



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL SUIT NO. 317 OF 2009**

**KOKO LIMITED.....PLAINTIFF**

**V E R S U S**

**MADISON INSURANCE CO. LTD.....DEFENDANT**

**R U L I N G**

The case that the Plaintiff brought herein against the Defendant by **plaint dated and filed on 11<sup>th</sup> June, 2009** was that it was the Defendant's month-to-month tenant in residential premises occupied by its managing director. The Plaintiff further pleaded that in breach of its obligations under the tenancy, the Defendant embarked on a campaign of harassment against the occupant of the premises with the intention of forcing the Plaintiff to give up possession thereof. Such harassment was pleaded to be "levy of unrealistic, inflated and incorrect electricity charges"; and a 14-day notice of termination of tenancy given on 8<sup>th</sup> June, 2009.

Three main reliefs were sought by the Plaintiff as follows:-

- 1. An account be taken "in regard to the overpayment by the Plaintiff to the Defendant, and payment to the Plaintiff of sums found to have been overpaid ".**
- 2. An injunction to permanently restrain the Defendant from "carrying out the harassment complained of or breach of covenant or interference with the Plaintiff's peaceful occupation of the premises".**
- 3. Damages for breach of covenant.**

Together with the plaint, the Plaintiff filed an application by **chamber summons dated 11<sup>th</sup> June, 2009** in which it sought an interlocutory injunction to restrain the Defendant from "threatening the Plaintiff with eviction from the suit premises or in any other manner harassing the Plaintiff" pending determination of the suit.

When the Plaintiff appeared before the Court *ex parte* on 11<sup>th</sup> June, 2009, and upon inquiry by the court, the court granted an interim injunction, pending hearing *inter partes* of the application, upon the condition that the Plaintiff deposits in court within a specified time the sum of KShs. 600,000/00as security. The said sum was indeed deposited in court.

Subsequently, by **consent order entered on 1<sup>st</sup> October, 2009** (as read together with a subsequent **order of 21<sup>st</sup> October, 2009**) the said sum of KShs. 600,000/00 was ordered to be released to the Defendant apparently as arrears of rent and/or electricity charges.

Then on 19<sup>th</sup> November, 2001, following the filing of a **consent letter dated 11<sup>th</sup> November, 2009** duly signed by advocates for both parties, the following consent order was recorded.

**“By consent:**

- 1. The Plaintiff/Tenant will quit, vacate and deliver vacant possession of the demised premises on 31<sup>st</sup> March, 2010.**
- 2. The electricity bills to be verified by the advocates of both parties in consultation with Kenya Power & Lightening Company Limited and the amount found to be owing to be paid to the Defendant. Conversely if the bills are found to have been overpaid, the sum paid in excess to be credited to the Plaintiff’s rent account.**
- 3. In the meantime, the Plaintiff will pay all the arrears of rent by 30<sup>th</sup> November, 2009 and thereafter pay in advance rent for December, 2009 and quarterly rent for January, February, and March, 2010 on or before 15<sup>th</sup> January, 2010.**
- 4. Mention on 18<sup>th</sup> January, 2010.”**

Clearly this order was meant to compromise not only the application then before court, but also the entire suit. The subsequent entry of interlocutory judgment against the Defendant on 22<sup>nd</sup> March, 2010 in default of filing of defence was done in error as the suit had already been compromised.

By a **ruling dated and delivered on 21<sup>st</sup> March, 2010** the court (Machelule, J) found that indeed the suit had been compromised and refused to hear the application that had been filed together with the plaint (chamber summons dated 11<sup>th</sup> June, 2009). Similarly Khamoni J. in a **ruling date 27<sup>th</sup> April, 2010** refused to entertain another application by the Plaintiff by **chamber summons dated 19<sup>th</sup> April, 2010** which had sought certain temporary restraining and mandatory injunctions against the Defendant.

In its turn the Defendant came to court by **notice of motion dated 17<sup>th</sup> June, 2010**, the subject of this ruling. The application, stated to be brought under **Order 20, rule 12(1) (a) and (b)** and **Order 21, rule 37**, of the old **Civil Procedure Rules**, and also under the inherent power of the court, seeks the following main orders:-

- “1. ....**
- 2. ....**

- 3. Pursuant to the Consent Order given on 19<sup>th</sup> November, 2009, the Plaintiff/Respondent do pay the Defendant/Applicant accrued mesne profits from the date of the said Consent order, to the date the Respondent quits, vacates, and delivered vacant possession of the demised premises to the Applicant;**
- 4. In default of payment of the said mesne profits, the Applicant be at liberty to attach all movable property of the Respondent in the demised premises for sale at a public auction to recover the said mesne profits and incidental costs;**
- 5. Upon payment of all the mesne profits and incidental costs as prayed herein, the Respondent forthwith quits, vacates and delivers vacant possession of the demised premises;**
- 6. An Order that the Respondent be evicted from the demised premises unless it quits, vacates and delivers vacant possession after payment of mesne profits and incidental costs as prayed in**

**prayer 5 herein;**

7. ....”

