REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Suit 425 of 2010

JAMES KARIKI KINYUA ……..……. PLAINTIFF

VERSUS

RUTH NYAMBURA KEIGE…….…….…….. DEFENDANT

R U L I N G

This ruling relates to three (3) applications. The Plaintiff's motion dated 17th June, 2010 for injunctive orders, the Defendant's motion dated 23rd September, 2011 seeking the discharge of injunctive orders in force as well as eviction orders against the Plaintiff and the Plaintiff's motion dated 19th October, 2011 seeking an order to compel the Defendants to pay the Plaintiff the full value of the properties confiscated and sold on 19th June, 2011 and the full value of the fixtures erected upon the suit property.

The Plaintiff contended that he is a periodical tenant of the 1st Respondent in the property known as LR Plot No. 1/234 Argwings Kodhek Road by virtual of a lease dated 19/12/2006 (hereinafter "the suit property"), that he took possession of the suit property when it was vacant and spent millions in establishing his restaurant, that the 2nd Defendant as the management agent of the 1st Defendant had been charging illegal charges upon the Plaintiff which were not part of the lease between the Plaintiff and the 1st Defendant. That on 28th May, 2nd, 4th and 10th June, 2010 respectively, the 1st Defendant instructed the 3rd Defendant who without prior notice or proclamation confiscated various items belonging to the Plaintiff for unknown rent arrears, that the removal of all things from the suit property was tantamount to evicting the Plaintiff and that the lease had not been legally terminated. The Plaintiff prayed that the application be allowed.

To that application, the 1st Defendant filed a Replying Affidavit sworn by Ruth Nyambura Keige on 8th March, 2011. That application was also sworn on behalf of the 2nd Defendant who had executed and filed an authority to that effect. The 1st Defendant denied that she is the owner of the suit property, that she could not therefore enter into any lease agreement over the suit property, that the lease agreement executed by the Plaintiff was therefore invalid for not having been executed by the registered owner of the suit property, she denied having appointed the 2nd Defendant as agent to manage the suit property, she further denied giving instructions to the 3rd Defendant to harass the Plaintiff, she stated that the Plaintiff has defaulted in the payment of rent thereby necessitating distress for rent by the Defendants, she produced copies of cheques issued to her and the 2nd Defendant by the Plaintiff which were returned

unpaid, she accused the Plaintiff of material non-disclosure. The 1st Defendant further denied that the Plaintiff's items had been removed by the 3rd Defendant as contended by the Plaintiff, she however swore in the alternative and on a without prejudice that the proclamation was carried out legally pursuant to a court order for collection of rent arrears. She averred that the lease between the parties obligated the Plaintiff to pay rent on or before the 8th day of every month, that the Plaintiff had failed to settle the utility bills, that all due legal processes were followed before attachment of the Plaintiff's goods, that the total arrears due as at 31st May, 2010 was Kshs.260,000/- together with penalties and collection charges of Kshs.26,000/-, that the premises had been closed down as at the time of attachment, that the rent arrears as at 31st January, 2011 was Kshs.1,106,313/-, that the Plaintiff cannot refuse to pay rent and thereafter seek the protection of the court, that the loss to be suffered by the Plaintiff could be adequately compensated by damages.

The 3rd Defendant opposed the said application by filing a Replying Affidavit sworn on 9th March, 2011 and written submissions dated 4th July, 2011. The 3rd Defendant swore and it was submitted on his behalf that he had received instructions from the 2nd Defendant to levy distress upon the Plaintiff's items on 3rd May, 2011, that he visited the premises and proclaimed the items on the same day giving the Plaintiff 14 days notice to settle the rent arrears, that he obtained a Court order for police assistance to gain entry to the suit premises, that on 28th May, 2010 he attached all the proclaimed goods, that he sold the items on 5th June, 2010 and that the application had therefore been overtaken by events and that the Plaintiff's remedy is in damages.

As regards the Defendants motion of 23rd September, 2011, the Defendants prayed for a declaration that the injunction made on 23rd June, 2010 has lapsed and/or for the variation of that injunction. The Defendants also prayed for the eviction of the Plaintiff from the suit premises. In the alternative, the Defendants prayed that the Plaintiff does deposit in court a sum of Kshs.1,706,313/- being the rent arrears. In support of that application, the 1st Defendant contended that she was the manager of the suit premises which she had leased to the Plaintiff, that due to rent arrears, the 2nd Defendant had instructed the 3rd Defendant who levied distress, attached and sold the Plaintiff's goods in May, 2010 whereby the premises remained closed. That it was now over 12 months since the interlocutory injunction was made on 23rd June, 2010, that the Plaintiff should be evicted as he was not paying any rent for the premises which had accumulated to Kshs.1,706,313/-.

