



REPUBLIC

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 94 OF 2009

CYCLE IMPORTERS LIMITED

.....PLAINTIFF

VERSUS

KALSON PROPERTIES LIMITED1ST DEFENDANT

FRONTIER PROPERTIES LIMITED2ND

DEFENDANT

BEN MBUGUA GATHURI T/A AUCKLAND AGENCIES3RD

DEFENDANT

RULING

This Chamber Summons dated 29th April, 2009 is filed by the 1st Defendant herein and is premised under Order VI Rule 13 (1) (b), (c), (d) of Civil Procedure Rules (repealed and substituted by CPR 2010) and Sec. 3A of Civil Procedure Act (Capt 21).

It seeks the prayers that the Plaint herein be struck out as against the 1st Defendant. The application seeks support from the grounds set forth on its face and supporting affidavit sworn by one Atul Shah on 29th April, 2009.

The main issue raised before the court is that the Applicant has sold the suit premises to the 2nd Defendant and thus it does not have any interest in the suit property, proprietary or equitable or at all and the prayers made in the Plaint cannot be available or enforced against the 1st Defendant.

The facts which are undisputed are that the Plaintiff/Respondent herein has been a tenant of the 1st Defendant occupying the suit premises for about 50 years. The Plaintiff occupies the suit premises as a controlled tenant. The 1st Defendant sold the suit property to the 2nd Defendant and thus the claim that it does not have any interest thereon.

The Plaint on the other hand, has sought claims for loss and damages as a result of the attachment removal of goods, trespass and damage to the suit property. Along with the Plaint claiming many reliefs against all the three Defendants, the Plaintiff had filed an application for Interim Injunctory Orders. The said application dated 2nd March, 2009 was heard and determined by Hon. Sitati J. who in her Ruling dated 27th August, 2009, issued Interim Mandatory Injunction against all the Defendants and found as under:-

“It is not in dispute that the Plaintiff has been a tenant in the suit premises for over 50 years; that it has faithfully paid rent as and when it is due; that the suit premises changed hands when the Plaintiff

was still in occupation; that the 1st and 2nd Defendants played a rat and mouse game after the change of ownership thus making it difficult for the Plaintiff to pay rent due; that the 2nd Defendant, through the 3rd Defendant broke into the suit premises, caused wanton destruction and took away the Plaintiff's tools of trade. The purported distress for rent was done at a time when the Plaintiff was not in any arrears of rent. It would thus appear to me that the 2nd Defendant was bent on getting rid of the Plaintiff from the suit premises at whatever cost.

In the above circumstances, I am persuaded that this is one of those clearest and exceptional cases in which mandatory injunctions ought to be issued. The 1st and 2nd Defendants used the revised rent as an excuse for saying that the Plaintiff was in arrears of rent and to cause the Plaintiff's removal from the suit premises. The Defendants, no doubt, stole a march on the Plaintiff in an extremely unorthodox manner. The Defendants have not denied that the Plaintiff's goods were carted away and still remain where they were taken by the 3rd Defendant."

After finding as above, she gave the orders of return of goods attached as well set aside the order of attachment made by the Chairman of Business Premises Rent Tribunal and declared the attachment as illegal.

This Ruling has been appealed against and is pending hearing.

With the above facts, the application before me is to be heard and determined.

It was emphasized by the Applicant that it has no interest, right or liability over the suit property and that this suit cannot be brought against it.

None of the prayers made in the Plaint avail as against the Applicant. It was further submitted that as contended by the Plaintiff/Respondent, the matter is not *res judicata* because the prayer for striking out the Plaint was not heard and determined in the previous Ruling of Hon. Sitati J. The Applicant by these proceedings is simply seeking the exercise of the discretion of the court to strike out the suit as there is no cause of action and thus the suit is scandalous and an abuse of court powers.

Moreover, Order 40 Rule 6 of Civil Procedure Rules 2010 was quoted to emphasize that the Interlocutory Injunction has lapsed as the suit is not determined within period of twelve months from the date of granting of the said order.

In opposition to the application, the Plaintiff/Respondent contended that the arguments which are submitted were proffered by the Applicant before Hon. Sitati J. and the court specifically ruled that 1st and 2nd Defendants were responsible and liable for the claims made by the Plaintiff/Respondent. It is also shown that the 1st Defendant did receive the rent after the date of sale of property and both 1st and 2nd Defendants claimed rents for the same period and as a result thereof, the suit property was trespassed and damaged as well as goods belonging to the Plaintiff were attached.

The suit could not be heard due to pendency of this application and may be due to the pending appeal. I shall not at this juncture make any finding on the issue whether the interim order has lapsed and note that the application was filed and heard under the old Civil Procedure Rules.

I am, till the appeal is heard, bound by the observations and findings made by Hon. Sitati J. wherein she specifically observed the involvement of the Applicant so far as the grievances of the Plaintiff are concerned.

If so, can I be justified in overlooking those findings and remove the Applicant from this suit? I am afraid I cannot do so, despite the strong submissions made.

In the premises, I do not allow the application. The Applicant may revisit the issue at an opportune time.

The costs of the application in the cause.

Orders accordingly.

Dated, signed and delivered at Nairobi this 23rd day of September, 2011.

**K. H. RAWAL
JUDGE
23.9.2011**