



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 425 OF 2012

SHOP ONE HUNDRED LIMITED..... PLAINTIFF

VERSUS

- 1. KULLSAM KASSAM**
- 2. THE ADMINISTRATOR**

(Estate of AZIZ KASSAM, Deceased)

- 3. JASON ONDABU**

(t/a ONDABU & COMPANY, ADVOCATES)

- 4. ZACHARIA BARAZA**

(t/a SIUMA RADERS).....DEFENDANTS

RULING

1. The background to this dispute, so far as I can gather from the material now before the Court, is as follows –

(a) The Plaintiff filed a complaint with the **BPR Tribunal** vide its **Case No. 194 of 2012** seeking protection under Cap 301. The Tribunal found that the lease between the parties had expired by effluxion of time and that therefore there was no landlord and tenant relationship between them.

(b) The Plaintiff appealed against that decision of the Tribunal vide **Nairobi High Court Civil Appeal No. 273 of 2012**. The appeal was subsequently withdrawn.

(c) The 1st Defendant then filed suit against the Plaintiff in the lower court vide **Milimani CMCC No. 3019 of 2012** seeking an order of eviction from the suit premises. In a ruling delivered on 24th July 2012 the lower court granted the order of eviction and also directed the OCS Central Police Station and the Administration Police Officer in charge of Nairobi Area to assist in the eviction. The lower court granted a stay of execution for 14 days. That stay lapsed on 7th August 2012.

(d) The 1st Defendant has stated that upon expiry of the stay granted by the lower court the 1st Defendant leased the premises to a third party named JOHN KURIA.

(e) The Plaintiff in the meantime appealed against the order of eviction vide **Nairobi High Court Civil Appeal No 398 of 2012**. On 6th of August 2012 the High Court issued an order for maintenance of the *status quo*, in effect staying execution of the order of eviction.

(f) The 1st Defendant has stated that on 10th August 2012 the Plaintiff was evicted from the premises by the 4th Defendant as had been directed by the lower court with the assistance of the police. It is further stated that on the day of the eviction the 4th Defendant was served with the order issued in High Court Civil Appeal No. 398 of 2012.

(g) Subsequently there were contempt proceedings in High Court Civil Appeal No. 398 of 2012 for disobedience of the said order of 6th August 2013 of maintenance of the *status quo*. The 1st Defendant and others were found to be in contempt and were variously fined and/or ordered to serve prison terms. There are applications to set aside those contempt convictions, and the sentences were stayed pending disposal of those applications. In the meantime the 1st Defendant died.

2. The Plaintiff then filed the present suit. It claims the following main reliefs against the Defendants -
 - a. **A prohibitory injunction restraining the 1st and 2nd Defendants, whether by themselves, their agents/or servants from letting out the premises to any other party other than the Plaintiff.**
 - b. **A mandatory injunction requiring the 1st and 2nd Defendants to give possession of the premises to the Plaintiff and indemnify the Plaintiff for the cost of renovating the premises to the state prevailing before the unlawful eviction.**
 - c. **The sum of KShs 25,045,705/43 in special damages arising from the unlawful eviction.**
 - d. **General damages**
 - e. **Exemplary and aggravated damages.**

3. This suit is founded squarely upon the disobedience of the order for maintenance of the *status quo* granted on 6th August 2012 in High Court Civil Appeal No. 398 of 2012. The disobedience was in the form of violent eviction of the Plaintiff from the suit premises and wanton destruction of its properties in the course of the said eviction leading to the special losses claimed.

4. Together with the plaint the Plaintiff filed **notice of motion dated 30th of August 2012**. That application is the subject of this ruling.

The application is brought under **Order 40, Rules 1(a) & (b), 4(1) and 10(b)** of the **Civil Procedure Rules, 2010** (the **Rules**). **Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act, Cap 21** are also invoked.

5. The application seeks the following main orders –

- a. **That the Court be pleased to issue a mandatory injunction requiring the 1st and 2nd Defendants to reinstate the Plaintiff into the premises previously occupied by the Plaintiff on the ground and mezzanine floors of NCM House erected on L.R. No. 209/2382 on Tom**

Mboya Street, Nairobi pending the hearing and determination of this suit.

- b. **That the Court be pleased to order the cost of reinstating the Plaintiff back into the said premises – including fitting out the premises to the condition that they were in before the Plaintiff was evicted from the same – be borne by the 1st and 2nd Defendants.**

6. There is a supporting affidavit sworn by one **MOHAMED DEVJI**, the General Manager of the Plaintiff. In that affidavit he has recounted the history of the dispute. Annexed to the affidavit is a huge bundle of documents of over 200 pages in length.

