



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA
Civil Case 215 of 2008

OLD PORT HARDWARE LTD.....PLAINTIFF

VERSUS

DIVYESHKUMAR INDUBHAI PATEL.....DEFENDANT

RULING

I have three applications before me for hearing by Old Port Hardware Limited (HCCC No. 215 of 2008), Nyali Construction & Electrical Services Limited (HCCC No. 218 of 2008) and Ligna Limited (HCCC No. 219 of 2008). All the applications have been lodged against the same defendant Devyeshkumar Indubhai Patel. The applications seek similar orders of the court and the parties agreed that a ruling in one application would bind parties in the other files. Arguments were therefore made in HCCC No. 215 of 2008 in which the primary orders sought are expressed as follows:-

- a) That a prohibitory order be issued restraining the defendant by himself, his agents and/or servants from, in any way whatsoever dealing with, transacting in any further dealings/transactions, Titles to plot Nos. 186/1/MI, 250/1/MI and 2535/V/MN and/or in any way parting with possession of or continuing with the demolition of the premises erected on the said plots pending the hearing interpartes and/or further orders of the court.
- b) That an interlocutory injunction be issued restraining the defendant by himself, his agents and/or servants from, in any way whatsoever and howsoever, dealing with, transacting in any further dealings/transactions titles to plot numbers 186/1/MI, 250/1/MI and 2535/V/MN and or in any way parting with possession of or continuing with the demolition of the premises erected on the said plots pending the hearing and final determination of this suit and/or further orders of the court in this suit.
- c) That pending determination of this suit a temporary mandatory injunction be forthwith issued directing and compelling the defendant to reconstruct within six (6) months of the date of the order to its original condition before the demolition on the 26th July 2008 the premises on plot numbers 186/1/MI and 250/1/M situated along Dar-es-Salaam Road, Shimanzi Mombasa and reinstate the plaintiff as a tenant thereto/therein at the same terms as before the eviction of 26th July 2008.
- d) A mandatory injunction be issued directing and compelling the defendant to reconstruct the demolished premises on plot numbers 186/1/MI and 250/1/MI situated along Dar-es-Salaam Road Shimanzi Mombasa and reinstate the plaintiff as tenant therein/thereto at the same terms as before the eviction of 26th July 2008 pending final determination of this suit.

The grounds for the application on the face of the application are expressed as follows:-

- a) That the Landlord/Defendant has proceeded to unlawfully evict and commence demolition of the suit premises notwithstanding pendency of a Reference by the plaintiff/tenant to the Tribunal.
- b) That the demolition and eviction is without any lawful suit being filed and appropriate, Court Orders being granted thereto.
- c) That unless the matter is heard on priority and injunctive orders issued, the defendant is to completely demolish the whole structure and unlawfully keep the plaintiff away while the tenancy is not lawfully terminated.
- d) That, the plaintiff's business has been brought to a halt through unlawful and mischievous scheme of the defendant and all its employees had been rendered jobless.
- e) That the defendant has stolen a match against the plaintiff through unlawful scheme by carrying out eviction at night i.e. 9.00 o'clock on 26th July 2008.
- f) That the plaintiff is to suffer irreparable loss through the unlawful breach of the Law by the defendant that has paralyzed its operations.

The application is supported by an affidavit sworn by one Clement Otieno Okumu, the plaintiff's Managing Director. It is deponed in the affidavit that the applicant is by law deemed to be a tenant at the premises situated on plot numbers 186 and 250/1/MI in respect of which M/S Kiarie Kariuki & Company Advocates issued a Termination Notice dated 14th December 2007 on behalf of the Landlord/defendant. It is next deponed that, upon the defendant being served with the termination notice, an appropriate reference was lodged on behalf of the plaintiff/tenant at the Business Premises Rent Tribunal (hereinafter "the Tribunal") at Mombasa on 15th February 2008 with notice to M/S Kiarie Kariuki & Company advocates who had served the said notice of termination. It is further deponed that the Tribunal then issued a hearing notice in respect of the reference in Tribunal case No. 20 of 2008 for 30th July 2008.