The application is opposed by the Plaintiff, who has filed a **notice of preliminary objection dated 30<sup>th</sup> September, 2010** and a **replying affidavit** sworn by the managing director of the Plaintiff and filed on 1<sup>st</sup> October, 2010.

The points taken in the preliminary objection are technical in nature to the effect that the Orders and Rules under which the application has been brought have no application to the application at hand. These points were taken up during hearing of the application. Hearing was by way of written submissions, but the parties presented brief oral submissions on 12<sup>th</sup> April, 2011.

I have considered the submissions of the learned counsels. No authorities were cited. I have also read the supporting and replying affidavits. As is apparent from what I have stated elsewhere above, I have perused the court record.

The consent order entered on 19<sup>th</sup> November, 2009 was clearly intended to compromise the suit, though it could have been better framed in order to avoid the lacunas that have encouraged the parties to subsequently apply. For instance, there could have been default clauses. There could also have been time-lines within which the account between the parties relating to electricity bills and rent could have been taken.

Nevertheless, and despite those shortcomings of the consent order, a decree was extractable from that order. The Plaintiff was to vacate the premises on 31<sup>st</sup> March, 2010. In default, though not so stated, the Plaintiff was liable to be evicted from the premises upon application by the Defendant.

In the meantime, the Plaintiff was supposed to pay all arrears of rent by 30<sup>th</sup> November, 2009, and future rents for the period up to 31<sup>st</sup> March, 2010 on or before 15<sup>th</sup> January, 2010. The rent sums might have been affected once the account relating to the electricity bills was taken. Regrettably, no such account was taken.

It is also common ground that the Plaintiff is still in possession of the premises and has not vacated them. The Plaintiff says in the replying affidavit that it has been prevented from vacating the premises by the Defendant in an effort to force it to pay sums of money that have not been determined by the taking of accounts. The Plaintiff further says that the Defendant also wants to compel it to pay *mesne* profits, which sums were never awarded in the consent order of 19<sup>th</sup> November, 2009.

In the affidavit sworn in support of the Defendant's application, the Defendant appears to be complaining that the Plaintiff is still in possession of the premises despite being required by the consent order of 19<sup>th</sup> November, 2009 to vacate on 31<sup>st</sup> March, 2010. But at the same time the Defendant says that the Plaintiff should not vacate the premises before paying *mesne* profits. The same theme is repeated in clearer terms in the Defendant's submissions. This gives credence to the Plaintiff's complaint that it is in fact the Defendant who has prevented it from vacating the premises.

One thing is clear. No *mesne* profits were awarded to the Defendant in the consent order of 19<sup>th</sup> November, 2009 or by any other order so far recorded. Indeed, it is to be noted that no defence and counterclaim, or indeed any defence at all, was filed by the Defendant as the same was rendered unnecessary by the consent of 19<sup>th</sup> November, 2009 which compromised the Plaintiff's claim. So, this claim for *mesne* profits by the Defendant made irregularly in the present application is clearly misconceived.

As is well known, a consent order or judgement has the same effect as a contract between parties. It can only be set aside or varied upon grounds as would entitle the setting aside or variation of a

contract. There is no application before the court to set aside or vary the consent order of 11<sup>th</sup> November, 2009. But the parties are at liberty to vary or indeed set aside the said consent order by a new consent if they are so minded.

For now, the effect of the said consent order of 19<sup>th</sup> November, 2009 cannot extend beyond 31<sup>st</sup> March, 2010 when the Plaintiff was supposed to vacate the premises and bring to an end the relationship between the parties. If any further rights have accrued to any of the parties after 31<sup>st</sup> March, 2010, these ought to be subject to fresh litigation. It will be remembered that the Plaintiff claims that it has been unlawfully prevented from vacating the premises by the Defendant, and the Defendant's stand appears to be that it was entitled to prevent the Plaintiff from vacating until it pays mesne profits. These are new issues that ought to be litigated in a fresh action as the present action was compromised by the consent order of 19<sup>th</sup> November, 2009.

For now the important thing is to bring the present litigation to an end as envisaged by the consent order, and in line with the overriding objectives of the Civil Procedure Act and Rules as set out in **sections 1A and 1B** of the **Civil Procedure Act, Cap 21**. To enable that, I will make the following orders:-

1. The Defendant shall forthwith and unconditionally permit the Plaintiff to vacate the suit premises.
2. The parties shall within 14 days from the date of delivery of this ruling take accounts before the Deputy Registrar relating to electricity bills and rent up to 31<sup>st</sup> March, 2010.
3. Any claims by either party relating to the period after 31<sup>st</sup> March, 2010 should be subject to fresh litigation. The parties are of course at liberty to enter a further consent herein that will finally and clearly settle all outstanding issues between them.
4. The Defendant's application by notice of motion dated 17<sup>th</sup> June, 2010 is otherwise dismissed with no orders as to costs.

Those shall be orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 31<sup>st</sup> DAY OF MAY, 2011**

**H.P.G. WAWERU**  
**JUDGE**

**DELIVERED THIS 3<sup>RD</sup> DAY OF JUNE, 2011**