



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 721 of 2012

TAJ MILLENIUM MANAGMENT LIMITEDPLAINTIFF

VERSUS

TAJ MALL LIMITED..... DEFENDANT

RULING

1. The plaintiff / applicant has filed a notice of motion dated 17/10/12 under section 3A & 63(e) of the Civil Procedure Act, Order 40 Rules 1,2 & 3 and Order 51 Rule 1 of the Civil Procedure Rules, seeking the following orders;

i. spent.

ii. That this Honourable Court be pleased to issue an order of injunction restraining the defendant either by itself, its agents, servants and/or its officials from disposing off, charging, transferring or in any other manner dealing with the suit property, LR. No. 209/14036 pending the inter partes hearing of this application.

iii. That this Honourable Court be pleased to issue an order of injunction restraining the defendant either by itself, its agents, servants and/or its officials from disposing off, charging, transferring or in any other manner dealing with the suit property, LR. No. 209/14036 pending the inter partes hearing of this suit

iv. That this Honourable Court be pleased to issue an order of injunction restraining the defendant either by itself, its agents, servants and/or its officials from carrying out any further works of bringing down the gymnasium or in any manner interfering with the gymnasium pending the inter partes hearing of this application.

v. That this Honourable Court be pleased to issue an order of injunction restraining the defendant either by itself, its agents, servants and/or its officials from carrying out any further works of bringing down the gymnasium or in any manner interfering with the gymnasium pending hearing and determination of this suit.

vi. That a mandatory injunction be issued to compel the defendant either by itself, its agents, servants and/or officials to reinstate the gymnasium to its previous state pending the hearing and determination of this suit.

vii. That a mandatory injunction be issued to compel the defendant either by itself, its servants and/or its officials to transfer the revisionary interest to the plaintiff pending the hearing and determination of this suit.

viii. That a mandatory injunction be issued to compel the defendant either by itself, its servants and/or its officials to hand over the following documents to the plaintiff pending the hearing and determination of this suit.:-

- a) The original certificate of incorporation of the plaintiff.
- b) Memorandum and articles of association relating to the plaintiff.
- c) Company seal belonging to the plaintiff.
- d) Original certificate of title relating LR. No. 209/14036 (the property).
- e) Original building plans and
- f) Originals of all the thirty (30) share certificates relating to the apartments on the suit property.

ix. That the costs of this application be provided for.

2. The application is based on the following grounds.

i. The defendant has breached a lease agreement requiring it to among other things transfer the revisionary interest to the plaintiff as the management company.

ii. Despite numerous requests to hand over vital documents relating to the plaintiff, the defendant has refused and/or neglected to hand over the same.

iii. The defendant's continued holding the said documents is not only unlawful but also infringes on the plaintiff's constitutional right as to property.

iv. The plaintiff's operations are at risk of being crippled in absence of the documents enumerated herein above.

v. Unless the orders sought herein are granted, the defendant may continue breaching the lease agreement which will adversely affect the interest of the plaintiff.

vi. This application is aimed at promoting the plaintiff and its shareholders right to the suit propriety.

vii. It is therefore in the interest of justice that the orders sought in the application herein be granted.

3. Mr. Samuel Ouko Mbori the Chairman of the Board of Directors of the plaintiff depones as follows in his affidavit: That he is one of the apartment owners/sub lessees in respect of the parcel of land known as L.R No. 209/14036 and as such he is a shareholder of the plaintiff. That the defendant is and has been the registered proprietor as lessee from the Government of the Republic of Kenya for the unexpired residue of the term of ninety nine years of all that parcel of land known as L.R No. 209./14036 situate in the city of Nairobi measuring 0.3264 ha (hereinafter known as the suit property). That defendant developed properties for sale and created leases in favour of the purchasers in respect of suit propriety in the concept of apartments against which it sold the same in the market to would be purchasers and owners of the apartments and holders of leases conferring title and ownership upon them. That on or about 27th September, 2001 the plaintiff entered into a lease agreement with the defendant in respect of the suit property. In the said lease agreement the defendant agreed with the plaintiff among other terms as

follows:-

(a)The defendant had erected on the said parcel of land certain building consisting, of thirty (30) residential flats, health club, swimming pool, parking place and developed gardens.

