



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 141 of 2009

CITY COUNCIL OF NAIROBIPLAINTIFF

VERSUS

STAGE COACH INTERNATIONAL SERVICES LTD.....DEFENDANT

R U L I N G

1. By the Chamber Summons dated 30/03/2009 and brought under Order 39 Rules 1 and 2 of the Civil Procedure Rules Sections 3A and 63(c) and (e) of the Civil Procedure Act, Cap 21 Laws of Kenya, the Plaintiff/Applicant seeks orders of injunction to restrain the Defendant/Respondent whether by itself and/or its employees/agents/servants or via any other means whatsoever from trespassing on, taking possession of, selling, alienating, damaging, transferring or otherwise interfering with the property known as LR No. 209/1498/6 (sic) 209/14987, Ziwani) (the suit property) pending the hearing and determination of the present suit.
2. The application is based on grounds that the Plaintiff/Applicant is the proprietor of the suit property which it has had control over and upon which it has developed residential premises with current sitting tenants. The application is premised on further grounds that the Defendant's claim to the suit property is fraudulent, illegal or mistaken and further that the Defendant has threatened the Applicant's tenants with eviction.
3. The application is also supported by the affidavit sworn by Mary N. Ngethe on 30/03/2009. The deponent disputes the Defendant's allegation that there is a valid lease agreement between the Plaintiff/Applicant and the Defendant, which purported lease the deponent says is dated 15/05/1998.
4. The deponent states further that the purported lease, for a term of 40 years from 01/02/1987 is null and void for reasons set out in paragraph 8 of the supporting affidavit, that is to say:-
 - (a) *The lease is not executed or properly executed on behalf of the Plaintiff.*
 - (b) *No statutory authority has been obtained to let or transfer the property.*
 - (c) *The Plaintiff's purported seal on the lease is not witnessed or properly witnessed.*

- (d) *No authority has been obtained before the Defendant's seal was purportedly affixed on the said document.*
- (e) *No resolutions or minutes of the Plaintiff have been passed to lease the property to the Defendant.*
- (f) *The Defendant has never applied to the Plaintiff for allocation of the suit property.*
- (g) *No formal allotment of the property has been made to the Defendant.*
- (h) *The Defendant has not paid any consideration/stand premium for the property.*
- (i) *No public tender of the alleged lease has been floated.*
- (j) *The lease has purportedly been prepared by a private practitioner and not a counsel of the Plaintiff.*
- (k) *The lease document is on the face of it a forgery.*
- (l) *In view of the foregoing, the same could only have been prepared via fraud, collusion, forgery, deceit and corruption.*
- (m) *The purported lease was allegedly signed in 1998 but registered in 2007.*

5. The application is opposed by the Defendant vide the Replying Affidavit dated 03/07/2009 and sworn by Ann Gloag; a director of the Defendant/Respondent. The deponent says that the Defendant/Respondent is the current registered lessee of the suit property and that the block of flats on the said suit property were occupied by the employees of the Defendant/Respondent and/or Kenya Bus Services Ltd. The deponent also avers that the Defendant/Respondent has been paying annual rates to the Applicant as evidenced by the Applicants Rates and Land Rent Demand Notices dated 31/01/2008 and 14/03/2008 respectively. It is to be noted that the Defendant has not annexed any evidence of payment of these Demand Notes. The deponent however avers further that the lease dated 15/05/1995 between the Plaintiff/Applicant and the Defendant is a genuine lease between the two parties.

6. Simultaneously with the application, the Applicant filed its plaint dated 30/02/2009 in which it avers that it has never at any one time disposed of its proprietary interest or ownership in the suit property to the Defendant or any other person and that no resolutions decisions authority or minutes of the Plaintiff have been passed or secured to sanction any sale, letting, transfer leasing over the suit property. The Plaintiff therefore prays for judgment against the Defendants for:-

- (i) *A permanent injunction to restrain the Defendant whether by itself or via his agents, servants or otherwise whatsoever from interfering with the Plaintiffs' ownership, control and proprietary rights of the suit property;*

(ii) *Cancellation and revocation of the Defendant's alleged lease over LR No. 209/1498/6 (sic 209/1498).*

(iii) *Costs of the suit and interest.*

7. It was submitted on behalf of the Plaintiff/Applicant that is the registered proprietor of the suit property though there existed a lease agreement between the Plaintiff (as Lessor) and the Kenya Bus Services Ltd (as lessee) between 02/10/1957 and 01/10/1997 for a term of 40 years. It was further submitted that the said lease was never renewed and therefore that the purported renewal lease dated 15/05/1998 was without basis as no necessary consents were ever given by the Plaintiff/Applicant and/or the Minister for Local Government as required under Section 144 of the Local Government Act, Cap 265 Laws of Kenya.

