



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 286 OF 2001

KAMAHUHA LTD. PLAINTIFF/RESPONDENT

VERSUS

STANDARD CHARTERED

BANK OF KENYA LTD. 1ST DEFENDANT

SAMUEL MUREITHI MURIUKI 2ND DEFENDANT

UNCLE SAM'S GITHURAI LTD. 3RD DEFENDANT

RULING

1. For determination by this Court are two applications: the first is a Notice of Motion application filed by the Plaintiff dated 7th May, 2013 brought under the provisions of **Order 40 Rules 1, 2, 3 & 4, Order 51 Rules 1 & 3** of the *Civil Procedure Rules* and **Section 3A** of the *Civil Procedure Act*. Following the hearing of the application *ex-parte* on 8th May, 2013, the Court allowed prayers 2, 3, 4, 5 and 7 thereof on even date. The prayers allowed were as follows:
 1. **THAT the Defendants/Respondents, whether by themselves, their servants and/or agents or otherwise howsoever be and are hereby restrained from:**
 - a. **Trespassing, being, remaining, or entering upon all that property known as parcel No. RUIRU/KIU BLOCK 6/228 (hereinafter referred as the suit property).**
 - b. **Levying distress for rent and from conducting a public auction of goods as ported from the premises of the tenants on the suit property and more specifically from doing this through the firm of M/S Icon Auctioneers or any other auctioneers, bailiffs or agents.**
 - c. **Interfering howsoever with the Plaintiff/Applicant's quiet enjoyment, possession and occupation of the suit property.**
 2. **THAT the Court file in this case be reconstructed.**
 3. **THAT the said reconstruction be on the basis of the copies of the pleadings filed herewith.**
 4. **THAT upon reconstruction, the Court file be kept in safe custody in the Court Registry's**

strong room.

5. **THAT a copy of this order be served upon the Officer Commanding Station (O.C.S) Githurai Kimbo to ensure compliance.**
2. The application is predicated upon the grounds that the Court file has been missing since April, 2012 as a consequence of which, the Applicant has been unable to execute the Orders of Koome, J issued on 10th January, 2011. The Plaintiff contended that the Respondent is in flagrant breach and blatant disregard of the said Court Orders and the object of the instant application would be defeated and rendered nugatory if the said application is not allowed.
3. The application is supported by the Affidavit of **Susan Waithira Akasio**, the Applicant's General Manager, sworn on 7th May, 2013. The deponent avers that **H.C.C.C No. 286 of 2001**, the suit herein, was concluded by the Judgment of Koome, J on 10th January, 2011 and the Decree emanating therefrom made in its favour. Subsequent to the judgment, the learned Judge ordered for the execution of a Transfer of the suit property by the 2nd Respondent to the Applicant, which execution has been impeded by the missing Court file since April, 2012. It is deponed that the 2nd Respondent, being aggrieved by the Ruling of 10th January, 2011, filed an application for stay of execution dated 25th January, 2011 which was heard and determined by Kimondo, J on 9th December, 2011. That application was dismissed. It is further contended that the 2nd Respondent filed an Appeal, being **Civil Appeal No. 49 of 2012**, in which he made a similar application for stay, which was dismissed. The Appeal is still pending hearing and determination. It is the Applicant's contention that unless the Orders sought are granted, it stands to suffer substantial, irrecoverable and irredeemable losses.
4. The application is opposed. The 2nd Respondent swore an Affidavit in Reply on 16th May, 2013. Samuel Mureithi Muriuki, the 2nd Respondent herein, the alleged registered owner of the suit premises, avers that the matter is still alive, pending the hearing and determination of the Court of Appeal in **Civil Appeal No. 49 of 2012**. He contended that injunctive Orders granted to the Plaintiff in 2000 have since lapsed and have not been renewed as per **Order 40** of the *Civil Procedure Rules*. He also stated that the Court had issued *ex-parte* Orders on uncertified exhibits and pleadings and that the documents used may have been doctored by the Applicant to suit its cause. He further contended that the matter currently before Court is not related to the ownership dispute but to a rent dispute as between the current registered owner of the suit property and himself. Such was under the jurisdiction of the Business Premises Rent Tribunal and this Honourable Court does not have jurisdiction to hear and determine the distress (for rent) matter. The deponent further detailed that the Applicant herein is misleading the Court by putting forward unnecessary legal arguments which will be addressed by the Court of Appeal when it hears the Appeal and that the application is misplaced and is not pursuant to the Civil Procedure Rules.
5. The second application is an amended Notice of Motion by the 2nd Defendant dated 17th May, 2013 and brought under the auspices of **Sections 1A, 1B, 3A, 63 (e), 80 & 100** of the *Civil Procedure Act*, **Order 45 Rules 1, 2 & 3** and **Order 51 Rule 1** of the Civil Procedure Rules. In the application, the Applicant seeks for the following orders *inter alia*;
 1. **THAT upon hearing this application *ex-parte*, this Honourable Court be and is hereby pleased to set aside, vary review and/or discharge the ex-parte orders issued on 8th May, 2013 pending the hearing and determination of this application or until further orders of this Honourable Court.**
 2. **THAT upon hearing this application inter-parties, this Honourable Court be and is hereby pleased to set aside, vary, review and/or discharge the ex-parte orders issued on 8th May, 2013 pending the hearing and determination of the Plaintiff's application dated 7th May, 2013.**