It is further deponed that with the collusion of the Tribunal's staff, the defendant hatched a scheme to steal a match against the plaintiff by causing another file to be opened at the Tribunal as Tribunal Case No. 64 of 2008 wherein an ex parte Notice of Motion dated 18th April 2008 was filed purporting that the plaintiff had filed no reference against the defendant's said termination notice. It is also deponed that the defendant, with the collusion of the Tribunal staff, acted in bad faith so as to achieve its ill intentions of evicting the plaintiff and demolition of the tenancy premises. It is further deponed that the defendant extracted the ex-parte order of 22nd April 2008 in Tribunal Case No. 64 of 2008 and couched it in such a manner purporting it to mean/amount to a declaration/judgment authorizing or directing the eviction of the plaintiff among others. It is also deponed that there was a deliberate misinterpretation and misrepresentation that a judgment had been given that was to be adopted for execution whereupon eviction orders were obtained based on a non-existent judgment of the Tribunal. It is further deponed that the defendant was ill motivated as he damaged the plaintiff's properties therein and demolished the doors, roof and other parts of the premises in the wee hours of 26th July 2008 and evicted the plaintiff from the suit premises. It is also deponed that the plaintiff has been a tenant of the defendant in respect of the said premises since 1978 and in the said premises, were a lot of assets to wit machinery, tractors, spares and in the sudden eviction, a lot of the plaintiff's properties were damaged, pilfered and/or stolen as the defendant demolished the doors, walls and removed the roof of the demised premises. It is then deponed that, it took the plaintiff over a week to be able to secure its assets to other premises even though there still remained within the suit premises a lot of goods belonging to the plaintiff. In the plaintiff's belief the intention of the defendant was to defeat the plaintiff's reference which was and is still pending before the Tribunal.

It is further deponed that, the actions of the defendant have occasioned the plaintiff losses running into millions due to the destruction of/damage to the plaintiff's properties, lost business opportunity and profits and the same continue till reconstruction and reinstatement of the plaintiff to the tenancy premises. It is also deponed that M/S Nyali Construction & Electrical Services Limited filed reference

No. 21 of 2008 which reference is still pending at the Tribunal. The plaintiff has exhibited, *inter alia*, copies of the termination notice, reference, Hearing notices, application before the Chief Magistrate, extracted order of the Tribunal, extracted order and proceedings of the Chief Magistrate, and application for execution.

The application is opposed and there is a replying and a further affidavit sworn by the defendant. In the replying affidavit, the defendant depones, *inter alia*, as follows: That he indeed issued a termination notice through his former advocates and on enquiry at the Tribunal by his present advocates, the Tribunal stated that no reference had been filed against the said notice. That the said advocates then obtained an order from the Tribunal reiterating the plaintiff's failure to file a reference. That the said advocates then applied for adoption of the order of the Tribunal and obtained orders of execution against the plaintiff. That the plaintiff sought a stay of the said execution but the Tribunal declined jurisdiction. That in the premises this application is incompetent and an abuse of the process of the court as the plaintiff ought to have appealed against the order of the Tribunal. That the plaintiff has always and continues to be in arrears of rent now running into millions of shillings which information the plaintiff has failed to disclose. The defendant denied all the allegations of the plaintiff in the supporting affidavit and stated that the execution of the orders of the Chief Magistrate is complete. With regard to the pending reference alleged by the plaintiff, the defendant denied knowledge of the same and added on advise of his advocate, that there is no legal requirement for filing a suit for eviction as suggested by the plaintiff's advocate. The defendant denied that the plaintiff had suffered any losses or damage.

In the further affidavit sworn by the defendant it is, *inter alia*, deponed that the plaintiff has not been paying rent since 1997 and has therefore not done equity. It is further deponed that the plaintiff has clearly quantified its damages which the defendant is capable of paying. It is further deponed that in seeking to reverse the order of the Tribunal by its application of 29th July 2008, the plaintiff submitted itself to the jurisdiction of the Tribunal and can only challenge the same by involving the High Court's appellate jurisdiction.