Mr. Njeru learned Counsel for the Plaintiff urged the court to treat the Plaintiff's application dated 19th October, 2011 as a reply to the Defendant's motion dated 23/9/2011. In that application, the Plaintiff sought only one prayer that the Defendants be compelled to pay the Plaintiffs the full value of the properties illegally confiscated and sold on the 19th June, 2011. The Plaintiff contended that at no time had he been served with any proclamation until after the filing of the suit when, on 7th October, 2011 the 3rd Defendant broke padlocks to the premises and confiscated specified items there from, that the Plaintiff had been totally crippled. The Plaintiff produced an order given by the Chief Magistrate's Court on 4th October, 2011 directing the police to give assistance to fantasy auctioneers to remove goods belonging to the Plaintiff in the recovery of rent amounting to Kshs.2,066,313/-. Mr. Njeru for the Plaintiff urged the court to dismiss the Defendants' application and allow that of the Plaintiff's.

I have carefully considered the Affidavits on record and the submissions of counsel.

In this ruling, I propose to start with the 3rd application, the Plaintiff's notice of motion dated 19th October, 2011. Mr. Njeru, learned Counsel for the Plaintiff abandoned prayer Nos. 1, 2 and 4 of the said motion and only argued prayer Nos. 5 and 6 thereof. Prayer No.3 had been allowed previously by Hon. Havelock J. Prayer No. 5 of that motion sought an order to compel the Defendants to pay to the Plaintiff the full value of the properties illegally confiscated and sold on 19th June, 2011 and the full value of the fixtures that the Plaintiff had erected on the suit property.

To my mind the prayer for the payment of the value of the properties is not well founded. This is because such an order cannot be made in a summary manner and in an interlocutory stage as it is now sought. Liability must not only be established, evidence should be called to prove the value of those items. Looking at the application, I did not see any evidence to prove the value of the properties alluded to nor the value of the fixtures. In any event, even if such evidence was readily available, I am still of the view that such evidence must be presented orally and tested in the normal manner.

Accordingly, the Plaintiff's application dated 19th October, 2011 is dismissed. However, for the reason that part of that application was allowed earlier on as I had stated and for what I am going to state hereafter, I make no order as to the costs of that application.

The second application I propose to consider is the Plaintiff's Notice of Motion dated 17th June, 2010 that seeks restraining orders against the Defendants. The principles applicable when considering an interlocutory injunction were enunciated in the celebrated case of **Giella –vs- Cassman Brown (1973) EA** that is, that the applicant must establish a prima facie case with a probability of success, that an injunction will not normally be granted unless the applicant will suffer loss that cannot be compensated by an award of damages and that, in the event the court has doubt on those two (2), it will decide the matter on a balance of convenience.

Prima facie case was defined by the Court of Appeal in the case of **MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD (2003) KLR 124** as a case where on the material presented, a tribunal directing its mind properly would say there is a right of the Plaintiff that has been breached by the Defendant which calls for rebuttal by the latter.

Is there any right of the Plaintiff that has been infringed to warrant a rebuttal by the Defendants? I am satisfied that the Plaintiff is a lawful tenant of the suit premises by virtue of the Lease Agreement dated 19th December, 2006 exhibited as "JKK1", the term of such lease was five (5) years and eleven (11) months. The lease was therefore terminable on or about October, 2012. However, it is clear from the record that on various dates in the months of May and June, 2010, the Defendants or people acting on their behalf duly invaded the suit premises and removed therefrom various items that were later on sold.

The 1st Defendant has challenged the Plaintiff's application on various grounds. She has contended that she is not the registered owner of the property whereon the suit premises is erected and that the lease agreement relied on by the Plaintiff is invalid for not having been executed by the registered owner. In the alternative, she has contended that the Plaintiff was hopelessly in arrears of rent and that the distress was therefore valid.

