



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 679 OF 2007

M KAYS RENTALS & EQUIPMENT CO LTD PLAINTIFF

VERSUS

MERU SOUTH FARMERS CO-OP UNION LTD.....DEFENDANT

R U L I N G

The Plaintiff's suit herein (by **plaint dated and filed on 27th September 2007**) was provoked by its eviction from the suit premises on 27th April 2007. The Plaintiff has pleaded that it was the Defendant's tenant at all material times in the suit premises, and that its eviction from the premises was violent and illegal, as a result of which it suffered loss and damage.

The Plaintiff sought the following main reliefs: -

1. A declaration that its eviction from the suit premises was illegal and unlawful.
2. Special damages of KShs 4,950,000/00.
3. General damages.
4. Prohibitory injunction to preserve the status of the suit property.
5. Mandatory injunction to reinstate the Plaintiff into the suit premises.

On 1st November 2007 the Defendant filed a statement of defence dated 30th October 2007. The Defendant denied in effect that the Plaintiff was ever its tenant in the premises as pleaded or that it ever took possession of the suit premises. It pleaded in the alternative and without prejudice that its tenant in the premises was an entity called **M. KAYS** which was a month-to-month tenant.

The Defendant further pleaded that its said tenant was evicted after due notice was given pursuant to provisions of the **Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap 301**, which notice the said tenant did not resist as provided for in the said Act.

The Defendant otherwise denied all the allegations contained in the plaint and put the Plaintiff to strict proof thereof.

In the meantime, the Plaintiff applied by **notice of motion dated 2nd October 2007**. It sought the following main orders: -

“1...

2. ...

3 ...

4 ...

5. **That the ... court be pleased to issue an order of temporary prohibitory injunction restraining the Defendant ... from in any way howsoever ... maiming, mutilating, defacing and/or destroying the suit premises and/or further maiming, mutilating, maiming, defacing and/or destroying the suit premises, pending the hearing and determination of this suit.**

6. **That the ... court be pleased to grant an order of mandatory injunction restating and/or putting back the Plaintiff into the suit premises pending the hearing and determination of this suit.**

7. ...

8. ...”

On 2nd October 2007, an order was granted *ex parte* in the following terms: -

“That status quo limited to preservation of the suit premises known as L.R. No. 209/4211 situated along Tom Mboya Street within Nairobi Central Business District from alienation be and is hereby granted.”

Under the old **Order XXXIX, rule 3(2)** of the **Civil Procedure Rules** (the **Rules**), an *ex parte* injunction could be granted only once for not more than 14 days and was not amenable to extension. It must therefore be taken that the above *ex parte* order lapsed on or about 16th October 2007.

The Plaintiff has applied by **notice of motion dated 25th July 2011** (the subject of this ruling) seeking two main orders as follows: -

1. That the Defendant’s statement of defence be struck out.
2. That summary judgment be entered for the Plaintiff as prayed in the plaint.

The application is expressed to be brought under **Order 36, rules 1(1) (a)** and **rule 8** of the **Rules**. The grounds for the application appearing on the face thereof are: -

1. That the Defendant has no reasonable defence to the Plaintiff’s claim.
2. That the statement of defence is scandalous, frivolous and vexatious.
3. That the statement of defence is evasive and consists of mere denials.
4. That the Defendant was served with a court order preserving the *status quo* limited to preservation of the suit premises but it disobeyed the same by evicting the Plaintiff from the suit premises and letting the same to a third party.
5. That as a result of the Defendant’s actions of unlawfully and illegally evicting the Plaintiff and thereafter letting out the suit premises to a third party in complete contravention and disobedience of a court order, the Plaintiff has incurred losses which the Defendant ought to be condemned to compensate the Plaintiff for.

The application is supported by an affidavit sworn by one **SURJU DHANANI**, the managing director of

the Plaintiff.

The Defendant has opposed the application by **grounds of opposition dated 16th September 2011** and **replying affidavit filed on 16th September 2011**. The replying affidavit is sworn by one **GEOFFREY MIRITI M'NAIROBI**, the general manager and chief executive officer of the Defendant. The grounds of opposition include: -

1. That the prayer for summary judgment is misconceived and does not lie under Order 36, rule 1 of the Rules.
2. That the application lacks merit cause the defence raises triable issues on both fact and law.
3. That the alleged disobedience of a court order by the Defendant cannot vitiate the defence and is not a valid ground for striking out a pleading or for summary judgment.
4. That the application is an abuse of the process of the court.

The application was canvassed by way of written submissions. I have read and considered the same, including the cases cited.

Order 36 of the Rules provides for summary procedure in suits. Rule 1 (1)(a) thereof provides as follows:
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“1. (1). In all suits where a plaintiff seeks judgment for-

(a) a liquidated demand with or without interest; or

(b) ...

where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest....” (Emphasis provided.)

Even without determining whether or not the Plaintiff's claim is a liquidated demand, Order 36, rule 1(1) is not available to the Plaintiff for the simple reason that the Defendant filed defence, as already seen, on 1st November 2007. The summary procedure under the aforesaid rule is available only where the Defendant has appeared **but has not filed a defence**. The rule says so!

What about the prayer seeking the striking out of the Defendant's defence?

Jurisdiction in that regard is available under **Order 2, rule 15** of the Rules. The Plaintiff has not invoked that jurisdiction. But that is not a fatal omission by virtue of **Order 51, rule 10(1)** of the Rules which provides: -

“10. (1) Every Order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

The power to strike out a pleading is a drastic one. It is to be exercised sparingly and only in the clearest of cases. The court will not lightly drive a party away from the seat of judgment. It is eminently desirable that disputes be settled by way of a proper hearing of the action unless such trial is clearly not necessary. There are numerous cases that have restated these principles.

In the present case, there are several issues that are in contention between the parties. They include:-

1. Was the Plaintiff the Defendant's tenant?
2. If it was, was its tenancy duly terminated by notice issued under Cap 301?
3. Was the Plaintiff's eviction from the suit premises unlawful?
4. Did the Plaintiff suffer loss as a consequence of its eviction from the suit premises, and if so, what is the quantum of such loss?

It will be noted that no clear evidence of the Plaintiff's alleged tenancy has been exhibited in the application. The two receipts for Kshs 48,000/00 each (part of Exhibit "A" in the supporting affidavit) exhibited as payment for rent show that the receipts were issued by **NITHI INVESTMENT CO LTD**. That company is not the Defendant.

It will therefore be necessary for the issue whether or not the Plaintiff was the Defendant's tenant in the suit premises, as well as the other issues, to be properly tried by way of tested evidence.

The Plaintiff has also misrepresented the fact of its eviction from the suit premises. It says in the grounds for the application that it was evicted from the suit premises in disobedience of the court order issued on 2nd October 2007 for maintenance of the *status quo* limited to the perseveration of the suit premises.

As already seen from the plaint itself, the Plaintiff filed suit on 27th September 2007 after being evicted from the premises on 27th April 2007, some 5 months earlier. So, it is simply not correct for the Plaintiff to state that it was evicted from the premises in disobedience of the *ex parte* order granted on 2nd of October 2007. No mandatory order was issued for reinstatement of the Plaintiff into the premises.

In the circumstances, I find no merit in the application by notice of motion dated 25th July 2007. The same is hereby dismissed with costs to the Defendant. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF DECEMBER 2011

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 9TH DAY OF DECEMBER 2011