



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Environmental & Land Case 7 of 2009
SAFLO LIMITED.....PLAINTIFF

VERSUS

LLOYD MASIKA LIMITED.....DEFENDANT

RULING

1. The application before court is the Defendant's Notice of Motion dated 25/03/2009 by which the defendant prays for an order dismissing the plaintiff's suit on grounds that the same is scandalous, frivolous, vexatious and an abuse of the court process. In the alternative the defendant prays that the court be pleased to discharge and/or set aside its orders issued on 8/01/2009 against the defendant and extended on 21/01/2009.
2. The application is premised on the grounds appearing on the face thereof and in particular that the plaintiff has not complied with the court order issued on 21/01/2009 regarding fresh service upon the defendant. The defendant also says that the injunctive orders ought to be discharged and/or set aside because the said orders were issued on the basis of material non-disclosure by the plaintiff. The defendant also contends that the subsistence of the said injunctive orders are prejudicial to the defendant's principal and also that the plaintiff came to court with unclean hands.
3. The application is further supported by the affidavit dated 25/03/2009 sworn by **David K. Machua** who describes himself as a Director of the defendant and well versed with the facts of this matter.
4. The application is opposed. The replying affidavit is sworn by Samson Mogikoyo Nyarangi on the 6/07/2009. The deponent says that the main problem with the tenancy of the plaintiff company is the payment of the Value Added Tax (VAT) to the Landlord who is not registered with the Commissioner of Income Tax to collect VAT on its behalf. He prays that the defendant's application be dismissed.
5. There is in reply to the replying affidavit a supplementary affidavit sworn by David K. Machua on 25/07/2009. Mr. Machua says that the plaintiff/respondent is in rent arrears. That there is no truth in the allegation made by the plaintiff that there was no proper handing over of books of accounts by the previous management agents M/S Regent Management Limited to the defendant. That the Landlord is a duly registered agent for purposes of VAT and that if the issue in this case is on VAT then the plaintiff should have sued the Landlord and not the defendant. Mr. Machua prays that the defendant's application be allowed as prayed.
6. On the 23/07/2009 the court ordered the parties to put in written submissions by latest 29/07/09. A mention date was taken for 16/07/2009 for purposes of taking a ruling date. Both parties were present in court on the 23/07/2009 when the order for filing written submissions was made. On the 16/09/2009 there was no appearance for the plaintiff/respondent nor had the Plaintiff filed their submissions by 16/09/2009. Defendant's counsel was present in court on 16/09/2009 and confirmed filing his submissions on behalf of the defendant/applicant.
7. The genesis of this application is in the plaint dated 5/01/2009 and filed in court on 7/01/2009. The plaintiff in the suit is a tenant while the defendant is described as an agent of the Landlord, Government of the Republic of Uganda, who instructed the auctioneers to levy for distress for rent. The defendant collects rent and service charges from the tenants among them the plaintiff occupying premises in Uganda House. The defendant says that as at 19/11/2008 the plaintiff was in rent arrears amounting to Kshs.208608/= hence the instructions by the defendant to Galaxy Auctioneers to levy distress. It

transpired that after proclamation of the plaintiff's goods, that the plaintiff is said to have admitted at a meeting on 28/11/2008 that it owed the amount and promised to pay up by way of post dated cheques on 31/12/2008. The defendant says that the post dated cheques were dishonoured for lack of sufficient funds and it was only after the cheques bounced that the plaintiff filed suit. On the 8/01/2009, the plaintiff obtained interim orders of injunction against the distress. The orders were extended on the 21/01/2009 and the plaintiff was ordered to effect fresh service upon the defendant. The defendant says the plaintiff did not comply with the orders of 21/01/2009 to effect fresh service of the application and the order upon the defendant, hence this application.

8. According to the defendant, the main issues for determination by the court in this matter are the following: -

(i) *Whether the institution of the suit against the defendant/applicant alone is proper and whether the suit is competent on that account;*

(ii) *Whether the institution of this suit in the Land and Environment Division of the High Court is proper and done in good faith;*

(iii) *Whether the plaintiff/respondent obtained ex-parte orders of injunction against the defendant/applicant by concealing material facts from the court and whether the same ought in the interest of justice to be vacated;*

(iv) *Whether non-compliance with the court's express order on fresh service having obtained orders of injunction amounts to an abuse of the court process;*

(v) *Whether the entire suit based on alleged non-registration of the Uganda High Commission by the Commissioner of Income Tax when there is proof to the contrary is incompetent, vexatious, scandalous and frivolous amounting to an abuse of the court process.*

(vi) *Who will bear the costs of this application and suit?*

9. In answer to the six questions, the defendant submitted that the plaintiff ought to have instituted this suit against the landlord and not the agent who cannot competently be held liable for carrying out instructions on behalf of its principal when no complaint has been made against the principal. Secondly counsel for the defendant submitted that though the plaintiff is seeking orders to restrain the defendant from collecting VAT in the interlocutory application, there is no substantive prayer in the main suit and that for this reason the application must fail.

10. Learned counsel for the defendant also submitted that this is not a proper case for the Land and Environment Division since the central issue in this case is a dispute over payment of VAT which is a matter for the Commercial and Tax Division of the High Court. Counsel submitted that issues to do with tax are specialized issues which can only be dealt with by the relevant Division of the High Court.