8. As to the law, counsel for the Plaintiff/Applicant relied on **Aiknan –vs- Muchoki [1984] KLR 353** and urged the court not to assist the Defendant in perpetrating an illegality and flouting of the law. In the said case, the Appellants were put into possession of the estates of the 2nd and 3rd Appellant companies as receivers and managers under the terms of a debenture. The Respondents who were directors of the two companies entered into the estates while the Appellants' appointments were in force and forcibly ousted the Appellants' servants and refused to permit them to enter the premises. The Appellants' application to the High Court for interlocutory injunctions against the Respondents was dismissed for not meeting the requirements for the grant of injunctions.

9. On appeal by the Appellants, the Court of Appeal held inter alia that (a) the Appellants being lawfully in possession of the two estates under the authority of the debentures had shown a clear and overwhelming prima facie case with probability of success and (b) the Respondents having unlawfully seized possession of the estates were infringing on the rights of the Appellants and ought to have been restrained by an injunction as equity does not assist law breakers.

10. In **Halisbury's Laws of England**, Fourth Edition Reissue Volume 24 at paragraph 853, the principles upon which the courts act when granting interlocutory injunctions are restated as follows:-

“On application for an injunction in aid of a Plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rules on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course”.

11. On the local scene the principles governing the grant of interlocutory injunctions were set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**, namely that:-

(a) *an applicant must show a prima facie case with a probability of success;*

(b) *an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury;*

(c) *when the court is in doubt, it will decide the application on the balance of convenience*

These principles have been applied time and again by our courts such as **E.A. Industries Ltd. –vs- Trufoods Ltd. [1972] E.A. 420; Assanand –vs-Pettit (No. 2) [1989] KLR 249.**

12. It is on the basis of the above principles that counsel for the Plaintiff/Applicant prays that the order sought be granted. It was argued that the damage to be suffered by the Plaintiff in this case, namely the threatened transfer of the title and interest in the suit property to the Defendant who has merely put an illegal and non-existent claim to the Plaintiff's property would be difficult to compute in damages, and that such injury would thus be irreparable.
13. On the issue of convenience, it was argued on behalf of the Plaintiff that the same should tilt in favour of the Plaintiff for reasons that the Plaintiff is in possession of and has control over the suit property as opposed to the Defendant whose claim to the suit property is illegal and non-existent.
14. M/s J.M. Njenga & Co. for the Defendant submitted that the Plaintiff has not established a prima facie case with a probability of success. It was argued that the Defendant has in its possession a validly executed lease and that all along the Defendant has paid rates and rent to the Plaintiff. The Defendant's counsel also submitted that the Plaintiff's proprietorship of the suit property is questionable and further that the Plaintiff has not adduced evidence of possession of the suit premises and that the occupants of the suit property are Plaintiff's tenants. It is thus the contention of the Defendant that this is not a clear case where an interlocutory injunction can be issued.
15. I have now carefully considered the two opposing views in this matter. I have also considered the applicable law. From the facts before me, I am satisfied that this is a case where an interlocutory injunction should issue. As much as the Defendant claims that it is a lessor of the Plaintiff, Ann Gloag says the following at paragraph 4 of her Replying Affidavit

“4. The block of flats on the suit premises were occupied by the employees of the Respondent company and/or Kenya Bus Services Ltd.”.
16. The use of the past tense in the above averment suggests to me that the Defendants employees are no longer in occupation of the flats on the suit property. This statement thus lends credibility to the Plaintiffs' contention that it is in possession of the suit property and that the occupants of the flats thereon could very easily be the Plaintiff's tenants. That being my considered view, I allow the Plaintiff's application dated 30/03/2009 in terms of prayer (2) thereof and order that a temporary injunction be and is hereby issued to restrain the Defendant by itself and/or its employees, agents, servants or via any other means from trespassing on, taking possession of, selling, alienating, damaging, transferring or otherwise interfering with the suit property until this suit is heard and determined.
17. From the nature of this case, I order that each party shall bear its own costs.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of April, 2010.

R.N. SITATI

JUDGE

Read and delivered in the presence of:-

Mr. Odede for Omotii (present) For the Applicant/Plaintiff

Mr. Njenga (absent) for the Respondent/Defendant

Weche - Court clerk