6. The grounds upon which the application is predicated are that the orders issued by the Court are final and cannot be issued at an interlocutory stage and that the orders issued were not in the purview and jurisdiction of this Court. It maintained that the Applicant is unfairly, unprocedurally and irregularly being condemned unheard but that there is nothing to be heard in view of the orders issued on 8th May, 2013. The application is further supported by the Affidavit of the 2nd Respondent, **Samuel Mureithi Muriuki** sworn on 17th May, 2013. The deponent avers that the Orders sought to be put in place, were not capable of being granted at an interlocutory stage. Further he maintained that the matter is exclusively the purview of the Business Premises Rent Tribunal and that the granting of any Order by the Court is against the principles of natural justice. As regards the uncertified copies of Rulings, pleadings and exhibits, it is the deponent's contention that the application dated 7th May, 2013 by the Plaintiff is a re-commencement of a suit. Such should be discouraged by allowing the instant application and having the Orders issued on 8th May 2013 set aside as they were obtained irregularly and unprocedurally.
7. The Plaintiff/Respondent, in opposing the application, filed its Grounds of Opposition dated 20th May, 2013. The Respondent reiterated that the application was incompetent, unmerited and an abuse of the process of the Court. The Respondent also alleged that the Applicant is not the registered owner of the suit property and that he has defied, ignored, violated and breached the Honourable Court's Orders/Decree issued on 10th January, 2011 in respect of the Ruling of Koome, J. It is further contended that the application is unmerited as no new and important matter has been discovered or disclosed, that no error apparent on the face of the record has been disclosed and that no sufficient reason has been advanced to justify the application for review.
8. The Court will first determine the application for review by the 2nd Defendant dated 17th May, 2013. In submitting in relation to the said application, counsel for the party, Mr. Okindo reiterated that the Orders issued by the Court on 8th May, 2013 were granted without affording the Applicant an opportunity to be heard. He also submitted that there was an error apparent in that the Orders issued were not within the purview of the Court but the Business Premises Rent Tribunal. It was stated that the Court has no jurisdiction to issue the Orders and the same should therefore be dismissed and/or set aside. Counsel for the Plaintiff/Respondent in objecting to the application, submitted that the matter was not a tenant-landlord dispute to be determined by the Business Premises Rent Tribunal, but a dispute over the ownership of the suit property and is thus well and proper before this Court. Mr. Kamaara submitted that the Court should issue the orders as prayed for, so as to ensure that Applicant is restrained from interfering with the suit property. Further, the Court should enforce compliance of the Order issued by Koome, J on 10th January, 2011.
9. Having perused the application, the supporting affidavits and the grounds of opposition filed by the respective parties, it is this Court's finding that so far as the application for review is concerned, it should conform to the principles and the law as set out under **Order 45** of the Civil Procedure Rules. Under **Rule 1** of the said Order, it is provided that:

“(1) Any person considering himself aggrieved—

- a. **by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
- b. **by a decree or order from which no appeal is hereby allowed,**

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 when the decree was passed or the order 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 decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

It is therefore imperative that, for the Court to consider such an application for review, the aforementioned provisions under **Order 40 Rule 1** have to be satisfied. The Applicant/2nd Defendant has not tendered before the Court any new evidence or presented any new matter that

has not already been previously canvassed before the Court. Secondly, the Applicant has not adduced any sufficient reason as to why the Orders that he seeks should be granted. The Applicant seeks to rely on the third ambit of the provision in **Rule 1** in that there is an error apparent on the face of the record. Following his application and his submissions, it would seem that it is the Applicant's contention that the Court erred in issuing the Orders in its Ruling of 8th May, 2013. The Applicant contends that the Orders were issued based on uncertified copies of Rulings, Pleadings and Exhibits which was unprocedural, unfair and irregular. However, the Applicant does admit that indeed there is an appeal pending, namely **Civil Appeal No. 49 of 2012**, against the Ruling of Koome, J of 10th January, 2011. The Court notes that the Court of Appeal, in dismissing the Applicant/Appellant's application for stay before it, made reference to the Ruling of Koome, J in **Samuel Mureithi Muriuki & Another v Kamahuha Ltd [2013] eKLR** as follows:

