REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 237 of 2010

NASSOR MOHAMED NAHDY …... PLAINTIFF

VERSUS

ABDALLA AHMED OMAR …... DEFENDANT

RULING

(1)"The rule of law applicable to the case appears to me to be this:

If a man under a verbal agreement with a Landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the Landlord, that he shall have a certain interest, takes possession of such land, with the consent of the Landlord, and upon the faith of such promise or expectation, with the knowledge of the Landlord, and without objection by him, lays out money upon the land, a court of equity will compel the Landlord to give effect to such promise or expectation …

"If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the Landlord, the tenant has no claim which any court of law or equity can enforce."

Per Lord Kingsdown, sitting in the House of Lords in **Ramsden v. Dyson (1866) L.R. 1 H.L 129 at pp. 170-1**. I recite the above principles of law and agree with Kingsdown that they are founded on plain rules of reason and justice. The principles have been followed in the two English Court of Appeal decisions cited by counsel for the Defendant herein - I**nwards v. Baker (1965) 2 QBD 29 and Crabb v. Arun District Council (1976) 1 Ch. 179** - and adopted in Kenya by Harris J. in the 1968 decision of **The Commissioner of Lands v. Hussein (1968) EA 585**. I consider the principles to be applicable **on all four** to the disputes before the court in these proceedings.

It is common ground that the Defendant, at his expense, demolished an old daub and wattle house on which he operated a hotel business as a tenant of the Plaintiff, and subsequently put up a modern commercial building on which he resumed his hotel operations and let part of it to third parties. What is disputed is the exact terms and circumstances upon which the Defendant undertook the expenditure in demolishing the old house and constructing a modern building upon which he continues to carry on business. There is no dispute as to the ownership of the parcel of land which lies with the Plaintiff.

(2) For the Plaintiff, it is submitted in reliance to the Plaint and his supporting affidavit that the Defendant requested the Plaintiff to demolish the old daub and wattle house which the Defendant then occupied as a tenant and put up a modern and permanent premises. When the Plaintiff explained that he had no funds

for the exercise, the Defendant suggested to the Defendant that he (the Defendant) would do the demolition and put up a new building at his own cost. The Plaintiff alleges that he agreed with the Defendant's proposal **"subject to the two entering into a written agreement before the Respondent (Defendant) would either demolish or construct a new building."** It is further submitted for the Plaintiff that:-

"without the said agreement or authority from the Applicant (Plaintiff), the Respondent (Defendant) went ahead to demolish the old house over which he had a monthly tenancy. In essence the existing tenancy terminated with the demolition of the house and any subsequent dealings with the land by the Respondent without the authority of the Applicant were unlawful and amounted to trespass. Upon the demolition of the house, the Respondent went ahead and constructed a one storey building which he is using for commercial purposes and he has let part of it for profit. He is not paying rent to the Applicant and indeed there is no tenancy agreement between himself and the Applicant... The building has also been condemned by the Municipal Council and the Respondent ordered to demolish it for want of approval of the building plans."

(3)The Defendant's perspective on the matter is synthesized in the submissions filed on his behalf is as follows: -

"That as good friends, the Plaintiff and the Defendant thought of how to end a long standing problem of refurbishing (after every rainy season) the old daub and wattle house from where the Defendant's family has operated cafe business for a long time as explained above. The Plaintiff invited the Defendant to demolish at his expense the old daub and wattle house on the suit property and in its place put up a wooden commercial structure at his own cost. The new ground rent would be agreed upon. The Defendant would also pay a token fee in cash to the Plaintiff in the sum of Ksh. 300,000/-. The defendant had the building plans done. He represented them to the Plaintiff who signed one set, albeit the Plaintiff disputes ever signing the same. The plans were nevertheless approved by the Municipal Council of Mombasa. The demolition and redevelopment of the suit property followed openly and it was not until the construction work entered the second level that the Plaintiff wrote to the Defendant to ask him to stop further construction work and enter into an agreement to avoid trouble in future. In these circumstances, the Defendant avers that he has an equitable interest under the principle of Inwards v. Baker [(1965) 2 QBD 29], having been encouraged by the Plaintiff to demolish the old house and in its place put the new structure at a great expense. He has expended money on the land of another and enhanced the value of the property tremendously. The Plaintiff would thus be unjustly enriched were he to keep the Defendant out of the house by getting an injunction to cease business, or if he otherwise managed to stop the business carried on thereat by the Defendant and his partners."

