



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 179 OF 2010

1. HIMDAT FADHIL M. MAAWIYA
2. ZAHIDA FADHIL M. MAAWIYA PLAINTIFF/APPLICANT
3. MAIDA FADHIL M. MAAWIYA

-VERSUS-

1. RAJNIKANT DESA t/a DIP DAYA

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DEFENDANTS/RESPONDENTS

2. FATMA MOHAMED M. MAAWIYA

RULING

The plaintiff moved the Court by Notice of Motion dated **11th June, 2010** and brought under Order 80, rule 1 of the Civil Procedure Rules. Two substantive prayers remain outstanding in this application:

(i) “THAT pending the hearing and determination of the suit herein there be an order restraining 1st defendant either personally or through his employees, servants and/or agents from proceeding with the renovations and/or sub-division work on the shop known as Dip Daya existing on Plot No. Mombasa/Block **XXVIII/36**”; and

(ii) “THAT pending the hearing and determination of the suit herein there be an order compelling 1st defendant personally or through his employees, servants and/or agents to restore the shop known as Dip Daya and existing on Plot No. Mombasa/Block **XXVIII/36** to its original state by demolishing any additional wall and/or structure intended to sub-divide the shop”.

The application rests on the following grounds:

(a) the plaintiffs are co-owners of Plot No. Mombasa/Block **XXVIII/36**;

(b) 1st defendant is a tenant on a shop existing on the suit property and known as Dip Daya;

(c) 1st defendant, with the connivance of 2nd defendant, has commenced major renovation and/or sub-division of the shop rented to him, without the authority and/or approval of the plaintiffs;

- (d) the defendants have ignored the plaintiffs' protests and notices not to proceed with the works;
- (e) the said renovation and/or sub-division would expose the plaintiffs to irreparable damage;
- (f) it is in the interests of justice to grant the orders sought.

Facts in support of the foregoing grounds are set out in 1st plaintiff's affidavit dated **11th June, 2010**. The defendants responded by filing (on **18th June, 2010**) grounds of opposition, as well as (on **21st June, 2010**) a replying affidavit (by 1st defendant).

In the grounds of opposition, the defendants contend that: the plaintiffs have no *locus standi* to institute the suit; and that the plaintiffs, before instituting suit, did not obtain the consent of the other registered owners of the suit property.

In the replying affidavit, 1st defendant avers that he occupies only a portion of the suit premises, and regularly pays monthly rent to the registered owners of the suit property, through one **Mr. Abdulaziz Mohamed Maawiya** who is, himself, one of the registered owners; that he could not have acted in connivance with 2nd defendant who is one of the registered owners of the suit premises; that those responsible for the sub-division complained about, are registered owners of the suit property; that the deponent has never dealt with the applicants in any capacity as landlords of the suit premises.

Counsel for the plaintiffs submitted that the plaintiffs "are the registered owners [of the suit property] and 1st defendant is a tenant of one shop existing thereon known as Dip Daya", and "the plaintiffs are 1st defendant's landladies". Counsel submitted that "the plaintiffs are not the sole owners of the suit property and are therefore not the only landladies and/or landlords of 1st defendant".

Counsel submitted that there was no law requiring one co-owner to seek the consent of another co-owner before instituting a suit. Counsel urged that the plaintiffs have established a *prima facie* case, in their capacity as registered owners.

Counsel for 1st defendant urged that the plaintiffs had not shown a *prima facie* case with a probability of success, and were therefore not entitled to the interlocutory orders sought: that it emerged from the plaintiffs' supporting affidavit that the suit premises is jointly owned by eight registered owners; the share of the applicants is indicated as one-half; and it remained unclear whether the space occupied by 1st defendant is to be attributed to the applicants, in a scenario in which the suit premises had not been subdivided.

Counsel urged that the applicants did not show that they stood to suffer irreparable damage, not compensable by an award of damages. Counsel submitted that any loss caused by "the constructions alleged to be going on at the suit premises could easily be remedied by payment of damages", since, on the pleadings, the plaintiffs are praying for *general damages*.

Counsel asked the Court to take into account the fact that the plaintiffs have joint-ownership of the suit premises with 2nd defendant, and the particular share due to the plaintiffs has not yet been determined.

Counsel urged that the demarcations on the suit property had not been done by 1st defendant, but by registered owners who obtained restructuring plans from the Municipal Council of Mombasa.

Counsel submitted that the tenancy in question is governed by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap. 301, Laws of Kenya); and s. 2 thereof defines a landlord as the person for the time being entitled to rents and profits of the premises payable under the terms of the tenancy: the landlord in this regard was **Mr. Abdulaziz Mohamed Maawiya**, the only person 1st defendant ever dealt with on matters of rent, over a period of 27 years.

Counsel urged that the applicants, by challenging 1st defendant while remaining silent as regards 2nd defendant who is a co-registered owner, were merely subjecting 1st defendant to harassment.

Counsel submitted that the applicants had not come to Court with clean hands, as they were not suing the landlord who receives and has always received rent from 1st defendant; yet the Municipal Council record shows the landlord to be the one who had obtained the requisite **consents for the renovations** to the premises.

Counsel submitted that the applicants' prayer for termination of the tenancy had no basis, as the procedures for such termination were laid out in the Landlord and Tenant (Shops, Hotels and Catering Establishments Act (Cap. 301)).

It is clear from the evidence that the plaintiffs constitute only a fraction of the landlords/landladies of the suit premises; and that only the three are prosecuting a suit against the renovation works by one defendant who, obviously, would obtain no approvals for those works without the consent and approbation of the landlords/landladies. The governing contract of tenancy itself is, in my opinion, compromised in its integrity by the landlords/landladies themselves acting in disagreement with one another; but it is not possible to say 1st defendant is in breach of any law relating to the tenancy agreement.

Therefore, the plaintiffs have made no **prima facie** case for the interlocutory orders which they seek. The plaintiffs, therefore, must look only to the dispute lodged in their plaint, as the basis for any recompense for them.

It follows that the plaintiffs' application by Notice of Motion dated **11th June, 2010** is dismissed, with costs to the defendants/respondents.

DATED and **DELIVERED** at **MOMBASA** this 8th day of April, 2011.

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J. B. OJWANG
JUDGE