Counsel agreed to make written submissions which were in place by 18th March 2009.

I have considered the application, the affidavits filed both for and against the application and the submissions of counsel. Having done so, I take the following view of the matter. The principles for the grant of both prohibitory and mandatory interlocutory injunctions are well settled. With respect to the grant of a prohibitory injunction the conditions were laid down in the case of Giella – v – Cassman Brown and Company Limited [1973] EA 358. They are as follows:-

- 1) An applicant must show a prima facie case with a probability of success at the trial.
- 2) An interlocutory injunction will not normally be granted unless an applicant can show that he would suffer irreparable loss if the injunction is not granted.
- 3) If the court is in doubt, it should decide the application on a balance of convenience.

The affidavit evidence adduced before the court demonstrate that there has been a tenant/Landlord relationship between the plaintiff and the defendant and that the Landlord/defendant served a Notice to terminate the tenancy dated 14th December 2007. The plaintiff has persuaded me that it challenged the said Notice to terminate its tenancy and filed a reference with the Tribunal which eventually set down the dispute for hearing on 30th July 2008 in Tribunal Case No. 20 of 2008.

The affidavit evidence further indicates that, somehow, the defendant lodged Tribunal case numbers 64, 65 and 66 of 2008 in which he obtained an order that his Notice to terminate the tenancy between him and the plaintiff had taken effect and the tenancy had accordingly terminated. Upon obtaining that order, the defendant lodged CMCCC No. 1578 of 2008 in which he successfully sought an order that the said Tribunal Order be adopted as a judgment of the court. He immediately followed the adoption with an application for leave to evict the plaintiff which appears to have been granted as the plaintiffs were evicted pursuant to the order given by the Chief Magistrate's Court.

The plaintiff's main complaints are that the entire proceedings commenced by the defendant before the Tribunal in its case numbers 64, 65 and 66 of 2008 and before the Chief Magistrate's Court in Case No. 1578 of 2008 were ex-parte and were conducted during the pendency of its said reference which reference has to date not been adjudicated upon. The plaintiff further complains that in fact no order of eviction was issued by the Tribunal but the extracted order was crafted in a manner to show that eviction had been granted by the Tribunal and decreed by the Chief Magistrate's Court. In the premises, the plaintiff contends that its eviction is null and void and the orders sought should be granted as prayed.

The defendant's response in brief is that he is not aware of the reference filed by the plaintiff and in the absence of any reference, he was entitled to seek the orders given by the Tribunal and the Chief Magistrate's Court. In his view there was no requirement to serve the plaintiff with the proceedings before the Tribunal and the Chief Magistrate's Court. He further contends that the plaintiff sought to reverse the order given by the Tribunal which declined jurisdiction and its option was to invoke the appellate jurisdiction of the High Court and not its original civil jurisdiction. He further contends that the plaintiff has not paid rent since 1997 and has therefore not done equity and cannot obtain equitable relief which it now seeks.

It is clear that the defendant used the order allegedly issued by the Tribunal to obtain an eviction order from the Chief Magistrate's court. The Tribunal however, denied making an order telling the defendant to evict the plaintiff. In the Chairman's own words:- "It was a mere observation that if the notice had taken effect, then they were at liberty to proceed and obtain eviction orders from the appropriate forum. It is not my order that they were to execute..... Erroneous as the order may be, it is pursuant to the Chief Magistrate's order that the tenants were evicted..... I wish to restate that my order was extracted in error....."

I would only wish to state that on the face of it the references appear to be valid. However, the same were served upon the firm of Kiarie Kariuki Advocate and not the current advocate on record for the landlord. In that regard I would decline to make observations on those references until after hearing Mr. Kariuki's submissions. The reason being that it was by the landlord charging his advocates that he hatched a plan to evict the tenants. It is them that he set in motion the mischief of executing a non-existent order." (Emphasis supplied).