(4) The Plaintiff and the Defendant have lodged claims against each respectively by way of the Plaint dated 9th July 2010 seeking principally possession of the suit land and premises and the eviction of the Defendant therefrom; the recovery of rent and mesne profits from the Defendant; injunction to compel the Defendant to demolish the structure on the land and to restrain the Defendant from carrying on any trade on the premises, and a counter-claim dated 2nd August 2010 seeking principally a declaration of an equitable permanent tenancy on the suit premises in favour of the Defendant and, in the alternative, the award of damages for breach of the oral agreement for the grant of an equitable permanent tenancy to the Defendant.

(5)In furtherance of their respective interests in the suit premises, the parties have filed the two interlocutory applications dated respectively the 19th July 2010 and 17th August 2010, both which are the subject of this ruling. The former application, being an amended chamber summons amending the earlier application of 9th July 2010 after leave of court granted on 16th July 2010 sought the following orders: -

1. That this matter be certified as urgent and heard ex parte in the first instance.

2. That service on the Defendant be dispensed with.

3. That the Defendant by himself or by his servants and or agents be compelled to submit for approval the plan for building now standing on plot No. XVI/30/MN Mwembe Tayari off Jomo Kenyatta Avenue, Mombasa or in the alternative

4. That the Defendant by his agents and or servants or employees be ordered to pull down or, erase, remove or knock down the building now standing on plot No. XVI/30/MN Mwembe Tayari off Jomo Kenyatta Avenue, Mombasa.

5. That in the ALTERNATIVE to prayers 2 and 3 that by order of prohibition the Defendant be ordered to stop cease and or stop all the business, carried on by himself, his agents or servant in the premises in question.

6. ***That by order of orders of prohibition the Defendant be ordered to stop, cease or [close] the business carried by himself in the premises or his nominees be prohibited, stopped, restrained and in any way barred from constructing, rectifying building or any other way continuing to build or construct on plot No. XVI/30/MN off Jomo Kenyatta Avenue Mombasa in Mwembe Tayari aforesaid until further orders of this Honourable Court."***

The application was heard ex parte on 21st July 2010 and the court granted prayer No. 6 for 14 days pending hearing inter partes of the application on the 2nd August 2010.

(6)Aggrieved by the ex parte order to cease his business and further construction on the suit premises the Defendant filed his application by way of Notice of Motion dated 17th August 2010 seeking principally orders that: -

"2. The amendment of the Plaintiff's application for injunction is set aside for exceeding the leave and directions of the court; and

3. The injunction granted by this court is set aside and discharged on account of

(i) want of timely service on the Defendant and non-compliance with the rules of court;

(ii)Non disclosure of material facts and especially the fact that the Defendant (with others not parties to this suit) was in possession and carrying on business in the suit premises as a protected tenant;

(iii)It is granted in mandatory terms although the Plaintiff did not satisfy the requirement(s) for the grant of mandatory injunction;

(iv)The Plaintiff has circumvented the provisions of the Landlord and Tenant (Shops, Hotel, and Catering Establishment) Act and the injunction is thus counter-statute;

(v)The Plaintiff has not offered an undertaking as to damages."

(7)The proceedings leading to orders of 21st July 2010 challenged by the Defendants application of 17th August 2010 are as follows: -

"16/07/ 2010

Before Hon. Justice Mohamed Ibrahim
Court Clerk Kazungu
Mr. Hayanga for Plaintiff/Applicant
Mr. Hayanga
I wish to amend.
Order:

Application is certified as urgent. It shall be heard on 21st July 2010. The Applicant is granted

leave to amend prayer 3.

Ibrahim, J

<u>21/07/2010</u>
Before Hon Justice Mohamed Ibrahim
Court Clerk Kazungu
Mr. Hayanga for the Applicant
<u>Mr. Hayanga</u>

I have carried out the amendments. I apply for interim orders. The construction is continuing sporadically. There is an order for urgency.

<u>Order</u>

The application dated 19/07/10 shall be heard within the next 14 days. In the meantime, I do hereby grant prayer 6 of the application pending inter partes hearing which shall be on 2/8/2010.

Ibrahim, J."

(8) Against the background of disputed facts with regard to the circumstances surrounding the Defendants activities and occupation of the suit premises and the court proceedings as recorded on the court file and set out above, counsel for the parties, respectively, Mr. Hayanga for the Plaintiff and Mr. Kimani for the Defendant, have filed written submissions which the court has referred to earlier in his ruling and cited case law authorities in support of their respective contentions.

(9) Counsel for the Plaintiff/Applicant submits as regards application of 19th July 2010 that interlocutory prohibitory and mandatory injunctions are available to the Plaintiff on the authorities of **Giella v. Casman Brown (1973) EA 358 and Locabail International Finance Ltd v. Agro Export (1988) ALL E.R. 901**, respectively, on the strength of alleged facts that the Plaintiff is the owner of the parcel of land on which the Defendant former tenant constructed a building without his (Plaintiff's) authority by which action the Defendant has denied the Plaintiff the beneficial use of the property and rental income therefrom in an attempt by the Defendant to steal a march from the Plaintiff and dispossess him of the suit property. With regard to the Defendant's motion of 17th August 2010 to set aside amendments on the application on 19th July 2010 and the ex parte injunction granted therein, the Plaintiff's counsel argued that the amendments which were effected before close of pleadings and hearing of the application by the Judge were within the provisions of section 100 of the Civil Procedure Act and Order 8 rule 1 (1) of the Civil Procedure Rules and could have been effected even without leave of the court, and cited **Commissioner of VAT v. Shah & Others (1999) 2 EA 58** for the proposition that a chamber summons is a pleading amenable to such amendment. The Plaintiff further argued that late service of application and order is not **"a ground for setting aside of ex parte order granted by the court upon certification of a matter as being urgent"**, and that the Plaintiff had disclosed that the Defendant was in possession, and hence the prayer No. 6 of the application, but that he was a trespasser as the old landlord/tenant relationship had been determined upon the unlawful demolition of the old house and construction of the new house, and **"since then there has never been any other landlord and tenant relationship between the Plaintiff and the Defendant whether protected or not, and as such he cannot allege that the Plaintiff failed to disclose that he was a protected tenant."**

(10) In seeking the dismissal of the Plaintiff's application, the counsel for the Respondent summarizes his submissions into five contentions as follows:

1. The application was certified urgent and admitted to hearing mischievously and through legal deceit;

2. The suit and the application were brought after the house enacted on the suit property had risen to the second level and the Defendant and his partners had resumed operation of their cafe business, and there was no ground for the issue of peremptory injunction;

3. The Defendant has shown that he has equity of expectation arising out of the expenditure of his money on the land of the Plaintiff with the latter's acquiescence and consent and the equity is capable of protection both in equity and under the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act;

4. The ex parte proceedings were a nullity and the injunction and the pleadings were not properly and thereby served as required by law.

(11) I have considered the twin-issue in the two applications, namely whether interlocutory prohibitory and mandatory injunction will issue in the circumstances of the case or whether the ex parte orders granted herein will be set aside or discharged. I find that the determination of the issue depends on the answers given to several questions which are sub-sets of the issue, namely: (a) the principles for the grant of interlocutory injunction in the form both or prohibitory and mandatory directives; (b) principles for the amendment of pleadings; (c) effect of non-disclosure of material particulars and its application herein; and (e) primarily, the dictates of the overriding objective of the civil court process in the present proceedings.

(12) As I stated at the outset of this ruling, the determination of the suit will depend upon the court's decision as to whether in accordance with the two principles of the Rule in **Ramsden v. Dyson,** supra, the expenditure by the Defendant on the construction of the building upon the Plaintiff's parcel of land was authorized, approved or encouraged by the landlord. If the answer is in the affirmative, an equity is created in favour of the defendant capable of protection and enforcement by a court of law and equity by injunction both prohibitory and mandatory. The decisions of **Inwards v. Baker, Crabb v. Arun D.C.** and **The Commissioner for Lands v. Hussein**, supra, exemplify this principle. If the answer is in the negative, the Defendant will be declared a trespasser and ejected from the suit property and penalized in mesne profits.

(13) On the authority of **Mbuthia v. Jimba Credit Ltd** (1988) KLR 1, it is not for this court at the interlocutory stage to determine disputed matters of fact; it is for the trial court to deal with the findings of facts, and all the court at interlocutory stage is required to do is to weigh the respective strengths of the respective propositions of the parties. Deferring the determination of the disputed facts to the trial court, I would agree with the decision in *American* **Cyanamid Co. v. Ethicon 1975)1 ALL ER 504** and Platt JA in the **Banana Hill Investment Ltd v. Panafrican Bank Ltd and 2 ors.** (1987) KLR 351 that the establishment of prima facie case is not primary to the consideration of whether to grant interlocutory injunction, and that the same should be considered on the balance of convenience and amenability to relief by compensation in damages. See my decisions on this point in **Margit Sommer Charo v. Isaac Njuguna Noroge, Mombasa HCCC NO. 230 of 2010 and Michael Ndungu Mbugua and 2 Ors v. Cecilia Wanjiru Cooper and Anor. Mombasa HCCC NO. 460 of 2011**.

