



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVILSUIT NO. 242 OF 2011**

KEN SALAMBA PLAINTIFF

VERSUS

DR. JARNARDAN D. PATEL & ANRDEFENDANT

Coram : Mwera J.
Gathu for Plaintiff
Billing for Defendant
Njoroge court clerk

RULING

The plaintiff filed a notice of motion dated 10.8.11 under the provisions of Order 45 rule 1, Order 50 rule 6, Order 51 rules 1, 3 of Civil Procedure Rules and sections 1A, 1B, 3A of Civil Procedure Act. The main prayers therein were:

- i) that there be extension of time within which the applicant is to post a bank guarantee ordered on 11.07.11.
- ii) that there be a review to vary the orders of 11.07.11.

The grounds advanced were that when making the order of 11.07.11 the court overlooked to consider a supplementary affidavit by the plaintiff sworn on 30.5.2011 stating that he made a payment of sh. 1,378,816/= to M/s Medical Upperhill Centre – hence this application.

The plaintiff swore a supporting affidavit making an extract from the ruling under review and annexing the said supplementary affidavit to demonstrate that sh. 1.3m was paid to Upperhill Medical Centre Ltd, which confirmed the payment. That had the court properly considered that bit it could not have arrived at the decision to order the plaintiff to provide a bank guarantee for the same sum. That the defendants were shareholders in Upperhill Medical Centre Ltd and so the plaintiff should not post a bank guarantee in their favour when payment of the same sum had already been made to the Centre.

As to why the plaintiff did not join Upperhill Medical Centre Ltd in these proceedings it was deponed:

“7. That I did not seek to join Upperhill Medical Centre Ltd in this suit for the reason that the issue of who between the 2 parties is entitled to the suit premises is already before this Honourable Court for consideration in HCCC 413 of 2009.”

If we can stop here for a while, the plaintiff annexed the 1st defendant’s affidavit in HCCC 413/2009, sworn on 6.11.09. The parties to that suit are **Dr. Jarnardan P. Patel (1st plaintiff)** and **Dr. (Mrs) Divya**

J. Patel (2nd Plaintiff Vs Upperhill Medical Centre Ltd.

The 1st plaintiff there is the 1st defendant here. The present plaintiff/applicant is NOT a party in HCCC 413/2009. But he appears in the 1st defendant's affidavit there in two paragraphs:

“ 24: That the purported lien cannot be exercised when there is a dispute and in any case, the lease purportedly entered (into) by the defendant directly by Dr. Ken Salamba is ineffective, null and void. The plaintiffs are ready to continue paying the rent as stipulated by the lease pending determination of the arbitral process.

25. That indeed, I think that the defendant has itself acted with shocking mala fides, by coercing Dr. Ken Salamba, who had a running lease with me for a period of 5 years 3 months from 1st April 2006 to 30th June, 2011 to enter into a direct lease with it.”
(And the lease was annexed)

Now with the plaintiff here not being a party in HCCC 413/2009, the court was left wondering why he introduced those proceedings here. The quoted parts of the 1st defendant's affidavit there seem to state that the plaintiff had a lease with the 1st defendant and not Upperhill Medical Centre Ltd. It means that he had an obligation to pay rents to the 1st (and 2nd defendant) here – not the Medical Centre. Anyway, we proceed with the plaintiffs supporting affidavit to the present motion.

He concluded that the balance of convenience tipped in his favour and so orders sought ought to be granted.

In an *ex parte* order issued on 16.8.11, the plaintiff was granted extension of the guarantee period up to 22.8.11 and seemingly up to this time. It was not readily available on the file that the defendants opposed the motion with any papers but both sides submitted.

The plaintiff again reiterated that he paid sh. 1,378,816/= to Upperhill Medical Centre Ltd and his supplementary affidavit sworn and filed in court on 30.5.11 stated all that, together with acknowledgement by that Centre of the same date that indeed sh. 1,378,816/= was paid to it by the plaintiff for rent during the period of February 2009 to October 2010. If it may be remarked on now, even as the plaintiff introduced this supplementary affidavit (Ann. KS 2) at this point, such affidavit does not appear on the file, even as an order to file one was made on 23.5.11 by Mugo J. Further, it was not referred to in the submission by the plaintiff filed by his then lawyers M/Gadhia & Mucheru Advocates.

