orders contempt proceedings were initiated which in turn gave rise to an appeal to the court of appeal where there is a pending application before the Court of Appeal seeking to stay the contempt proceedings before this court. There is also an indication there is a pending constitutional reference yet again triggered by the contempt proceedings. It is against this muddle that the parties herein seek further directions on the way forward in regard to this matter.

The plaintiff and the 3rd Defendant have filed submissions as directed by the court on the issue of

directions on the way forward. The plaintiff principally hinges his submissions on the order issued by Hon. Justice Nyamweya on 19th January, 2012. The plaintiff submits that arising from the said order it is clear that the orders issued by Justice Mbogholi Msagha on 1st December, 2011 were suspended pending the hearing of the plaintiff's application inter partes on 6th February, 2012. My understanding of Hon. Justice Nyamweya's order is that it stayed proceedings related to execution of the orders issued by the court on 1st December, 2011 and related to and arising from the application dated 20th December, 2011 by the 3rd Defendant. It did not therefore suspend the orders of Justice Msagha as stated. On 19th January, 2012 when the order for stay was issued the plaintiff was not in the premises. After the expiry date of 60 days from 12th October, 2011 when the order to vacate was given the continued possession by the plaintiff was unauthorised and on 15th January, 2012 when it is stated the plaintiff was evicted, the plaintiff was in unlawful possession.

With respect to the plaintiff's counsel the order by Hon. Justice Nyamweya of 19th January, 2012 did not reinstate the plaintiff's case as against the 3rd defendant and could not do so as Hon. Justice Nyamweya was not sitting as an appellate Judge and the application before her was neither for review or to set aside Hon. Mbogholi Msagha's orders. The application was simply to stay proceedings related to the execution of the orders of 1st December, 2011 that had been initiated by the 3rd defendant.

The plaintiff has further submitted that the 3rd defendant proceeded to lease the premises to Pentaville Capital Limited when there was an order to reinstate the plaintiff into the premises. This is not borne out by the facts as the plaintiff was evicted from the premises on 15th January, 2012 and the premises were leased to Pentaville Capital Limited on 17th January, 2012 before the order by Justice Nyamweya was issued on 19th January, 2012. I have stated elsewhere in this ruling that the fact of Pentaville being leased the premises on 17th January, 2012 was not disclosed to Hon. Justice Nyamweya. The order for reinstatement of the plaintiff into the premises issued on 15th February, 2012 could not be compiled with by the 3rd Defendant without in turn obtaining vacant possession from Pentaville Capital Ltd who had become tenants in the premises. Pentaville for their part obtained an order of injunction from the Magistrates court in CMCC No. 1351 of 2012 restraining the 3rd Defendant to case interfering with its quiet possession of the suit property as per its lease.

After a careful review of the court record of this matter and the various applications and orders that have been given in this matter and having regard to the submissions by the parties and the requirement of the court to administer substantive justice to parties in just and expeditious manner having regard to all the attendant circumstances I give the following directions:-

- i. That the order by Hon. Lady Justice Nyamweya made on 15th May, 2012 staying all proceedings in this matter till the 3rd Defendant purges the contempt of the court be lifted to facilitate the hearing and determination of the pending applications.
- ii. That the applications by the plaintiff dated 18th January, 2012 seeking a stay of execution of the orders of 1st December, 2011 and the application seeking to enjoin Pentaville Capital Limited dated 16th January, 2013 be heard together on a date to be mutually agreed between the parties.
- iii. Any pending contempt applications to be terminated as the same are on the basis of the record unsustainable.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants