



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL CASE 238 OF 2009

JUST TIP TOP COLLECTIONS LTDPLAINTIFF

V E R S U S

MODWAYS INVESTMENTS LTDDEFENDANT

R U L I N G

The Plaintiff filed suit herein by plaint dated 4th May, 2009. It claimed, in effect, that it is the Defendant's protected tenant in the premises known as **Shop No. M29** in the premises standing on land parcel **L.R. No. 209/11616, Nairobi** (commonly known as **CAPITAL CENTRE**). That shop will hereinafter be called the **suit premises**. The Plaintiff pleaded that it had filed a reference before the **Business Premises Rent Tribunal** (the **Tribunal**) for determination of the issue whether or not it was indeed a protected tenant under the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301**. That reference is said to be still pending before the Tribunal. The Plaintiff also pleaded that in an effort to unlawfully evict it from the suit premises the Defendant had disconnected electric power. The Plaintiff sought two main reliefs as follows:-

1. An injunction to restrain the Defendant from interfering with the Plaintiff's quiet and peaceful possession of the suit premises during pendency of the reference to the Tribunal.
2. A mandatory injunction to compel the Defendant to reconnect electric power to the suit premises during pendency of the reference the Tribunal.

Together with the plaint the Plaintiff filed under certificate of urgency a **chamber summons dated 4th May, 2009**. It sought in essence the main orders of temporary prohibitory and mandatory injunctions pending disposal of the suit. The application also sought interim orders in the same terms pending disposal of the application *inter partes*.

On the same day of filing suit, that is 4th May, 2009, at around 12.30 p.m. the application was placed before me as Duty Judge. Upon reading as much of the application as I could in the limited time available, and upon representations made *ex parte* by the learned counsel for the Plaintiff, I granted an interim injunction in terms of prayer number 3 of the application, the same to remain in place until the date of hearing of the application *inter partes* on 15th May, 2009. Those representations were

substantially to the effect that the Tribunal had ruled that it had no jurisdiction to grant temporary injunctive relief pending disposal of the substantive issue pending before it, that issue being whether or not the Plaintiff was a protected tenant, and that therefore the Plaintiff was compelled to come to this court for such temporary injunctive relief.

The interim injunction granted *ex parte* restrained the Defendant, whether by itself, servants or agents, from interfering with the Plaintiff's quiet and peaceful possession of the suit premises until hearing *inter partes* on the aforesaid date.

It would appear that upon being served with the application and the *ex parte* interim order the Defendant took great exception to the latter. On 6th May, 2009 it filed an application under certificate of urgency **by notice of motion** of the same date seeking, in prayers numbers 2 and 3, orders to set aside or stay the aforesaid *ex parte* order. Those two prayers are the subject of this ruling. Prayer 4 of the application sought an order to strike out the suit. That prayer shall be dealt with on another date.

It is the Defendant's case as stated on the face of the application and in the supporting affidavit that the *ex parte* order was obtained upon the basis of material misrepresentation as well as non-disclosure of material facts by the Plaintiff who was under a legal duty to make a full, frank and fair disclosure. When the application was placed before me as Duty Judge on the same day it was filed, I ordered that it be served forthwith upon the Plaintiff, and the issue of the propriety or otherwise of the *ex parte* interim order be canvassed *inter partes* on 12th May, 2009. The issue was so canvassed.

I have carefully considered the submissions made by the learned counsels appearing for the parties, including the authorities cited. I have also now had the opportunity of perusing in greater detail the record of the Plaintiff's application by chamber summons dated 4th May, 2009. It is not my intention at this preliminary stage to decide any issues that ought to await hearing of the aforesaid application. I have heard the parties solely for the purpose of determining whether or not it is in the interests of justice for the interim injunction granted *ex parte* on 4th May, 2009 to remain in place pending disposal *inter partes* of the Plaintiff's aforesaid application.

