



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

CIVIL CASE NO. 14 OF 2011

RAYAT TRADING CO. LIMITED.....PLAINTIFF

- VERSUS -

BANK OF BARODA (K) LIMITED.....1ST DEFENDANT

TETEZI HOUSE LIMITED.....2ND DEFENDANT

RULING

This is a Ruling on the Notice of Motion application dated 16th May 2011 brought by the 2nd Defendant/Applicant under Section 3, 3A and 63 (e) of the Civil Procedure Act and Order 5 Rule 1 (6), Order 51 Rule 1 of the Civil Procedure Rules. The application seeks the following orders:-

- 1) (spent).
- 2) That the entire suit be struck out summarily with costs as it has abated.
- 3) That in further and/or in the alternative the injunctive order obtained by the Plaintiff herein on the 26th day of January 2011 be discharged varied and/or set aside.
- 4) That rent collected from the suit property Land Reference Number 209/4460 with effect from 1st January 2011 and at the end of each succeeding month be paid into an interest bearing account in a reputable bank to be opened jointly by the Advocates for the Plaintiff and the Advocates for the 2nd Defendant.
- 5) That in default of payment of any one month's rent the orders issued in favour of the Plaintiff on the 26th January, 2011 shall stand discharged.
- 6) That further the 2nd Defendant be authorized by order of this court to take up possession forthwith of the suit premises Land Reference Number 209/4460 unconditionally and/or on such terms as this Honourable Court may deem just and fair to impose.
- 7) That the OCS Industrial Area Police Station does assist forthwith in the due execution of this order.
- 8) That the costs of this application be provided for.

The application is supported on grounds on the face of the application viz:-

- a) The 2nd Defendant purchased the subject property Land Reference number 209/4460 from the 1st Defendant vide Agreement for Sale dated 1st February 2010.
- b) The 2nd Defendant paid to the 1st Defendant the full purchase price of Kenya shillings Eighteen Million (Kshs.18,000,000/=) and on the 16th December 2010 the 2nd Defendant was registered as the proprietor of the suit property.
- c) There are tenants on the suit property paying rent of approximately Kenya Shillings Three Hundred Thousand (Kshs.300,000/=) to the Plaintiff.
- d) The temporary order of injunction obtained by the Plaintiff on the 26th January 2011 was obtained by the Plaintiff through non-disclosure of material facts and misrepresentation by the Plaintiff.
- e) The 2nd Defendant has reason to believe that the Plaintiff will be unable to pay the 2nd Defendant damages in the likely event that the Plaintiff's application dated 24th January 2011 is dismissed.
- f) On the basis of the temporary order of injunction issued and delivered against the Defendants on 26th January 2011 the Plaintiff has continued to unjustly enjoy rent.
- g) The Plaintiff has not taken out nor served summons within the stipulated period.
- h) This court has jurisdiction to hear and determine this application.

It is also supported by the affidavit of John M. Mburu dated 16th May 2011 and its annexures **JMM1** to **JMM 4**.

The application is opposed through a replying affidavit dated 27th June 2011 sworn by Gurubash Singh Rayat.

The summary of the application is that the 2nd Defendant purchased the subject property land Reference Number 209/4460 from the 1st Defendant vide a Sale Agreement dated 1st February 2010 at the price of Kshs.18,000,000/= which was fully paid and on the 16th December 2010 the 2nd Defendant was registered as the proprietor of the suit property. The Applicant alleges that there are tenants on the suit property paying rent of over kshs.300,000/= per month, but the Plaintiff disputes the amount saying the monthly rent is only kshs.122,000/= much of which is alleged to be in arrears.

Some of the prayers in the Notice of Motion have already been overtaken by events i.e. prayers 1, 3, 4 and 5. By an order of this court dated 16th August 2011 all the rent is now payable to a joint account in the name of the parties' advocates. This position now leaves me with prayers 2 and 6 as the substantive prayers to address, prayers 7 and 8 being consequential thereto.

Prayer 2 requires me to strike out the suit summarily on the alleged grounds that it has abated for reason of non-service or late service of summons.

Prayer 6 requires me to order that the 2nd Defendant takes up possession of the premises immediately.

The issues to determine then are:-

- 1) Has the suit abated?
- 2) Is the 2nd Defendant entitled to possession of the premises?