“The Applicants have already lodged an appeal from the Ruling and Order of the Superior Court (Koome J, as she then was) being Civil Appeal No. 49 of 2012. The said Ruling was delivered on 10th January 2011, and at its conclusion the learned judge made the following findings which are the cause of the Applicants' grievance in their said appeal:

“Accordingly, I have no hesitation to grant the orders sought by the Plaintiff's application dated 18th September 2009 in the following manner:-

- 1. The 2nd and 3rd Defendants amended statement of defence dated 31st July 2009 is hereby struck out.**
- 2. The 2nd Defendant to execute the transfer of a title No. Ruiru/Kiu Block 6/228 in favour of the plaintiff within 30 days failure to do so the Deputy registrar of this court to sign, seal execute the transfer in favour of the plaintiff.**
- 3. The plaintiff shall also have the costs of this application as against the 2nd and 3rd Defendants.”**

10. To my mind, the error apparent, as alleged by the Applicant/2nd Defendant, is unfounded as indeed there was a Ruling delivered on 10th January, 2011 by Koome, J to which an appeal has been lodged. For the Applicant to claim that the dispute is between landlord and tenant and not over the proprietorship of the suit premises is a fallacy and would be misleading the Court. In any event, in my view, no error has been established on the face of the record of the Ruling delivered on 8th May, 2013. I would adopt the Ruling in **Francis Origo & Another v Jacob Kumali Munagala [2005] eKLR**, where the Court of Appeal held:

“From the foregoing, it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason...Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. (emphasis added). **Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction.”**

As a result, it is this Court's finding that the Applicant/2nd Defendant's application dated 17th May, 2013 is without merit and is dismissed with costs to the Respondent/Plaintiff.

11. With regard to the application dated 7th May, 2013, the Respondent contended that he had been

condemned unheard and that the Orders issued were unprocedural and irregular and could not be issued at an interlocutory stage. The Court is cognizant of the fact that the file may have been misplaced and/or lost which is why the Applicant sought an order for the reconstruction of the file. Pursuant to the provisions of Section 1A(3) of the Civil Procedure Act, a party or an advocate has the duty to assist the Court in furthering the overriding objective as envisaged under the provisions of the Act. For the Respondent to seek to deny the Court (and indeed all the parties herein), the opportunity to dispose of this matter in a just, expeditious, proportionate and affordable manner, is tantamount to abusing the process of the Court. The Respondent has admitted that there is an Appeal lodged in the Court of Appeal i.e. **Civil Appeal No. 49 of 2012** against the ruling of Koome, J delivered on 10th January, 2011. In the same breath, he denies the veracity of the documents adduced by the Applicant attached to the application, condemning them as uncertified. However, these are the same documents that the Respondent has used in lodging its Appeal to the Court of Appeal. No other document or evidence has been produced to show that the Ruling attached is a doctored copy thereof. In fact a copy of the said Ruling, the full citation of which is **Kamhuha Ltd v Standard Chartered Bank of Kenya Ltd & 2 Others [2011] eKLR** may be obtained from the Kenya Law Reports, the official law reporting website of the National Council for Law Reporting and is the same as the Ruling attached to the application by the Applicant/Plaintiff.

12. The upshot is that the Orders sought by the Applicant/Plaintiff in its application dated 7th May, 2013 were in my view, so requested in order to safeguard its interest in the suit premises. The Court in its Ruling of 10th January, 2011 awarded the suit property in its favour. The Respondent's contention that the Orders sought cannot be granted by the Court at an interlocutory stage and that the Applicant/Plaintiff should seek to institute a new course of action, is unfounded, biased and aimed at misleading this Court. The Respondent has continuously, reprehensibly and flagrantly deceived the Court of the true position in relation to this matter, as it stands. The injunction issued against the Respondent/2nd Defendant was not in 2000 as alleged in paragraph 6 of the Replying Affidavit but on 10th January, 2011. Further, the issue in contention is not about the landlord levying distress against a tenant but is clearly a dispute over the ownership of the suit property, which is now the subject matter of appeal in the Court of Appeal.
13. In light of the foregoing, the application dated 7th May, 2013 is allowed and upheld, as was ordered on 8th May, 2013. Costs of the Applicant/Plaintiff's said application shall be in its favour as against the Respondent/2nd Defendant. This litigation must come to an end and the Respondent/2nd Defendant should take cognizance of the fact that continual and repeated applications of this nature before this Court, may well result in an Order for contempt.

DATED and delivered at Nairobi this 31st day of October, 2013.

J. B. HAVELOCK

JUDGE