(b) Upon payment of full membership fees of Kshs.50,000/- by each of the sub-lessees (apartment owners) to the defendant it will transfer the reversionary interest to the plaintiff and that all the lessees were to pay Kshs. 50,000 being membership fees for membership in the plaintiff and their respective portion of the reversionary interest.

(c)The plaintiff would manage the estate and the lessees of each flat in the estate would simultaneously with the execution of their respective leases apply for membership in the plaintiff to remain inseparable portion of their respective leases.

4. That the defendant sold all the thirty (30) units to willing purchasers. It was a condition of the said lease agreement that upon purchase of any unit in the project one would buy a share in the plaintiff. All the purchasers complied with the foregoing condition and as such, all the buyers became shareholders. That despite the plaintiff and the purchasers and owners of the apartments complying with the terms and condition of the said lease, the defendant has refused to transfer the reversionary interest to the plaintiff. That in addition to the above, and in further breach of the terms of the lease agreement the defendant did not construct a gymnasium (health facility) and instead decided to convert two (2) of the units into a gym where the defendant has been levying charges to the apartment owners and allowing outsiders to access and use the facilities. That the defendant has removed the gym equipment and is now in the process of converting the said two units into apartments. That unless restrained by this Honourable Court, the defendant will continue to breach the agreement which will ultimately affect the plaintiff's interest in the suit property. That the defendant may deal with the suit property in a manner which is likely to defeat the plaintiff's rights to the suit property. That despite the fact that the apartment owners bought shares in the plaintiff, the defendant has refused to release vital documents relating to the plaintiff which has the effect of hampering the operations of the plaintiff. As such, this Court is enjoined to order that the defendant releases all the documents relating to the plaintiff and the suit property to the plaintiff for safe custody. That the plaintiff has demonstrated a clear and a straight forward case which merits grant of orders of mandatory injunction at the interlocutory stage. That the prayers sought are extremely necessary to obviate any hardship in running the operations of the plaintiff. The apartment owner's interest/right in the suit property is at risk in that there is no guarantee of reversionary interest. The defendant cannot sustain a plausible defence to this application and the entire suit given that it sold the apartments to the plaintiff's shareholders and as such the defendant is required by law to transfer the reversionary interest to the plaintiff. The plaintiff is not entitled to the documents he is withholding from the plaintiff and any refusal to release them is unlawful. It is inequitable for the defendant to have the purchase price and continue retaining the title to the suit property. It is in the interest of justice that the prayers sought be granted. That the defendant has refused to transfer the reversionary interest and release the said documents to the plaintiff despite numerous requests for it to do so hence this suit.

5. The application was served on the respondent who did not respond. The applicant seeks prayers 2 to 8 of the application under consideration. In this ruling I have reproduced what is averred in the applicant's affidavit which has not been challenged by the defendant. The applicant has demonstrated through annexure SOM1 that they are shareholders of the plaintiff and through SOM2 the defendant is the registered proprietor as lessee from the Government of Kenya. Through SOM3 it has annexed the lease with the defendant that describes the agreement they have. As owners of the property are aggrieved by the defendant's current actions of wanting to remove the gym equipment which they have had all along. The defendant has not challenged the fact that it is in breach of the agreement. To preserve the status quo I find that the defendant is entitled to an order of an injunction as prayed in prayer 3 of the application. The applicant being owners of the various units have demonstrated a prima facie case with a probability of success. They are likely to suffer irreparable loss and the balance of convenience tilts in their favour.

6. In my view the applicant is entitled to prayer 3 and 5. I decline to grant prayer 6, 7 and 8 at this stage, as they are mandatory orders which should be granted after full hearing of the suit. I therefore grant

prayer 3 and 5;

3. That an order of injunction shall issue restraining the defendant either by itself, its agents, servants and/or its officials from disposing off, charging, transferring or in any other manner dealing with the suit property, LR. No. 209/14036 pending the hearing and determination of the suit

5. That an order of injunction shall issue restraining the defendant either by itself, its agents, servants and/or its officials from carrying out any further works of bringing down the gymnasium or in any manner interfering with the gymnasium pending hearing and determination of this suit.

Cost shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 6th day of December 2012.

R. OUGO

JUDGE

In the Presence of:-

.....PLAINTIFF/APPLICANT

..... DEFENDANT/RESPONDENT

.....COURT CLERK