However, if I had to consider the prima facie test under the **Giella v. Casman Brown** principle, I would find that the matter raises a doubt resulting from conflict between legal title to land and equitable interest in land with Plaintiff's legal title to the suit property being prone to the probability of declaration of proprietary equitable interest on the part of the Defendant by virtue of the rule in **Ramsden v. Dyson** because of his expenditure on the construction on the Plaintiff's suit property with apparent approval of the Plaintiff. I am encouraged in this observation by the uncontested allegation of fact by the Defendant that the Plaintiff stood by without protest for over one year when the Defendant put up the building after demolishing the daub and wattle house; that by his letter of demand of 4th January 2009, the Plaintiff only requested the Defendant to cease upward development and instead complete the first and mezzanine floors as they waited to write and sign an agreement; and by the fact that no explanation is offered by the Plaintiff as to how the Defendant resumed possession of the premises for purpose of operation of the hotel business following the demolition of the daub and wattle house on which event the Plaintiff contends the Defendant's tenancy on the premises was extinguished. The latter might render credible the assertion of protected status of the Defendant under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap. 301.

(14) I find that the balance of convenience is in the preservation of the property pending determination of the dispute on ownership of proprietary interests on the property. As the Defendant has by virtue of the consent order of 20th August 2010 operated this hotel business pending the hearing and determination of the applications, the balance of convenience before the final determination of the dispute would lie in the continuation of the business so that the substance of the dispute is not lost or damaged pending the termination thereof rendering the Defendant's counter-claim to proprietary equitable interest nugatory. The Plaintiff's legal ownership of the property will not be affected by preservation of the status quo as a suitable order for ground rent or mesne profits will be available either upon the interlocutory application or the final determination of the suits. The parties may be directed to agree on such ground rent on account without prejudice pending the final determination of the dispute.

As regards whether the award of damages is adequate compensation, I accept the conventional wisdom of judicial practice observed in **Russel Co. Ltd** case [**Russell Co. Ltd v. Commercial Bank of Africa Ltd & Another (1986) KLR p. 633]** that in cases involving land it is usual to grant injunctions. I however distinguish the present application in that the Plaintiff is not really losing his proprietary right to the land. The land has, both before and after the acts of demolition of the daub and wattle house and construction of a modern building thereon, been used as a commercial premises of alleged tenancy and any loss therefrom is the rental income which can adequately be quantified. The land remains the property of the Plaintiff.

(15) However, as regards interlocutory mandatory injunctions, I accept as held in **Locabail International Finance Ltd** case, supra, that they should be granted in special circumstances and only in clean cases. In view of the real propensity of proof of proprietary equitable interest by the defendant, I do not find that the plaintiff's case for possession and ejection of the Dependant as sought by the chamber summons application of 19th July 2010 is clear nor do I find any special circumstances the claim being one of alleged implied termination of tenancy between the parties upon the demolition of the daub and wattle house.

Moreover, being in the nature of a final order, mandatory injunctions should not be made on ex parte applications. As held in **R v. Attorney General & Another (2006) 2 KLR 219** ex parte orders are in their nature **provisional** and may be set aside by the court that granted them or other court in its place. A final or peremptory order ought only be made upon hearing both parties and not at ex parte stage. See **Noormohamed Jarmohamed v. Kassanali Virji Madhani (1951) EACA 8** and **Graig v. Karseen (1943) ALL ER 108.**

Accordingly, the portion of the ex parte order granted under prayer No 6 of the chambers summons of 19th July 2010 which had mandatory effect requiring the Defendant to **"stop, cease or close"** his hotel business is a nullity, which must be set aside *ex debito justitiae.*

