



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

**Civil Suit 446 of 2007**

**BARCLAYS BANK OF KENYA LTD ..... PLAINTIFF**

**V E R S U S**

**MARTHA KARWIRWA ANTHONY .....DEFENDANT**

**R U L I N G**

Barclays Bank of Kenya Limited the Plaintiff herein, initiated this suit against the Defendant Martha Karwira Anthony seeking judgment against the Defendant for two main orders, namely, an order of permanent injunction restraining the defendant, her agents or servants from interfering in any way whatsoever with the plaintiff's quiet possession of property known as LR. NO.17589 situated in Ongata Rongai (*hereinafter referred to as Suit Property*); a declaration that the lease agreement dated 28<sup>th</sup> December, 2006 over the suit property is valid and binding on the defendant. The plaintiff's claim against the defendant has its roots on an agreement entered into between the plaintiff and the registered proprietor of the suit property, for lease of the suit property for a term of six (6) years with effect from 28<sup>th</sup> December, 2006.

The registered proprietor of the suit premises and the defendant were apparently embroiled in a dispute over the ownership of the suit property. The dispute is the subject of a claim in **Nairobi High Court Civil Case No.1114 of 2006**. The Defendant contends that the dispute has been resolved through a consent order recorded in that suit whereby it was agreed that the suit premises would be transferred to the defendant and the lease would be registered. This has however, not been done. Instead, the defendant is demanding vacant possession of the suit premises from the plaintiff and is threatening to demolish the plaintiff's structure which is on the suit premises. The plaintiff is therefore seeking the intervention of the court through the aforementioned orders.

File simultaneously with the Plaintiff is a Chamber Summons dated 29<sup>th</sup> August, 2007 in which the plaintiff seeks *inter alia*, interlocutory orders of injunction restraining the defendant from interfering with the plaintiff's quiet possession of the suit premises, pending the hearing and determination of the suit.

The applications premised on the grounds that the plaintiff has a *prima facie* case with overwhelming chances of success as it holds a valid lease over the suit premises, and that the defendant has no right to interfere with the plaintiff's quiet possession. Further that the plaintiff stands to suffer irreparable loss if the defendant dispossess the plaintiff, as the plaintiff's reputation and goodwill will be seriously undermined and its expansion initiative will be impacted negatively.

The application is supported by an affidavit sworn on 29<sup>th</sup> August, 2007 by David Swao, a senior legal counsel of the plaintiff and a further affidavit also sworn by David Swao. In the two affidavits, Swao reiterates the facts set out in the plaintiff's claim and exhibit a copy of the lease agreement, a copy of the consent order entered into by the parties in **HCCC 1114 of 2006**, a copy of the letter from the defendant demanding vacant possession of the suit premises. It is further deponed that the plaintiff has been paying rent to the registered proprietor of the suit premises. Copies of letters forwarding cheques for payment of the rent have been exhibited.

The defendant responded to the application through a replying affidavit in which she swore that she was not party to the lease agreement and that the dispute between defendant and the registered proprietor was in existence well before the lease was entered into. The defendant exhibited an agreement for the sale of the suit property entered into between the defendant and the Registered Proprietor. She maintained that at the time of that transaction, the suit property was an empty plot without any building or development. The defendant further contended that the consent order entered into in **HCCC NO.1114 of 2006** and not resolve the ownership dispute, and that the registered proprietor never transferred the suit premises to the defendant which was the condition precedent to the registration of the lease. The defendant further maintained, that since she was not party to the lease, she could not negotiate or mutually agree on further terms of the lease without the lease being registered. The defendant deponed that it was in fact the plaintiff who was interfering with the status quo.

Mr. Ogunde, who argued the application on behalf of the plaintiff submitted that the defendant has tacitly acknowledged the lease in favour of the plaintiff, in **HCCC NO.1114 of 2006**, by virtue of the consent which was recorded and therefore defendant is estopped from denying the lease. He explained that the plaintiff has been paying rent to the registered proprietor as the terms of the lease were not complied with. Mr. Ogunde maintained that the plaintiff stands to suffer irreparable loss if the order of interlocutory injunction is not granted as plaintiff has established a branch in the suit premises and any change would impact on brand presence and overall strategy leading to loss which cannot be adequately compensated by an award for damages.

Mr. Machira who appeared for the defendant submitted that the plaintiff cannot rely that the plaintiff cannot rely on the consent recorded in **HCCC NO.1114 of 2006**, as he was not a party in the proceedings. He submitted that only parties to the consent can be bound by the contract entered into through the consent.

Mr. Machira, further submitted that the defendant having entered into a sale agreement with the registered proprietor and having taken possession of the suit property before the lease agreement was entered into, and the defendant not being party to the lease agreement the same is not binding on him. Mr. Machira contended that the lease agreement was invalid and could not be a basis for an injunction as it was not registered as required under the provisions of the law, nor does it specify under which Act the property is registered. Mr. Machira, maintained that *prima facie* the plaintiff's prayer for a declaration that the lease was valid and binding on the defendant cannot succeed.

On the issue of irreparable loss, Mr. Machira stated that the plaintiff has not demonstrated how irreparable loss would occur. He pointed out that according to the lease agreement the suit premises were to be used only for Mobile Banking and no irreparable loss could therefore occur.