If it may be recapped here, that submission stated in part something to the effect, and the 1st defendant seemed to say so in the affidavit referred to in HCCC 413/09, that the plaintiff had a running lease with the 1st defendant from 1.4.06 to 30.6.11. This must have been a sublease because the submission that gave rise to the ruling subject to the review now sought stated:

“Your Lordship, the plaintiff had no choice to pay rent to the head-lessor to protect its rights and to comply with the defendants' obligation in terms of the sublease agreement with the plaintiff.”

The plaintiff told the court that he paid rents directly to the Medical Centre (head-lessor) because the defendants had breached the terms of the sublease with him. They had not been paying rents on their *lease* and so the head-lessor began to harass the plaintiff. Then, even now, the plaintiff maintains that it is not fair to require him to post a bank guarantee for the sum of money he paid to the head lessor, the Medical Centre, where the defendants were shareholders. The review should issue because the court did not consider the supplementary affidavit filed on 30.5.11, with evidence that the sum in dispute had been paid and acknowledged by the Medical Centre. Therefore there was sufficient reason to grant the review. Some cases were cited.

The defendants' submission started off by asking to rely on their grounds of opposition dated and filed in court on 11.8.2011. If the court should so state, NONE ARE ON THE FILE! The same jinx of the

plaintiff's supplementary affidavit filed on 30.5.11 whose date-stamped copy the court has been referred to? Anyway.

The defendants asserted that the present application was misconceived and bad in law and did not fall to be considered under the provisions of law cited. The court was urged to consider the Upperhill Medical Centre Ltd letter of 30.5.11 as not stating that the sum it acknowledged as having been paid to it, would be accounted for or paid over to any other party applying for its release. And that the sum of sh. 1,804,425/= in the bank guarantee did not tally with the sum allegedly paid to the Medical Centre. It was claimed that the applicant had taken inordinately long to bring this application and so that constituted bad faith. And if the orders are granted, the defendants will be prejudiced. And after citing some cases, the court was asked to dismiss the application because an error on the face of the record was not noted and no new and important matter or evidence had been discovered, let alone demonstration of any other sufficient reason.

On considering all the material placed before it and with the remarks made earlier at given stages of this ruling, the court is minded not to grant the orders. It is admitted that the supplementary affidavit filed in court on 30.5.11 as per the copy furnished by the plaintiff does not feature on the file. That may be an error on the part of the registry. So the court could not have had sight of when drafting the ruling under review. Annexed to it was a letter dated 30.5.11 from Upperhill Medical Centre (not Limited) stating that:

“We confirm that Dr. Ken Salamba paid Ksh. 1,378,816/= against our statement for quarterly rent, rent arrears, outstanding service charge and power electricity recharges (for) Suite 5B Upperhill Medical Centre during the period from February 2009 to October 2010.”

The order under review stated *inter alia* that:

“..... the plaintiff at this stage do post a suitable guarantee from a reputable bank in the sum of sh. 1,804,425/= within the next 30 days.”

Before so ordering, the court had noted:

“On perusal of all the above the court was left with the impression that the plaintiff did not demonstrate with evidence that it (sic) paid rents to Upperhill Medical Centre and that body was willing to account for it (sic) either to him or the defendants.”

Even as the court did not have on record the acknowledgement of rents paid to it by the plaintiff, and the plaintiff has demonstrated that such evidence ought to have been on the file for consideration, still that evidence does not satisfy one that even with rents paid to the 3rd party, the Medical Centre, it was willing to account for them to the defendants. The plaintiff was the subtenant of the defendants. He was bound to pay rents to them and not the Medical Centre, no matter that the Medical Centre was harassing him for rent arrears and the defendants were its shareholders.

If he did not pay the sublease rents to the defendants and instead paid the same to the head lessor, the Medical Centre, his obligation to the defendants still stands. If they are pursuing him for the sum as rent arrears and this court was of the view that he should post a bank guarantee for that sum so that the defendants could stop to chase him about, then that should remain so. The court did not direct the plaintiff to deposit cash. He has enjoyed long enough periods to post that guarantee since it was ordered. He should now post it within the next 30 days and go on to prepare his suit for trial. Or in default, the defendants go for him for their money. This court cannot easily appreciate how a person has an agreement with one party to pay him rents, then he proceeds to pay them to a 3rd party, and turn round to assert that he paid the rents to the party he had a contract with.

Anyway at the end of this case, if the trial court will be satisfied that such payment to a 3rd party (Medical Centre) was in order, then the guarantee will cease to operate.

Orders refused with costs.

Delivered on 10.11.11.

J. W. MWERA
JUDGE