The Learned Chairman of the Tribunal was of the clear view that the plaintiff had lodged a reference against the defendant's Notice to terminate its tenancy and further that there was no order issued by the Tribunal for the eviction of the plaintiff and that the one extracted was erroneous. So, the very foundation of the eviction of the plaintiff collapsed.

Clearly therefore, the plaintiff has established a prima facie case that its eviction may have been unlawful and irregularly obtained. The defendant's action of instructing new counsel to lodge proceedings at the Tribunal for orders that his notice to terminate the tenancy of the plaintiff had not been opposed was clearly mischievous as the plaintiff had in fact opposed the notice to terminate the tenancy and lodged the reference referred to above.

In view of the Chairman's own findings quoted above, it will be difficult for the defendant to establish that he lawfully and procedurally evicted the plaintiff. The plaintiff's contention at the trial will therefore probably succeed. On that basis I am satisfied that the prohibitory order sought by the plaintiff should issue pending hearing and determination of this suit.

I turn now to the plaintiff's prayer for orders of mandatory injunction. The conditions for the grant of such an injunction are also settled. The *locus-classicus* would appear to be the case of Locabail International Finance Limited – v – Agroexport and Others [1986] 1 All ER 901. In that case the principles were stated as follows:-

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or

where the defendant has attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than was required for a prohibitory injunction.”

Those principles have been applied by Kenyan courts. (See Kenya Breweries Limited – v – Okeyo [2002] 1EA 109) which is a decision of the Court of Appeal. See also Maison Limited – v – Yaya Towers Limited [HCCC No. 2225 of 1992] (UR) which is a decision of Bosire J as he then was.

In addition to the above principles, being an equitable remedy the application for a mandatory injunction will not be granted if it appears inequitable to do so. In this case, it is clear to me that on the affidavit evidence availed, the plaintiff has demonstrated that the defendant has acted in an irregular and high handed manner. The defendant has, without doubt stolen a match against the plaintiff. He has effected the eviction of the plaintiff notwithstanding that the plaintiff lawfully opposed his notice to terminate the tenancy and duly lodged a reference at the Tribunal which reference is still pending hearing.

This is however, not a simple and summary matter which can easily be remedied. When the plaintiff was evicted, the defendant demolished the demised premises. So, even if I felt inclined to order reinstatement of the plaintiff as Bosire J did in Maison Limited – v – Yaya Towers Limited (supra), there are no premises to which the plaintiff can return. The plaintiff seeks a mandatory injunction directing and compelling the defendant to re-construct, within six (6) months of the date of the order to its original condition before the demolition, the demised premises and reinstate the plaintiff.

I remind myself that this is an interlocutory application. If I grant the plaintiffs prayer at this stage, the plaintiff’s primary claim will have been determined without taking evidence. There are also practicable difficulties in enforcing such an order. Re-construction of the premises will inevitably involve other agencies who are not parties before this court and therefore are without this court’s jurisdiction. There are also considerations of whether the defendant has funds for the reconstruction of the premises within the period stated or at all. Courts do not act in vain and the orders of the court should be final and not subject to supervision or control of other authorities at present not parties to the suit.

I therefore find and hold that this case presents difficulties or circumstances which remove it from the purview of the Locabail International Limited case (supra). Besides, a perusal of the plaint shows that the plaintiff has sought damages equivalent to the value of damaged properties during the eviction and for lost business opportunity and profits that would have been made from the date of eviction till date of reinstatement. An appropriate amendment can be made on application to claim further profits of course with provision for mitigation.

In the premises, I am not persuaded that any order for a mandatory injunction should issue at this stage. The upshot is that the prayers for the same are declined. In view of the conduct of the defendant I will depart from the normal rule that costs should follow the event and order that the defendant pays costs of this application.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 15TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

This order binds the parties in HCCC No. 218 and 219 of 2008 as previously agreed by counsel appearing.

F. AZANGALALA

JUDGE

15TH MAY 2009

Read in the presence of:-

Mr. Buti holding brief for Mogaka and Mr. Khatib holding brief for Mr. Hamza.

F. AZANGALALA

JUDGE

15TH MAY 2009