In paragraph 6 of the affidavit of **Benson Mulinge Musili** sworn on 4th May, 2009 in support of the Plaintiff's application of that date, it is stated in effect that the Tribunal held on 27th January, 2009, upon a preliminary objection to an application for temporary injunctive reliefs, that it had **no jurisdiction to grant such injunctive orders**. Although at paragraph 7 of the same affidavit documents pertaining to proceedings before the Tribunal are annexed, the ruling of the Tribunal is not one such document. A copy of that ruling is annexed to the affidavit sworn by **Edna Fernandes** in support of the Defendant's application dated 6th May, 2009. It is clear from that ruling that the Tribunal declined to deal with the Plaintiff's application for injunctive relief, not merely on account of want of jurisdiction to grant such relief, but on account of **the suit premises being outside the jurisdiction of the Tribunal**. In other words, the Tribunal ruled that it had no jurisdiction to deal with any issue at all pertaining to the suit premises. The effect of that ruling of the Tribunal, of course, is that there is no longer any issue pending before the Tribunal **that is properly justiciable before it**. There was thus no full and fair disclosure with regard to the ruling of the Tribunal.

The Plaintiff disclosed in its application that it appealed against the ruling of the Tribunal before the High Court, and at the same time sought stay pending disposal of the appeal. The Plaintiff further disclosed that the High Court (Okwengu, J) refused that application. The Plaintiff says that it was satisfied with the ruling of Okwengu, J, and that it subsequently withdrew the appeal and filed the present suit.

Although the Plaintiff annexed to the supporting affidavit the ruling of Okwengu, J, what is not disclosed in the body of the supporting affidavit is that Okwengu, J went far beyond merely refusing the application for stay of the order of the Tribunal pending disposal of the appeal. In a considered ruling, Okwengu, J held as follows *inter alia*:-

“23. In this case it is not disputed that there was no lease agreement between the applicant and the

respondent. To the contrary, the affidavit evidence from both sides is clear that the agreement was between the respondent and Benson Mulinge Musili t/a Just Tip Top Collections.

24. It has been argued that Just Tip Top Collections ceased to exist upon its incorporation into a limited company. However that is a misconception as Just Tip Top Collections, being only a business name, never had a distinct legal personality separate from Benson Mulinge Musili. The operation of the business under the business name may have ceased, but Musili remained fully liable in respect of all transactions made under the business name. The lease agreement therefore remains binding on Musili and Just Tip Top Collections Ltd cannot step into the shoes of Musili or Just Tip Top Collections.

25. *Prima facie*, there is no privity of contract between the applicant and the respondent. Although the applicant claims to be in possession of the suit premises, no evidence has been exhibited to demonstrate that the applicant took possession of the premises with the knowledge and or consent of the respondent.

26. To the contrary, the lease agreement which was exhibited shows that the lease granted to Benson Mulinge Musili t/a Just Tip Collections was to expire on 31st December, 2008, and the tenant was under a duty to yield up the premises. The issue of Just Tip Top Collections Ltd taking over the premises merely because it has taken over the business of Just Tip Top Collections, cannot therefore arise.”

It is clear that Okwengu, J found that there was no privity of contract between the Plaintiff and the Defendant. The lease agreement was executed between the Defendant and another person, BENSON MULINGE MUSILI, not the Plaintiff, a limited liability company. The said Musili purported to assign the lease to the Plaintiff without the consent of the Defendant. The lease expired on 31st December, 2008. Again it is clear that here as well the Plaintiff did not make a full and fair disclosure.

The findings made by Okwengu, J are substantive, though made on a *prima facie* basis upon an interlocutory application. The Plaintiff has stated that it was satisfied with the ruling of the learned judge. It must therefore have been satisfied with all those findings. Can it then be proper for the Plaintiff to canvass these same issues afresh in the present suit?

