



REPUBLIC OF KENYA

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

Civil Case 112 of 2008

WESTLANDS TRIANGLE PROPERTIES LTD.....PLAINTIFF

VERSUS

WESTLANDS SUNDRIES LIMITED.....1ST DEFENDANT

MEAT MASTERS LIMITED.....2ND DEFENDANT

DO IT YOURSELF LIMITED.....3RD DEFENDANT

RULING OF THE COURT

1. The Defendants are the Applicants in the application dated 17/11/2008, which is brought under Sections 3A and 63 of the Civil Procedure Act and Order L rule 1 of the Civil Procedure Rules seeking **ORDERS:-**

1. ***THAT this application be certified urgent and service be dispensed with in the first instance.***
2. ***THAT a mandatory injunction be issued to compel the Plaintiff to reinstate the Plaintiffs in the suit premises erected on LR No.209/6368/4 (IR 21827/1) forthwith pending the hearing and determination of this application.***
3. ***THAT the Officer Commanding Station Parklands to help in the enforcement of the Court Order.***
4. ***THAT a temporary injunction do issue restraining the Plaintiff/Respondent whether by itself, its agents, servants and/or employees from interfering, letting, transferring, charging, leasing, pledging or in any other way alienating the shops and space occupied by the Defendants pending the interpartes hearing of this application.***
5. ***THAT a temporary injunction do issue restraining the Plaintiff/Respondent whether by itself, its agents, servants and/or employees from interfering, letting, transferring, charging, leasing, pledging or in any other way alienating the shops and space occupied by the Defendants pending interpartes hearing of this application;***
6. ***THAT the Defendants/Applicants be allowed to deposit their monthly rent in court pending the hearing and determination of the suit.***
7. ***THAT the Plaintiff/Respondent do bear the costs of this application.***

The application is also premised on the grounds on the face thereof, namely that:-

(a) The Plaintiff has forcefully evicted the Defendants from their shop premises without any court orders and despite the fact that the High Court has declared the Plaintiffs (sic) protected tenants by a Ruling delivered on 30th April 2008 by the Honourable Lady Justice Ang'awa.

(b) The Business Premises Rent Tribunal had by a Ruling delivered on 14th November 2008 purported to overrule the decision of the High Court but nevertheless directed the Plaintiff to proceed to the right forum to seek eviction orders.

(c) The Defendants' property has been thrown out to the streets and destroyed by a bunch of goons employed by the Defendant.

2. There is also a supporting affidavit sworn by **IFHAAN DIAMOND VELJI** who says he is a director of the 2nd Defendant/Applicant and that he is duly authorized to depone the affidavit on behalf of the 1st and 3rd Defendants/Applicants. From the said affidavit, the Defendants case is that:-

- **The Applicants filed complaints before the Business Premises Rent Restriction Tribunal in February 2008, being BPRT Nos. 111, 112 and 113 of 2008, all of which were consolidated by an order of the Tribunal on 3/04/2008.**
- **Pending the hearing of the complaints, the Plaintiff filed a suit challenging the jurisdiction of the Tribunal.**
- **The Plaintiff's application seeking eviction of the Defendants was dismissed by Hon. Ang'awa J on 30/04/2008 on the basis that all the three Applicants were protected tenants and that the Tribunal had jurisdiction to hear and determine the complaints before the Tribunal.**
- **At the hearing of the complaints, the Plaintiff raised a Preliminary Objection to the Tribunal's jurisdiction and that on 14/11/2008, the Tribunal Chairman delivered her ruling on the Preliminary Objection purporting to overrule the decision of the High Court and that following that ruling by the Tribunal Chairman the Defendants have given instructions to their advocates to commence judicial review proceedings.**
- **On the 17/11/2008, an auctioneer who was accompanied by a gang of about 20 men went to the Defendant's premises and threw out their property from the suit premises, that the auctioneer did so without an eviction order and without any colour of right, and without complying with the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya.**
- **The Plaintiff has completely barricaded and blocked access to the Defendants' shops using iron sheets and that the Plaintiff has also broken the Defendants locks.**
- **The Plaintiff has persistently refused to accept rent and the Defendants seek to be allowed to deposit the rent in court pending the hearing and determination of the suit.**
- **The three Defendants have been in continuous and uninterrupted occupation of the suit premises for over 30 years.**

3. The Defendant's application is opposed. The Plaintiff filed Grounds of Opposition and Notice of Preliminary Objection. At the hearing of the application, it was agreed that the Preliminary Objection would be taken as part of the arguments in opposition to the Defendant's application. The grounds raised by the Plaintiff against the Defendants application are that:-

1. The application is an abuse of the process of the court.

2. The application is brought in the wrong forum.

3. The Applicants by their own affidavit sworn by Ifhaan Diamond Velji at paragraph 7 have instructed their advocate to apply for judicial review orders but the advocate seems to instead have erroneously or mistakenly filed these proceedings for mandatory injunction in a suit that is stayed.

4. *The orders of Honourable Lady Justice Ang'awa were clearly spelt out in her Ruling dated 30th April 2008 in paragraph 26 that:*

“I accordingly rule that the application for injunction and orders to stay the tribunal cases be and is hereby rejected. I order that this High Court case be stayed. That the proceedings before the Tribunal in case 111/09, 112/08 and 113/08 commence for hearing.”

