



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LAND AND ENVIRONMENTAL LAW DIVISION

CIVIL SUIT (ELC) NO.25 OF 2010

**FAZA HOLIDINGS LIMITED T/A DOWNTOWN
HOTEL.....PLAINTIFF**

VERSUS

JOHN KAGONYE NGURURI.....1ST DEFENDANT

KANGERI WANJOHI T/A KINDEST AUCTIONEERS.....2ND DEFENDANT

RULING

1. By a notice of motion dated 2nd February, 2010, John Kagonye Ngururi and Kangeri Wanjohi t/a Kindest Auctioneers seeks the following prayers:

(i) (spent)

(ii) That the ex-parte temporary injunction granted by this honourable court on 26th January, 2010 be discharged, stayed or set aside.

(iii) That the plaintiff's application dated 22nd January, 2010 be struck out and or dismissed.

(iv) That the plaintiff's suit be struck out with costs or stayed pending the hearing and determination of

(v) That the costs of this application and those of the plaintiff's application dated 22nd January 2010 be borne by the plaintiff.

2. The application is premised on grounds stated on the body of the motion. It is also supported by an affidavit sworn by the 1st defendant on 2nd February, 2010. Essentially, the defendants maintain that the orders of 26th January, 2010 were obtained through misrepresentation and non-disclosure of material facts. In particular non-disclosure of the fact that there has been previous suits between the parties involving the same subject matter i.e. LR No.209/4356 in which orders of interlocutory injunction either lapsed or were discharged, and that a suit filed against Eco Bank Ltd by the administrators of the estate of Abubakar Mohammed Habib, who is wrongly misrepresented as the registered owner of the suit property was dismissed. It is contended that the suit property was sold and transferred to the 1st defendant by Eco Bank Ltd pursuant to its statutory powers of sale.

3. The application was opposed through a replying affidavit sworn by Mohammed Abubakar a director of the plaintiff company. In his affidavit Mohammed Abubakar asserted that the injunctive order issued in regard to the suit property in HCCC No.153 of 2001, was registered against the suit property, and remain in force as the same has not been lifted. Further, that the grant in respect to the suit property was renewed in favour of Abubakar Mohammed Habib for a term of 50 years from 1st August 2001. Abubakar depones that an order of interlocutory injunction was issued against Akiba Bank Ltd (now Eco Bank Ltd) on 5th December, 2008 restraining it from selling the suit property. Therefore, the purported sale and transfer of the suit property to the 1st defendant on 31st December 2008 by Akiba Bank Ltd was done in contravention of that order and also contrary to Section 52 of the Transfer of Property Act 1882.

4. Hearing of the defendant's application proceeded ex-parte on 2nd December, 2010 because although the plaintiff/respondent was duly served, there was no representation for the plaintiff. The defence counsel relied on the grounds stated on the motion and reiterated that the plaintiff's suit was an abuse of the court process as it was filed contrary to Section 6 of the Civil Procedure Act.

5. I have given due consideration to the application before me. I have also anxiously perused the pleadings and the entire court record. As stated in my ruling of 29th July, 2010, the interim orders of interlocutory injunction issued by Mbogholi J. on 26th January 2010, were never extended and lapsed on 4th February, 2010. Therefore the prayer seeking for the orders to be discharged and or set aside is superfluous.

6. As concerns the propriety of the plaintiff's suit, the same is hinged on the plaintiff's right to remain in the suit property as a tenant of the registered owner of the suit premises. The plaintiff acknowledges in his plaint that there has been on-going litigation in HCCC No.153 of 2001 at Milimani Commercial Courts between Abubakar Mohammed Habib (deceased), the registered owner of the suit premises, and Akiba Bank Limited. The plaintiff also appears to rely on an interlocutory order of injunction issued by the court on 7th February 2001 in HCCC (Milimani) No.153 of 2001 and registered against the title to the suit property on 28th August 2008. The plaintiff maintains that the orders had not been vacated and were still subsisting. The said order restrained the Akiba Bank Ltd from selling the suit property. Thus it is maintained that the defendants to whom the bank purported to sell the suit property on 31st December, 2008, have no right to the suit property as the sale was irregular.

