



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 361 OF 2008

KOKO LIMITED.....PLAINTIFF

V E R S U S

1. MADISON INSURANCE CO. LTD
2. KNIGHT FRANK KENYA LIMITED
3. CHAKA AGENCIES.....DEFENDANTS

R U L I N G

The Plaintiff was at all material times the 1st Defendant's tenant in a residential apartment. The 2nd Defendant managed the premises on behalf of the 1st Defendant, while the 3rd Defendant is a firm of auctioneers.

The Plaintiff brought this suit against the Defendants seeking an injunction to restrain them from levying distress against it in respect of claimed arrears of rent which it denied in the sum of KShs. 68,023/00.

On 8th August, 2008 the court granted the Plaintiff, *ex parte*, interim injunction subject to the condition that it deposits the said sum of KShs. 68,023/00 in court as security within a limited period of time. The Plaintiff met the condition. The interim injunction has been extended from time to time, but the application for temporary injunction has never been heard *inter partes*.

In the meantime the Plaintiff filed another suit, **Nairobi HCCC No. 317 of 2009** against the 1st Defendant herein only. In that new case the Plaintiff pleaded that it was the 1st Defendant's month-to-month tenant in the same premises, and that contrary to its obligations as landlord, it was harassing the Plaintiff with the intention of forcing it to give vacant possession thereof. It sought three main reliefs-

1. An account of rent and electricity bills to be taken.
2. Appropriate permanent injunction.
3. Damages.

By consent letter dated 11th November, 2009 HCCC No. 317 of 2009 was compromised upon the following terms:-

1. That the Plaintiff do vacate and deliver vacant Possession of the premises on 31st March, 2010.
2. That electricity bills be verified by the advocates of both parties in consultation with Kenya Power &

Lighting Co. Ltd. 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 to pay arrears of rent by 30th November, 2009 and thereafter to pay in advance rent for December, 2009 and quarterly rent for January, February and March 2010 on or before 15th January, 2010.

The Defendants have now applied by **notice of motion dated 15th September, 2009** seeking various orders. At the hearing of the application on 30th June, 2011 the Defendants' learned counsel chose to prosecute only prayers 6 and 7 of the application.

Prayer 6 seeks the order that the sum of KShs. 68,023/00 deposited by the Plaintiff in court (as a condition for grant of interim injunction) be released and paid to the Defendants. Prayer 7 is for costs of the application.

In so far as prayer 6 is concerned, the application is brought under the inherent powers of the court as saved by **section 3A** of the **Civil Procedure Act, Cap. 21**.

The grounds for the application (relevant to prayer 6) appearing on the face thereof are:-

1. That a "further debit of KShs. 68,023/50 was outstanding on 30th September, 2005 in the rent account of the Plaintiff."
2. That the Plaintiff deposited that sum in court.

There is a supporting affidavit sworn by one **ROSE WATETU KIGIMA**, the Property Manager (Residential) of the 2nd Defendant. She depones that the alleged arrears of rent of KShs. 68,023/50 was incurred while the property was managed by previous managers.

There is a **supplementary affidavit filed on 31st May, 2011**. It is sworn by one **BERNARD GICHIA**, the Property Officer of the 1st Defendant. He depones, incorrectly and misleadingly, that by the consent dated 19th November, 2011 in HCCC No. 317 of 2009 it was mutually agreed "that all *mesne* profits be paid to the 1st Defendant, and that after such payment the Plaintiff shall vacate..." the premises on 31st March, 2011. That consent, which has been reproduced elsewhere above, did not contain any agreement for payment of any *mesne* profits.

It is further deponed in the supplementary affidavit that the sum of KShs. 68,023/50 is rightly owed to the 1st Defendant by the Plaintiff by virtue of the aforesaid consent entered in HCCC No. 317 of 2009.

The Plaintiff has opposed the application by grounds of opposition dated 1st April, 2011. Those grounds are, *inter alia*:-

1. That the application is defective, incompetent and an abuse of the process of the court.
2. That there are legitimate issues between the parties in this suit pending resolution by way of trial, and releasing the money deposited in court would short-circuit the legal process and sabotage the trial.

I have given due consideration to the submissions of the learned counsels appearing, including the cases cited.

The two cases cited by the Defendant's learned counsel are distinguishable. There were in those cases decrees for money in favour of the applicants. Deposit in court of the decretal sum was ordered as a condition for stay of execution of decree.

There is no decree here in favour of the Defendant for the sum of KShs. 68,023/50 or for *mesne* profits. The Defendants have not even counter-claimed for this sum or for *mesne* profits!

The sum of KShs. 68,023/00 was deposited in court by the Plaintiff as a condition for the interim injunction granted to it. It is its money, not the Defendants'. The Defendants cannot have a legitimate claim to it until and unless they have a decree for it, or for *mesne* profits.

It will be recalled that it is the Plaintiff's case that the claim for KShs. 68,023/00 as arrears of rent is a false claim, and that the same is not due. This is a triable issue that will have to be resolved at the trial of the action, unless the suit is otherwise compromised.

The consent of 19th November, 2009 in HCCC No. 317 of 2009 did not settle the issues in the present case, which case is not even mentioned in that consent.

The present application is clearly misconceived and has no merit. It is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF AUGUST, 2011.

H.P.G. WAWERU
JUDGE.

DELIVERED THIS 5TH DAY OF AUGUST 2011.