(16) The principle for the setting aside of ex parte orders on the grounds of non-disclosure of material facts founded on the decision of **King v. Kensingston General Commissioners for the Purposes of the Finance Tax Ex parte Princess Edmond De Polignac (1917) 1 KB 486** must be a consequence of reason and justice and it has been adopted in Kenya famously by the **Uhuru Highway Developers Ltd v. Central Bank of Kenya cases (1995) KLR.** I however do not find that the Plaintiff herein is guilty of material non-disclosure. The Plaintiff disclosed that the Defendant was in possession of the suit premises and in fact sought an order for cessation of business and further construction of the building. The issue as to whether the Defendant is a protected tenant under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act is a matter of law for the court to determine on the facts of the case to be proved at trial. The Plaintiff cannot under the duty of such disclosure be required to make statements on matters of law. Furthermore, it has not been shown that the cardinal ingredient for the offence of non-disclosure that the court was thereby deceived into making the ex parte orders. From the record of the proceedings set out above, it appears that the court was moved by the submission by counsel that the construction was proceeding sporadically and not by any deficiency in the description of the Defendant as a protected tenant under the Landlord and Tenant Act. [Because of the terse record of proceedings, I take opportunity here to call for the adoption of digital recording and transcription of the record of proceedings in court to ensure a full accurate and intelligible record upon which determination of subsequent

proceedings in the suit or upon appeal with be based].

(17) As regards the amendment of pleadings and the chamber summons of 19th July 2010 in particular, I would invoke the overriding objective of the civil process for the effective and fair determination of disputes to permit, as mandated by section 100 of the Civil Procedure Act, the amendment so that the real dispute between the parties may be determined. In this regard, I accept the holding in **Eastern Bakery Ltd v. Castellino (1965) EA 461** in that amendments sought before hearing should be freely allowed. The need to allow amendment to ensure that the real questions for determination between the parties are brought forth to the basis for the rule permitting amendment without leave of court in cases where, as in the present matte, the pleadings are not closed. I therefore do not find any merit in the objection by the Defendant on this appeal. That the Judge appeared to certify the application urgent before the actual inclusion by amendment of the formal prayer for certification of urgency and dispensation of service upon the Respondent is, in my view, a mere irregularity which could be and was indeed cured subsequently upon amendment by the same Judge who dealt with application on first appearance during the second appearance upon amendment. This irregularity and the alleged service of application and order outside the period prescribed under the Rules are some of the matters contemplated under Article 159 of the Constitution which directs the court to render substantial justice without undue regard to technicalities of procedure, especially where, as here, no prejudice has been shown to have resulted from the defaults. Save for the peremptory mandatory injunction order for the closure of the hotel business which I have dealt with elsewhere, the Defendant was able to enter appearance and file a Defence and Counter-claim and accompanying counter-application for the setting aside of the ex parte orders. I would therefore not consider fatal without more, the defaults in relation to certification of urgency, dispensation of service and the alleged late service of the application and order as prescribed in the Rules so as to call for the setting aside of the ex parte orders herein.

(18) Accordingly, for the reasons set out above, I make the following orders on the Plaintiff's Amended Chambers Summons dated 19th July 2010 and the Defendant's Notice of Motion dated 17th August 2010:

1. The mandatory injunction granted ex parte on 21st July 2010 for the Defendant to stop, cease or close his hotel and other business activities on the suit property is set aside.

2. The prohibitory injunction restraining the Defendant from proceeding with the construction of the building on the suit premises is confirmed and extended until the hearing and determination of the suit or until further orders of the court.

3. As the Plaintiff is entitled to compensation from the Defendant whether by way of ground rent, if the Defendant be established a lawful tenant or mesne profits if the Defendant is declared a trespasser, the parties are directed to agree on the amount of such payment to be paid during the pendency of the suit on account and towards the payment of the damages recoverable as such ground rent or mesne profits to date and thereafter until determination of the suit, and in default of agreement the court on motion by either party to determine such amount.

4. As each party has partially succeeded in its action against the other party, I direct that the costs of the two applications be costs in the cause.

5. For avoidance of doubt, the Defendant shall continue to operate the hotel business and other commercial interests on the suit property but he shall not proceed with further construction on the suit property until the hearing of the suit or further orders of the court.

6. The matter shall be mentioned after 14 days on the 31st October 2012 for compliance with respect to order No. (3) above on the interim payment by the Defendant.

Dated and delivered this 16th day of October 2012.

EDWARD M. MURIITHI
JUDGE

In the presence of:

Mr. Oguk for Mr. Hayanga for the Applicant

Mr. S.M. Kimani for the Respondents

Miss Linda Osundwa - Court Clerk