REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT 7 OF 2008

NAOMI MICHELLE LEVY ……..…….……PLAINTIFF

Versus

SILVIA BOLSON *sued as the administrator of the*

ESTATE OF GIUSEPPE BOLZONI ……..……DEFENDANTS

R U L I N G

1. Before me are two applications, the first, filed by the plaintiff on 11th February, 2011 and the second by the defendant on 13th April, 2011.

2. The former seeks inter alia, orders to vacate the injunctive orders issued by this court on 6th October, 2009, and that the applicant/plaintiff be allowed to occupy the suit property. The application is brought under Order 40 rule 6 and 7 of the Civil Procedure Rules and Section 1A, 1B, 3A and 63 of the Civil Procedure Act and is supported by the affidavit of Naomi Michelle Levy. The same expands upon the seven grounds on the face of the application, namely:

i. "That the defendant died sometimes on 14th February, 2010 in Italy after a long illness.

ii. That todate no legal representative has been appointed.

iii. That the management company appointed to manage the property has moved out.

iv. That the property is in danger of being wasted as nobody is taking care of the same.

v. That the plaintiff is in danger of losing her property as the property is left unattended.

vi. That apart from the building the plaintiff also has furniture worth 80,000 Eruos in the property which is likely to be vandalized and or stolen.

vii. That it is only fair that the injunctive order by vacated and the plaintiff allowed to occupy the property."

3.On 29th March, 2012 by a consent letter signed by the two advocates in this matter, one Silvia Bolzoni a

legal representative of the estate of the deceased defendant was joined as a party in place of the deceased defendant. Prior to that, on 25th March, 2012 counsel for the defendant had sworn a replying affidavit and filed grounds of opposition to the plaintiff's application. Both go into issues of fact and apparently contest the plaintiff's supporting affidavit. This is clearly erroneous. It is not proper for the party's advocate to jump in the fray, under whatever guise and to canvass upon facts in controversy between the parties (see decision of Ringera J, as he then was in **Kisya Investments Ltd & Ano vs. Kenya Fiannce Corporation Ltd & Others HCCC 3504/93).**

4. For these reasons, I have decided to strike out the replying affidavit sworn by Mr. Ndegwa on behalf of the defendant. Fortunately for the defendants, Mr. Ndegwa successfully moved the court to admit a supplementary affidavit sworn by Gian Franco Bruna the president of Ndovu Mdogo Ltd to the effect that the suit premises are beneficially owned by the said company, and are under the management of its appointee Sabatina Vitali Caporossi as ordered by this court. Further that the "property is well taken care of."

5. The second application was filed on 13th April, 2011 and seeks that the plaintiff's plaint be struck out and the entire suit dismissed whereupon summary judgment be entered for the defendant as per the defence and counterclaim filed herein. The same is expressed to be brought under Order VI rule 13 (1) a-d, 9, 10,(3), XXXV rule 1d, 2 of the Civil Procedure Rules and Section 1A and IB and 3A of the Civil Procedure Act (sic). Clearly these provisions are based on the old rules which have been replaced by the 2010 rules. Be that as it may, the grounds upon which the application was premised were inter alia, that the plaintiff has not filed a defence to the counterclaim filed by the defendant or reply to the defence.

6. The application is supported by the affidavit of Silvia Bolzoni. The gist thereof is that by her default the plaintiff is deemed to have admitted the facts of the counterclaim herein. Her plaint therefore"cannot disclose a cause of action" and should be struck out and judgment entered for the defendant. In her replying affidavit, the plaintiff states that this matter is not suitable for summary judgment and that delay/failure to file a reply to the counterclaim does not defeat her cause of action as per the plaint.

7. Both applications were by consent of the parties heard through written submissions. I have now read the parties' respective written submission in respect of the applications, as well as the oral arguments made during the highlighting session. I have also read through the ruling of Omondi J delivered on 6th October, 2009 which culminated in the injunctive orders the subject matter of the plaintiff's applications.

8. I intend to present in summary form the matters that were canvassed by the parties which go to the heart of the two applications. With regard to the plaintiff's application the key plank is that the suit property is at the mercy of vandals as the company appointed to manage the same has "moved out" thus exposing her to losses, she having paid a substantial portion of money to acquire the suit property. The defendant rejects her claim and state that the premises are under the care of a duly appointed manager, to which the plaintiff responds that the said manager has not furnished an affidavit. The plaintiff correctly argued that the replying affidavit by the defendant's counsel cannot stand as it consists of hearsay material and is irregularly presented.

9. With regard to the second application brought by the defendant, the defendant's argument is that the failure by the plaintiff to file a defence to the counterclaim amounts to an admission of the counterclaim and defeat of the plaintiff's cause of action as pleaded in the plaint. Thus summary judgment ought to be entered for the defendant on the counterclaim.

10. The plaintiff admits default in filing defence to counterclaim but argues that was not necessary by virtue of Order 7 rule 11 of the Civil Procedure Rules. Further that the defendant's application is an omnibus application drawing on non-existent or wrongly cited provision of the law, and is therefore defective, and without merit.