Relying on the equitable maxims, he who seeks equity must do equity, and he who comes to equity must come to court with equity, Mr. Machira submitted that the plaintiff was aware of the defendant's interest in the suit premises. He pointed out that **HCCC 1114 of 2006**, was filed by Migos, Ogamba & Company Advocates on 25<sup>th</sup> October 2006, i.e. before the lease was entered into. The same firm of Advocates subsequently prepared the lease for the plaintiff knowledge must therefore be implied. It was further submitted that knowledge could be implied from the injunction order issued against the Registered Proprietor in **HCCC NO.114 of 2006**, which order was served on the plaintiff amongst others. It was maintained that the plaintiff was not coming to court with clean hands, as it put up the construction in violation of the injunctive orders.

Further, Mr. Machira submitted that there was no privity of contract or consideration between the plaintiff and the defendant as the plaintiff has not been paying any rent to the defendant. Mr. Machira maintained that if the court was inclined to grant the interlocutory injunction, then it should order the plaintiff to pay rent to the defendant from the inception of the lease as the defendant was the one supposed to be in possession of the suit property.

In support of his submission Mr. Machira relied on the case of *Agricultural Finance Corporation v Lengetia Limited [1985] KLR 765*. Wherein it was held that as a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable.

In response to Mr. Machira's submission, Mr. Ogunde pointed out that even the agreement relied upon by the defendant has not been registered. He stated that the performance of the agreement has not been completed hence the failure to register the transfer. Mr. Ogunde, maintained that there was nothing to stop the court from looking at both agreements.

Mr. Ogunde submitted that there was no evidence that Migos Ogamba & Company was acting for the Bank in the lease transaction, nor is there any evidence that possession of the suit property was given to the defendant, it having been agreed that possession would be given on completion of the agreement and no completion having taken place.

From the above, it is not disputed that the defendant and the registered proprietor of the suit property have entered into an agreement for sale of the suit property. It is also not disputed that the plaintiff and the registered proprietor entered into an agreement for lease of the suit property for a period of 6 years with effect from 28<sup>th</sup> December 2006. The lease agreement appears to have been entered after the agreement of sale. It is also common ground that neither the lease agreement nor the agreement of sale nor the transfer of the suit premises has been registered.

For this court to grant the interlocutory order of injunction sought by the applicant, it must consider the case being put forward by the applicant and the evidence being advanced in support therefore and ask itself whether the plaintiff has demonstrated that his rights are being violated or in danger of being violated as to justify the need for an explanation from the defendant. (*Mrao Limited vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125*.....refers).

The court also needs to consider whether the plaintiff is likely to suffer irreparable loss if the injunction is not granted. It is apparent that the plaintiff is trying to protect its rights under the lease agreement entered into with the registered proprietor of the suit premises. This begs the question as to whether that lease agreement being a lease for 6 years and not having been registered is valid and enforceable given the prayers in the plaint.

This will be a pertinent issue at the trial and I do not wish to pre-empt the decision of the trial court, suffice to state that prima facie, the plaintiff has not shown any justification or excuse for the failure to comply with the mandatory requirement of the law regarding registration of the lease agreement.

Secondly, it is evident that the lease agreement was entered into between the plaintiff and the registered proprietor, after the registered proprietor had entered into a sale agreement with the defendant. According to the agreement, the defendant had the option to take possession of the suit property immediately upon signing the agreement and paying the sum of Kshs.2,000,000/=. The defendant maintains that it had taken possession of the suit property and the registered proprietor could not therefore lease the suit property to the plaintiff. Again, this is a matter to be determined by the trial court based on the evidence to be adduced, and it cannot be stated with finality that the defendant's demand for vacant possession of the suit property from the plaintiff is a violation of plaintiff's right.

Further, the plaintiff has relied on a consent entered into between the defendant and the registered proprietor in Nairobi **HCCC NO. 1114 of 2006**, regarding the transfer of the suit property to the defendant and the registration of the lease in favour of the plaintiff. The plaintiff is however, not a party

in **HCCC NO.1114 of 2006**, nor was he a party to that consent. The authority which was cited by Mr. Machira, ***Agricultural Finance Corporation vs Lengetia Limited*** (supra), neatly deals with such a situation, and I can do no more than repeat the holding in that case that “***as a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit or purports to give him the right to sue or to make him liable upon it***”.

Needless to state, that the plaintiff cannot rely on that consent. Moreover, the plaintiff has continued to pay rent to the registered proprietor a clear indication that it did not consider itself bound by the consent in **HCCC NO.1114 of 2006**. It is also not disputed that the lease agreement was entered into after the registered proprietor had entered into an agreement with the defendant for sale of the property to the defendant. This raises yet another hurdle to the Plaintiff as to whether the registered proprietor had any beneficial interest in the suit property at the time of entering into the lease agreement.

In the light of the evidence availed to this court, I find that the plaintiff has failed to establish a *prima facie* case upon which an order of interlocutory injunction can be predicated.

In view of the above findings, the issue of the adequacy of damages as a remedy does not arise. I will therefore make no finding on the same. The upshot of the above is that the Chamber Summons dated 29<sup>th</sup> August 2007, is dismissed.

Costs shall be in the cause.

Orders accordingly.

***Dated, signed and delivered this 29<sup>th</sup> day of February 2008.***

**H. M. OKWENGU**

**JUDGE**