11. Thirdly, counsel for the defendant submitted that the plaintiff herein obtained the ex parte order of injunction against the defendant by concealing material facts from the court. Counsel submitted that one of the grounds given by the plaintiff in its application was that it had no rent arrears as it had paid all rents due to the defendant. Counsel for the defendant submitted further that the plaintiff did not disclose to the court that: -

(a) *The plaintiff's managing director, Mr. Samson Mogikoyo Nyarangi had admitted verbally on 28/11/2008 and thereafter in writing through a letter dated 03/12/2008 (see annexure DKM2 to David K. Machua's supporting Affidavit) that indeed the plaintiff was in rent arrears. The said letter of 3/12/2008 which is addressed to Galaxy Auctioneers reads:-*

"Ref: Proclamation of Distrain (sic) of movable property without prejudice.

Since our financial position is not good at present we are clearing the arrears of 208608.00 as follow (sic). Already paid Sh.60,000.00 plus the enclose (sic) cheque NO.00064 for Kshs.30000.00. A further cheque No.00065 of Shs.118,608 dated 31.12.2008 is attached.

Yours faithfully,

This refers to our meeting in your office on 28th November, 2008. To date we have not received your letter returning our previous cheques, as advised today, however we have addressed ourselves through the Auctioneers as directed.”

(b) *the plaintiff's goods had been lawfully proclaimed on the basis of the indebtedness of rent arrears amounting to Kshs.208608.00*

(c) *That the Uganda High Commission was an authorized VAT agent on behalf of the Kenya Revenue Authority (KRA) – see letter dated 14/08/2008 which stated that the first VAT return was due on or before 20/09/2008.*

(d) *The plaintiff did not make any effort to check with the KRA whether the Uganda High Commission was a duly registered VAT agent.*

12. On whether or not the plaintiff's failure to comply with the further orders made by this Honourable Court on 21/01/2009 deprives the plaintiff of the benefit of the *ex parte* orders of injunction, the defendant's counsel submitted that no such service was effected and that in any event, the defendant's facts given in the supporting affidavit of David K. Machua remain unchallenged and unrebutted.

13. On the basis of the above submissions and on the law cited by counsel for the defendant, counsel for the Defendant submitted that the plaintiff's suit fits the description of being frivolous, vexatious and scandalous and amounts to an abuse of the process of the court.

14. I have now considered the facts and the submissions made by counsel for the defendant. I have also considered all the case law cited by counsel for the defendant's counsel. My findings are that as at the time of proclamation of the plaintiff's goods, the plaintiff was in rent arrears to the tune of Kshs.208608.00, which amount the plaintiff had, by its letter dated 3/12/2008 undertaken to clear by 31/12/2008 through some postdated cheques. I have also found that the plaintiff issued cheques which when presented for payment were dishonoured by the bank. I have also found that the plaintiff's contention that the Uganda High Commission was not duly registered by the KRA as a VAT agent was not true in view of the letter dated 14/08/2008 from the KRA. I have also found that the plaintiff did not give all material facts to the court when it appeared on 5/01/2009 to seek the interim order of injunction. As was held by Azangalala J. in the persuasive authority of **Andrew Ouko vs Kenya Commercial Bank Ltd & Others [2005] eKLR** such material non-disclosures do tear into the credibility of the plaintiff's case, thus making the plaintiff undeserving of any equitable relief of this honourable court. Azangalala J quoted from the case of **King vs the General Commissioners for the District of Kensington [1917]** where the learned Chief Justice Viscount expressed himself as follows: -

“Where an ex-parte application has been made to this court for a rule nisi or other process if the court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, the court ought for its own protection and to prevent an abuse of its process to refuse to proceed any further with the examination of the merits -.....but if the results of this examination is to leave no doubt that the court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit.”

and that is in such circumstances, the plaintiff should not be allowed to take advantage from an *ex-parte* injunction which he has improperly obtained, especially where the plaintiff has failed to fully state the facts giving rise to the cause of action.

15. In **Muchanga Investments vs Safaris Unlimited (Africa) & Others [2009] eKLR** and **Premar Construction Ltd vs Minakshi Shah [2005] eKLR**, the court of appeal categorically stated that a trial should only proceed on discernible issues otherwise it would be farcical to waste judicial time on it. In **Murri vs Murri & Another [2003] EA 212**, the Court of Appeal said that: -

“.....The object of summary procedure of striking out is to ensure that defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts..... The object is to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation.”

16. In the instant case, I am satisfied that the plaintiff's case is a hopeless one. The plaintiff has not contested the fact that it was in rent arrears and that its attempt to pay the amount failed when the

postdated cheques bounced. It is also not denied that the other ground for the plaintiff's claim that the defendant's principal, the Uganda High Commission was not a licensed VAT agent is baseless because there is evidence to the contrary. As such the plaintiff's case has no legs on which to stand even if it were to go on to full hearing.

17. In conclusion therefore, I am satisfied that the defendant/applicant has established beyond any doubt that there exists a basis for the grant of the orders sought by the application dated 25/03/2009. The same ought to be granted. I do not think that allowing the plaintiff's case to go to full trial will serve any useful judicial purpose and its only effect would be to harass and put the defendant to great expense. Accordingly, I allow prayer 1 of the defendant's application dated 25/03/2009 and order thus: -

(1) That the plaintiff's suit be and is hereby dismissed for being scandalous, frivolous, vexatious and an abuse of the court process.

(2) That the plaintiff shall bear the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of January, 2010.

**R.N. SITATI
JUDGE**

Delivered in the presence of:-

Mr. Mariaria (present) for the Plaintiff/Respondent

Mr. Odoyo (present) for the Defendant/Applicant

Weche – court clerk