It is clear from the conveyance exhibited as "RNK2" that the registered owner of the suit property is one James Mwangi Keige. However, the lease exhibited by the Plaintiff as "JKK1" and the 3rd Defendant as "DMM2" shows clearly that the 1st Defendant executed the said lease as the lessor of the suit premises. I do not think that the 1st Defendant can escape from responsibility on that lease. She presented herself as having the authority to enter into the lease agreement between herself and the Plaintiff. She further corresponded with the Plaintiff as the lessor of the suit premises. The Plaintiff obviously acted on that representation, signed the lease agreement, paid rent therefor and took possession of the suit premises. My view is that under Section 120 of the Evidence Act, the 1st Defendant is estopped from challenging the validity of the said Lease Agreement and the Plaintiff's claim thereunder.

The Plaintiff's contention is that the 3rd Defendant on the instructions of the 1st and 2nd Defendants raided the suit premises on 28th May, 2nd, 4th and 10th June, 2010 and confiscated various items there from which are set out in the Notification of Sale Nos. 532, 548,549,558,604 and 605, respectively which he produced as "JKK 3a". The Plaintiff contends that there was no proclamation before the removal of his items by the 3rd Defendant as aforesaid.

The Defendants answer is contained in their respective Replying Affidavits. I have already stated what

the Replying Affidavit of the 1st Defendant sworn on 8th March, 2011 states. I am of the view that, that affidavit is both scandalous and extremely bad in law. An Affidavit is a statement of fact and therefore evidence which is given on oath. My understanding has always been that evidence given on oath cannot be in the alternative or on without prejudice. Any evidence sworn in the alternative or on a without prejudice cannot be acted upon since evidence is supposed to be the truth. There cannot be alternative truths. A fact is either true or false. Whilst a party can plead in the alternative and or without prejudice in his/her pleading, that is not the case for an Affidavit. An Affidavit that is sworn on alternatives and on without prejudice is not only scandalous but incurably defective and that needs no authority.

To demonstrate what I have just stated, in paragraph 7 of the 1st Defendant's Replying Affidavit, the 1st Defendant swore on a without prejudice. In paragraph 10 she denied the Plaintiff's averments as to the raids on the suit premises by the 3rd Defendant and further stated:-

"…. In the alternative and without prejudice to the foregoing, I wish to aver that if indeed a proclamation was carried out by the 3rd Defendant, which is denied, then the same was carried out legally pursuant to an order of the court, and was for the collection of rent arrears particulars of which are well within the Plaintiff's knowledge."

Such are the averments to be found in that entire Replying Affidavit. Further, the same contains contradictions which make the Affidavit extremely unreliable. For example, in paragraph 3, she denies the Plaintiff's assertion that he is her periodical tenant in the suit premises by virtual of the Lease Agreement dated 19th December, 2006 which the Plaintiff has exhibited. In paragraph 4 she states that she is not authorized to enter into any lease agreement to the suit property since she is not the registered proprietor thereof. Then in paragraph 11, she depones:-

"11. THAT WITHOUT PREJUDICE TO THE FOREGOING, I wish to aver that it was an express term of the said lease agreement between the parties herein that the Plaintiff would settle the rent obligations on or before the 8th day of every month, which obligation the Plaintiff persistently breached as witnessed by the bounced cheques annexed hereto and marked 'RMK3(a-e)".

She then produced cheques issued in her name and that of the 2nd Defendant.

My view is and I so hold that, such an Affidavit is not only scandalous and unreliable, but also incurably defective. This is so because being evidence on oath, which part of such an Affidavit will the court rely on as the truth. The same in my view is not only embarrassing but it also prejudices the opposite party who cannot be able to tell the truth from fiction. To my mind, such an Affidavit ought to be struck out, which I hereby do.

Having struck out the 1st Defendant's Replying Affidavit, what is now left for consideration is the Replying Affidavit of the 3rd Defendant. His response to the Plaintiff's case was that, on the instructions of the 2nd Defendant given on 3rd May, 2010 he went on the same day to the suit premises and proclaimed the Plaintiff's items giving him 14 days to settle the rent arrears. He produced as "DMM3" proclamation No. 2376 in which he attached five (5) identifiable items '**AND ANY OTHER DISTRAINABLE ASSETS/GOODS/CHATTELS OF THE TENANT.'** He also stated that the items were seen through the window and he served the proclamation by affixing a copy onto the outer front door as no one was responding to his calls, that he later obtained orders for police assistance as the premises were locked and that he went back on 28th May, 2010 removed the items and sold them by public auction after advertisement and paid the 2nd Defendant the proceeds.