Mr. Gatheru for the 2nd Defendant orally submitted that prayer 2 raises a point of law and that the 2010 amendments to Civil Procedure Act at Order 5 Rule (6) it is mandatory that if summons are not ready within 30 days the suit shall abate, and that by that fact alone the suit has abated.

Mr. Muriasi for the Respondent in his oral submissions does not deny that the service of summons have not been served within the required time, but lays the blame for the delay on the court. He submits that at all material times the court file was with the Judge who was writing a ruling on the application by way of Notice of Motion dated 24/01/2011 and all their attempts to access the court file were futile.

During all this time the summons were in the file unsigned and unsealed and there was nothing further the Respondent could do. The counsel submitted further that Order 5 Rule 1 puts the responsibility of issuing summons on the Deputy Registrar. The Respondent had prepared and filed the summons in the suit but the Deputy Registrar is yet to issue the same by signing and sealing and then notifying the Respondent to collect them for service. On this ground the counsel submitted that the suit has not abated.

My view on the issue of the summons is that both counsels are correct in their interpretation of the law. While the law demands that summons be ready within 30 days, it is clear from the court records that the court file was at all material times with the Judge. One would have expected the learned counsel for the Respondent to make an attempt to access the file. It is a lame excuse for a counsel who is a dignified officer of this court to allege that he could not access a court file simply because the file was with the Judge.

This argument notwithstanding I am not inclined to declare the suit abated on this ground. I exercise my discretion to save this suit so that the issues raised may be fully ventilated.

The second issue is the prayer 6 which has asked this court to order that possession of the suit premises be given to the 2nd Defendant. In trying to determine this issue it is worth noting the ruling dated 12th September 2011 by Lady Justice Mugo. That ruling was in relation to the Notice of Motion dated 24th January 2011 brought by the Plaintiff/Applicant (the present Respondent) praying for a temporary injunction against the Defendants restraining them or their agents against alienating, disposing, selling, letting, demolishing and/or interfering with the Plaintiff/Applicant's ownership and possession of the property the subject matter of this suit and application, pending the hearing and determination of the suit.

The Judge, vide her ruling aforesaid detailed and analyzed the issues leading her to reject the application. I will not go into the details of that ruling except to say that in the considered opinion of the learned Judge – which I agree with - the Plaintiff/Applicant in that application had no case. I am aware that the Plaintiff has taken steps to, or has appealed against that ruling. But that will not stop me from emphasizing that in my view the Plaintiff has no case against the 2nd Defendant and all the steps being taken will yield nothing. I accept the submissions by Mr. Gatheru for the 2nd Defendant and Mr. Ogutu for the 1st Defendant that the 2nd Defendant is now the registered owner of the property, and was the owner of the same at the time the Plaintiff secured the first temporary injunction on 26th January 2011. The suit premises had legally changed hands.

The Plaintiff may have a remedy of damages especially against the 1st Defendant, if at all. However, the Plaintiff has no justification to continue occupying and possessing a property which belongs to the 2nd Defendant.

Mr. Muriasi, for the Plaintiff, has urged me to reject the prayer for possession on the basis that the suit is still pending, and that the Applicant has not in its defence and claim raised the issue of possession. That may be so. However, this court is not beholden to technicalities, and in the same manner I have declared that this suit has not abated, I declare that the 2nd Defendant having legally gone through the procedures which bestows the suit property to the 2nd Defendant, the 2nd Defendant is entitled to possession of the same. People do not acquire property for the possession and enjoyment of others. They do so to enable

them enjoy the right of possession. The right of possession of the suit premises Land Reference Number 209/4460 from now henceforth belongs to the 2nd Defendant even as the suit proceeds to its logical conclusion. This right of possession will however respect and honour the order of this court dated 16th August 2011 pending the hearing and determination of the suit.

I order and direct the Plaintiff and/or its agents to forthwith hand over the possession of the suit premises to the 2nd Defendant. The 2nd Defendant is at liberty, if it becomes necessary to seek further orders from the court, to ensure compliance with this order.

In the upshot I grant prayer 6 of the application. Costs shall be in the cause.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY 2012.

E. K. O. OGOLA
JUDGE

PRESENT:

Muriasi for the Plaintiff
Gatheri for the 2nd Defendant
Ogutuu for the 1st Defendant
Irene – Court clerk