It is now well established that when a party is seeking an *ex parte* injunction he has a legal duty to make a full, frank and fair disclosure of all facts known to it, or which should have been known to it had he made all such enquiries as are reasonable and proper in the circumstances. See the judgment of **Akiwumi, JA** in the case of **Uhuru Highway Development Authority vs Central Bank of Kenya, Court of Appeal Civil Appeal No. 126 of 1995** (unreported). The learned judge, after observing that the application which gave rise to the *ex parte* order discussed in the appeal was 82 pages long, said as follows:-

“Who can be expected at the hearing of such an urgent application to read and fully comprehend each and every one of these eighty two pages? This mischievous method of introducing a vast number of pages of documents some of which are described and some not, and without specifying which parts of the affidavit they relate to, can only have been intended to add confusion to the matter before the High Court judge, to conceal material facts from him and hopefully, to mislead him.”

The Plaintiff’s application herein dated 4th May, 2009 is 248 pages long!

The following further quotes (as they appear in the English case of **Memory Corporation Plc. Vs. Sidhu (No. 2) (C.A) [2000] WLR 1443**) are important to demonstrate the importance of a full, fair and proper disclosure in an *ex parte* application for injunctive relief:-

“ In Bank Mellat vs. Nikpour [1985] F.A.R. 87, 92 Slade L. J. said:

“the applicant should recognise his responsibility to present his case fully and fairly to the court

and that he should support it by evidence showing the principal material facts upon which he relies”.

“In *Siporex Trade S. A. vs. Comdel Commodities Ltd.* [1986] 2 Llyod’s Rep. 428, 437, Bingham J. said that the plaintiff:-

“must show the utmost good faith and disclose his case fully and fairly.....He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identifying any likely defences.”

“In *Marc Rich & Co. Holdings vs. Krasner* (unreported), 18 December 1998, Carnwath J. cited the *Tate Access* and said:-

“Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Once that confidence is undermined he is lost.”

With the benefit of submissions from both sides, and of the opportunity to peruse more fully the Plaintiff’s application dated 4th May, 2009, it is quite clear to me that the Plaintiff did not make a full, frank and fair disclosure of all material facts and particulars as it should have, either in the affidavit supporting the application or in the *ex parte* submissions of its learned counsel. Had such disclosure been made, I would not have granted the *ex parte* order that I did on 4th May, 2009. It is clear to me that the Plaintiff made only such disclosure, and in such manner, as would, in its view, shield it from an accusation of failure to make full, frank and fair disclosure. This was a dishonest and improper way to proceed. It disentitles the Plaintiff to the injunctive relief granted to it *ex parte*.

I think I have said enough. I should not prejudice the fair hearing of the Plaintiff’s chamber summons dated 4th May, 2009. But what I have said is sufficient to indicate that I must allow prayer 2 of the Defendant’s application by **notice of motion dated 6th May, 2009**. The *ex parte* interim injunctive order granted on 4th May, 2009 was clearly not deserved in the circumstances of this case. The same is hereby set aside.

The Defendant has claimed what it calls **indemnity costs** for the application, relying on some provision of **The Supreme Court Practice, 1977** of England. Well, our procedure is governed by our own **Civil Procedure Act** and **Civil Procedure Rules**, and they do not provide for **indemnity costs**. Whereas decisions interpreting the English practice rules may assist in interpretation of our own rules, it is certainly not permissible to import English rules of practice and apply them as such in our jurisdiction. I will therefore award “ordinary” costs of the application to the Defendant.

The decision made in this ruling, of course, does not, and cannot, absolve the Defendant or its agent and servants from the consequences of disobedience of the order of 4th May, 2009 while it remained in place, if there was such disobedience. The Plaintiff is therefore at liberty to pursue its applications by notices of motion respectively dated 6th and 11th May, 2009.

Those then will be the orders of the court.

DATED AT NAIROBI THIS 12TH DAY OF MAY, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 13TH DAY OF MAY, 2009