11. Having considered the material placed before me and rivaling arguments, I take the following view of the matter. The plaintiff's application is seeking to vary or set aside injunctive orders issued against her on 6th October, 2009. Before making the orders, the court had satisfied itself that the defendant's

application for such orders met the standards in **Giella vs Cassman Brown & Co.** The court found that there was a prima facie case of breach of the terms of the sale agreement between the plaintiff and defendant. It stated:

"Defendant sold the property (to the plaintiff), gave vacant possession, yet three years later when the sale ought to have been completed the (defendant) now he now has neither the property nor the money."

12.There is no evidence that the situations has changed since then. The plaintiff abandoned her grounds which cited failure by the defendant's estate to appoint a legal representative, after Silvia Bozoni was appointed. Equally, allegations that the management company Ndovu Ndogo Ltd had "moved out" leaving the property exposed are not supported by any evidence by the plaintiff. The affidavit of the president of the said company sufficiently controverts her assertions even though it may have been more appropriate for the manager, of Ndovu Ltd to swear an affidavit.

13.Be that as it may however, I am not satisfied that the plaintiff's application musters the threshold of prima facie case as outlined in **Giella vs Cassman Brown**. It would appear that the plaintiff's application was an attempt to get what she failed to achieve by her initial application before Omondi J. The subsequent appointment of a legal representative to the estate of the defendant effectively put paid the said attempt.

14.With regard to the defendants application for summary judgment, it is admitted that the wrong provisions of the law have been cited. This however is a defect in form that ought not to defeat the application if the same had any merit. In my considered view, the application is with respect as misconceived as the plaintiff's assertion that the plaintiff did is not required to file a defence.

15.Under the 2010 Civil Procedure Rules, Order 2 rule 15(1) provides for the striking out of any pleading on grounds that:

"(a) It discloses no reasonable cause of action; or

(b) It is scandalous, frivolous and vexation; or

(c) It may prejudice, embarrass or delay the fan trial of the action; or

(d) It is otherwise an abuse of the process of the court"

The wording of the rule clearly shows that a party must make an election of one or other ground. Besides under rule 2 no evidence is admissible in an application under subrule 1(a). What the defendant in this case has done is cite all the grounds in Order 2 rule 15(1) of the Civil Procedure Rules and in addition file a supporting affidavit. Thus the application cannot stand in terms of Order 2 rule 15(1) (a).

16. Secondly, the defendant has sought summary judgment now governed by Order 36 rule 1 and 2 of the Civil Procedure Rules which stated:

"1. (i) In all suits where a plaintiff seeks judgment for-

(a) A liquidated demand with or without interest; or

(b) The recovery of land, with or without a claim for rent or mesne profits, by a landlord forma tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

Where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2) the application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

2. The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit"

17.Mr. Khatib has argued that the practice of filing defences to counterclaim is not a requirement of the law. For this proposition he cited Order 7 rule 17(3) which states:

"Where a counterclaim is pleaded, a defence thereto shall be subject to the rules applicable to defence and Order 7 rule 1 of the Civil Procedure Rule provides for the filing of a defence. Within 14 days of appearance. The consequences of default are outlined in Order 10 which allows for a claimant to apply for judgment against the defaulting party. This, in my considered view, the defendant should have considered its option under Order 10 of the Civil Procedure Rules in the face of the plaintiff's admitted default. Instead the defendant resorted to the summary procedure under order 36 of the Civil Procedure Rules, which applies to liquidated demand or recovery of land (with or without mesne profit) by a landlord from a tenant. A reading of the defence and counterclaim discloses out of a sale agreement between the parties and the prayers in the counterclaim are non suited for the summary procedure contemplated in Order 36 rule 1a and b."

18.The counterclaim does not qualify as a liquidated claim or one for recovery of land by a landlord form a tenant or trespasser. A motley of prayers is listed in the counterclaim, including injunctions, declarations, special damages vacant possession, mesne profits, specific performance order for amounts, damages for breach of contract. So that even if it were to be argued that the plaintiff is entitled to approach the court for summary judgment against the plaintiff under Order 36 rule 1 (b) as a landlord proceeding against a trespasser, the remainder of the prayers in the counterclaim are not amenable to the said provision.

19.Besides, it does appear that the defendant's argument is equally defective: the failure by the plaintiff to file a defence to counterclaim amounts to admission of the same, hence the plaintiff's plaint discloses no cause of action, and consequently summary judgment should be entered for the defendant. With respect the argument is contrived in as much as it attempt to argue together two separate applications in one: an omnibus.

20. An application to strike out a pleading under Order 2 should proceed on the basis on grounds provided there under (see rule 1 (a-d). It is novel to ask the court to strike out the pleading on the basis that a defence has not been filed, which is essentially what the defendant is asking this court to do via a stretched argument that the plaintiff's supposed admission of the counterclaim renders her cause of action unviable in terms of Order 2 rule 15 of the Civil Procedure Rules.

21.For the foregoing reasons, I have found no merit in the plaintiff's application filed on 11th February, 2011 or the defendant's application filed on 13th April, 2011. Both are dismissed. Each party will bear own costs. The plaintiff should file a defence to the counterclaim if she desires to resist it. I direct that after such defence is filed, the parties proceed to set down this suit for hearing with dispatch, and in any event, within six (6) months of today's date, as it is an old matter.

Delivered and signed this 26th of July, 2012 in the presence of Mr. Khatib for the plaintiff/applicant, Respondent/defendant no appearance. Court clerk – Leah/ Evans.

C. W. Meoli

JUDGE