I find it difficult to accept the explanations given by the 3rd Defendant. His averment that he removed the items on 28th May, 2010 does not tally with the evidence he relies on as well as other evidence on record. Whilst the 3rd Defendant produced "DMM7" being the Notification of Sale of moveable property Nos. 532, 534, 548, 558 and 604 all dated 28th May, 2010, he also produced Notification of Sale Nos.602 and

605 dated 10th June, 2010 meaning that the items listed in the latter Notifications were removed on that later day. Further, the Plaintiff's assertions are that the 3rd Defendant raided the premises four (4) times and not once. That the 3rd Defendant only back dated the Notifications of Sale to the 28th May, 2010. Prima facie, I tend to agree with the Plaintiff that there may have been four (4) raids on the suit premises and not one as contended by the 3rd Defendant. The 3rd Defendant has admitted that fact in "DMM8" wherein in his fee note to the 2nd Defendant, he has clearly charged labour for four (4) times with different number of labourers for each occasion. Further, he indicated that the vehicles which removed the items were four in number and of different makes. That exhibit in my view, shows that the number of trips made to the suit premises may have been four and not one as the 3rd Defendant had contended.

Accordingly, if the 3rd Defendant could mislead the court in paragraph 7 of his Replying Affidavit, what assurance is there that he told the truth on the issue of proclamation. It raises questions how he could have received instructions on the 3rd May, 2010, proceed on the same day to the suit premises to levy distress and when he allegedly found the premises locked, he affixed the proclamation on the door. What was the urgency for? Was he not obliged to make one more or so visits to ascertain if truly the tenant could not be found? His story seems difficult to believe and on the material before me I am unable to do so. This seems to have been a calculated move by the Defendants, jointly and severally, to evict the Plaintiff from the suit premises in the guise of distraining for rent. The Defendants seem to have achieved their purpose by cleaning the entire premises of the Plaintiff's tools of trade! I believe that that is why the 3rd Defendant made four raids on four different occasions to clear the suit premises of all the items. That in my view is not legal. It contravenes the Auctioneers' Act and Rules. I believe that once an Auctioneer has proclaimed, he can only attach and remove only what he has proclaimed. After selling whatever he has attached and there is a short fall, it is only then that he should go back to proclaim once again for the balance and thereafter attach for the same. It is despicable that an auctioneer will purport to proclaim everything in a closed premises by affixing the proclamation on the outer door of the premises on his very first attempt. It is also clear from the record that the Defendants in this case did not even purport to demand for the alleged rent that was due. To my mind there was no due process culminating in the various raids that were meted upon the Plaintiff at the suit premises on the 28th May, 2nd, 4th and 10th June, 2010, respectively.

The upshot of the foregoing is that the Defendants acted illegally. They intended to achieve an eviction which they nearly achieved through the back door. They infringed upon the rights of the Plaintiff which requires a rebuttal. The Plaintiff has, in my view, established a strong prima facie case with a probability of success.

As regards the 2nd and 3rd limbs of the **Giella –vs- Cassman Brown**, I need not consider them having found that the Plaintiff has established a prima facie case and that the Defendants' have broken the law.

Be that as it may, I hold the view that to refuse to grant the injunction sought will be to reward the Defendants for their unlawful acts, to grant them what they had sought and partially achieved, that is, to drive the Plaintiff from the suit premises through most callous and unorthodox means.

As regards the balance of convenience, the same tilts in favour of upholding the law by not rewarding unlawful acts and to the contrary maintain the status quo. I am alive to the Defendants' contention that for two (2) years now the suit premises has remained in-operational and that the same being a business property, it should be put into good use. However, acceding to such a contention and deny the Plaintiff the injunctive order sought would, in my view, be to reward an illegality. Sometimes, the court needs to leave loss lie where it has fallen if only to maintain the rule of law. The Defendants created the present state of affairs. It cannot fall in their mouth that they need to put the suit premises to profitable use. This court cannot sanction an illegality!

For the foregoing reasons, the Defendants' application dated 23rd September, 2011 does not fall for consideration. I dismiss the same with costs and I allow the Plaintiff's application dated 18th June, 2010

with costs.

DATED and DELIVERED at NAIROBI this 13th day of June, 2012

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A. MABEYA
JUDGE