7. Having carefully perused the application, and considered the submissions, I find it evident from the affidavit sworn by the 1st defendant on 20th February 2010, and the annexures thereto including an affidavit sworn by Mohammed Abubakar in HCCC No.153 of 2001, on 14th November, 2008, that HCCC No.153 of 2001 filed by Abubakar Mohammed Habib against Akiba Bank Ltd abated on 17th June, 2008 in accordance with Order XXIII Rule 3(2) of the Civil Procedure Rules as no application for substitution was made within one year following the death of Abubakar Mohammed Habib on 17th June, 2007. Therefore the order of injunction issued on 7th February, 2001 abated with the suit on 17th June, 2008. Even assuming as was alleged by the plaintiff that the injunctive order registered against the title to the suit premises pursuant to the order of 7th February, 2001 was never lifted, the order lapsed with the abatement of the suit, and therefore was no longer effective on 28th August, 2008 when the order was purported to be registered against the title to the suit property. Therefore, the plaintiff's suit was based on either a misrepresentation or a misapprehension that the order of interlocutory injunction issued on 7th February, 2001 was still subsisting.

8. In his replying affidavit sworn on 11th February 2010, in response to the application Mohammed Abubakar a director of the plaintiff sought to rely on an ex-parte order of injunction allegedly issued in HCCC (Milimani) No.721 of 2008. Mohamed Abubakar deponed that the content of the exparte order was:

“The defendant/respondent by itself, its servants and or agents be restrained from selling by private treaty, public auction, or in any way disposing of Land Reference No.209/4356 situated at Nairobi pending the hearing and determination of this suit.”

9. I find that it is unlikely that the court would have granted an exparte order of interlocutory injunction on the 5th August, 2008 ***“pending the hearing and determination of the suit”*** before the inter parte hearing of the application for interlocutory injunction. Indeed, Order XXXIX Rule 3(2) of the Civil Procedure Rules provides that an exparte injunction may only be granted for a period of not more than 14 days. No copy of the order issued on 5th August, 2008, having been exhibited, I find that the plaintiff has failed to demonstrate that there was an order of interlocutory injunction in force against Akiba Bank on

31st December, 2008 when the bank sold the suit property to the 1st defendant. Thus, the plaintiff's claim to the suit property as a tenant of Abubakar Mohammed Habib has not been established. Nevertheless, there is an issue as to whether the plaintiff is a protected tenant in the suit premises and whether the defendant's actions of levying distress and purporting to evict the plaintiff from the suit premises were lawful. Essentially, that is the subject of the notice of motion dated 22nd January, 2010 and the plaint filed on 25th January, 2010. It cannot therefore be said that the plaintiff's suit or the application is frivolous or vexatious or an abuse of the process of the court.

10. As to the issue whether the plaintiff's suit should be struck out or stayed under Section 6 of the Civil Procedure Act in view of HCCC (Milimani) No.153 of 2011, I find that this suit does not involve the same parties or parties claiming under the same title. This suit has been brought by Faza Holdings Ltd which is a limited liability company. HCCC (Milimani) No.153 of 201 was filed by Abubakar Mohammed Habib now deceased. In the present suit the plaintiff is filing the suit in its capacity as a tenant in the suit property. Whilst in HCCC (Milimani) No.153 of 2001, Abubakar Mohammed Habib was suing as the registered proprietor and owner of the suit property. Although Mohammed Abubakar is a director of the plaintiff company, and also an administrator of the estate of Abubakar Mohamed Habib (deceased), his role in both capacities is distinct and he remains a different legal personality from both plaintiffs. Therefore, the two suits involve separate legal persons and the subject matter is also different. Which means that the issues are not directly and substantially the same. Section 6 of the Civil Procedure Rules is therefore not applicable.

11. The upshot of the above is that I reject prayer (iii) and (iv) of the defendants' notice of motion dated 2nd February, 2010.

Dated and delivered this 28th day of January, 2011

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the plaintiff absent

Orwa H/B for Ombati for the defendants

B. Kosgei - Court clerk