7. The main grounds for the application stated on the face thereof are that the Plaintiff's eviction from the suit premises was in utter contempt of the order of the High Court of 6th August 2012 in High Court Civil Appeal No. 398 of 2012; that the said eviction was violent and wanton, notwithstanding that the order had been duly served, even upon the Auctioneer (4th Defendant) early in the course of the eviction; that the eviction was unlawful and illegal, being in blatant defiance of a court order; and that therefore it is in the interest of justice that the orders sought be granted.

8. Various grounds of opposition, replying affidavits and notices of preliminary objection were filed in response to the application. The 4th Defendant filed **grounds of opposition dated 14th September 2012** and **replying affidavit sworn by him on the same date**. The 2nd Defendant filed **replying affidavit sworn by one ZUBEDA FATEH ALI NANJI on 14th September 2012**. The point taken by the 4th Defendant is that there is no order sought against him in the application, and that therefore he should not have been joined in the application; that the 4th Defendant was merely an agent of the court executing an order of the court, and that therefore the application and the suit are not maintainable against him; and that in any event the application does not meet the legal requirements for grant of the orders sought. His replying affidavit lays the factual basis for the points of objection he has taken.

9. As for the 2nd Defendant, she has given a history of the dispute and also pleaded that she was not aware of the *status quo* order of 6th August 2012 granted in the appeal.

10. The Plaintiff filed a **supplementary affidavit sworn by the same MOHAMED DEVJI** in response to the replying affidavits. It essentially joins issue with the Defendants upon their replying affidavits.

11. As for the 3rd Defendant, he appears to have reacted to the application by filing his own notice of motion dated 25th September 2012 in which he seeks an order to strike the suit as against him. He is an advocate of this court and was one of the persons found to be in contempt by Ang'awa, J in respect of the order of 6th August 2012.

12. The application was canvassed by way of written submissions. Those of the Plaintiffs were filed on 30th November 2012. The 1st and 2nd Defendants filed their submissions on 31st of January 2013. I have not seen on the record any submissions by or for the 3rd or 4th Defendants.

13. I have considered the submissions on record, including the cases cited. As noted earlier, one of the main reliefs sought in the plaint is mandatory injunction to restore the Plaintiff back into the suit premises. In the present application that mandatory injunction is also one of the main orders sought. The court will normally be loath to grant an interlocutory relief whose effect would be to determine the suit unheard.

14. It is not clear why this order was not sought in High Court Civil Appeal No. 398 of 2012; that is where the order of 6th August 2012, disobedience of which led to eviction of the Plaintiff, was given. If such application had been swiftly filed in that appeal the court would have been more confident in considering what measures to take to immediately put right an obvious wrong done in contempt of a court order, particularly after the court dealt with the contempt application that it dealt with in that appeal. As it is now, it is nearly a year since the Plaintiff was evicted from the premises. The Defendants say that the

premises were leased to a new tenant who has sworn an affidavit which is on record in which a new lease agreement is exhibited.

15. A temporary mandatory injunction such as is sought will normally not be granted in the absence of special circumstances. Even when there are special circumstances, it will be granted only in a clear case where the court thinks that the matter ought to be decided at once, or where the injunction is to be directed at a simple and summary act which could be easily remedied, or where the defendant has attempted to steal a march upon the plaintiff. In any event, the court must feel a high degree of assurance that at the trial of the action it shall be clear that the mandatory injunction had been rightly granted. See the English case of *Locabial International Finance Ltd Vs Agroport and Others [1986] 1 ALL ER 901*. These principles have been approved and adopted by our courts.

16. In the present case there were special circumstances. These special circumstances were the apparent flagrant disobedience of a court order and the violent and wanton eviction of the Plaintiff from the suit premises. But temporary mandatory injunction should have been sought and considered as soon as possible after the eviction of the Plaintiff. Now too much time has already passed.

17. The temporary mandatory injunction sought will also not be a simple and summary act which could be easily remedied if necessary. It has been deponed on behalf of the Plaintiff that in the course of eviction from the premises all its necessary fixtures like shelving, storage areas, etcetera (apparently the Plaintiff was running a supermarket in the premises) were removed. The Plaintiff has sought an order, if mandatory injunction is granted, for the Defendants to bear the cost of fitting out the premises to the condition that they were in before the eviction. That must of necessity involve a lot of work and expense. What is sought is thus not a simple act of merely restoring the Plaintiff into possession. A lot would have to be done to restore the Plaintiff into possession in such a way as it would be able to conduct the business it was operating in the premises.

18. One of the reliefs sought in the plaint is a huge claim in special damages. Exemplary and aggravated damages are also sought for disobedience of the court order. Given the particular circumstances of this case, that is probably the best way to go.

19. In the circumstances, I must refuse the application by notice of motion dated 30th August 2012. It is hereby dismissed. Costs of the application shall be in the cause. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF JULY 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2013