5. *The Tribunal did commence hearing as directed by the High Court and determined the proceedings on points of law in Preliminary Objection within the Tribunal's jurisdiction to which these Applicants submitted. The Applicants cannot now deny that jurisdiction.*

6. *The application is vexatious of the Plaintiff/Respondent because the Tribunal in its jurisdiction has determined that the Applicants were illegal tenants who had irregularly obtained injunction orders has set aside those orders. The High Court at paragraph 23 of its Ruling had decided and directed that:*

“23. The plaintiff in this case claim[s] that all the three defendants are illegal sub-tenants. The law states otherwise. That whether they are illegal or not the Plaintiff is subjected to the jurisdiction of the Business Premises Rent Tribunal to determine this issue.”

The application is vexatious and frivolous for claiming that the Tribunal had no jurisdiction when the Plaintiff and the Applicants obeyed the High Court and subjected itself to the Tribunal jurisdiction to determine the issue of the tenancies.

4. It is necessary at this point to look at the Plaintiff's suit which was commenced by way of plaint on 19/03/2008. The Plaintiff avers that it is the registered proprietor of the property comprised in a portion of Title Number I.R. 21827 under the Registration of Titles Act, Cap 281 Laws of Kenya and which portion is known as LR. No.209/6368/4. The Plaintiff has given a long history of how the three Defendant's came to be in occupation of the suit premises and avers at paragraph 24 of the plaint that the City Council of Nairobi has served the Plaintiff with notices under the planning law showing that the premises occupied by the three Defendants among others, have been illegally or irregularly altered, extended or added and that the Plaintiff was required to remedy the situation within three months with effect from 22/02/2008. The Plaintiff also avers that the three Defendants filed References to the Business Premises Rent Tribunal being Nos. 111, 112 and 113 of 2008 and that consequently, the Tribunal has purported to exercise the powers, functions and jurisdictions of a court under the Civil Procedure Act and the Civil Procedure Rules when on the 26/02/2006, it purported to issue hearing notices for the References filed by the three Defendants. The Plaintiff further avers that the Defendants' References to the BPRT are an abuse of the court process and that the tribunal lacks the jurisdiction to adjudicate disputes between the Plaintiff and the Defendants. The Plaintiff seeks, *inter alia*, a stay of proceedings commenced by Reference to the Tribunal and recovery of the suit property. The Plaintiff also seeks further declarations that none of the three Defendants is a controlled tenant and also that the Plaintiff is a third party to the arrangements for occupation made by the three Defendants and which arrangements were not consented to by the Plaintiff. Hon. Ang'awa J dealt with the matter and found that the Tribunal had jurisdiction to deal with the dispute. She ordered this High Court Case stayed and proceedings before the Tribunal to commence.

5. At the hearing of the application, counsel appearing went by the averments of their pleadings. Mr. Issa for the Defendants referred the court to a number of authorities. **Kamau Mucuha –vs- The Ripples Ltd. – Civil Application No. NAI 186 of 1992 (NAI 77/92 UR)** (Unreported) was in support of the Defendants prayer for a mandatory injunction. The court held in the said case that temporary mandatory injunctions will only be granted in exceptional and in the clearest cases such as when the party against whom the mandatory injunction is sought has taken the law into his own hands and taken direct action instead of going through the legally prescribed procedure. In **Thompson v Park [1944] 2 All ER 477**, a case referred to in the **Mucuha** case (above), the following passage appears at page 8 of the Ruling of Cockar, JA

“The Court of Appeal held that it is fallacious for a person to forcibly and riotously enter premises to maintain that his occupation of these premises is the status quo which must be maintained, and not disturbed, which of course in very many cases is the object of a temporary injunction – to keep things in status quo so that property in question is maintained, as far as possible, intact until the final determination of the suit. Goddard, LJ held in Thomspson –vs- Park that the status quo was not that which existed after the intruder’s illegal acts, but that which existed before hand.”

In the instant case, the Defendants allege that the Plaintiff rushed and threw them out of the suit premises even before the References to the Tribunal could be concluded as earlier ordered by Hon. Ang’awa J.

The Defendant’s counsel also referred the court to the holding in **Njoroge Kironyo & Others –vs- Koronyo Njoroge [1976-80) 1 KLR 132** where the court held as follows:-

“Although Order XXXIX of the Civil Procedure Rules does not expressly give the High Court jurisdiction to grant interlocutory injunction on the application of the Defendant, under Section 3(1) of the Judicature Act the High Court enjoys the same jurisdiction as the High Court in England enjoyed in 1897 in this respect, and accordingly, in appropriate cases may grant an interlocutory injunction on the application of a Defendant.”

6. It was also held therein that Section 3A of the Civil Procedure Act declares that nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The Applicant also referred the court to **Haircare Beauticians Ltd. –vs- Standard Properties Ltd. & Another – Court of Appeal Civil Appeal No. 179 of 1998 (68/98 UR)** – (unreported) where the court held that in a case where a Respondent has stolen a match over the process of the court by evicting the Applicant, the court will not sit back and encourage conduct unlawful or wrongful as a passport to favour. The court went ahead and issued a mandatory injunction against the Respondent restoring possession of the suit premises to the Applicant.

7. Counsel appearing for the Defendants herein argues that the Plaintiff stole a match on the court by evicting the Defendants before the References were heard. He argued that the eviction of the Defendants was unlawful and relied on **Caledonia Supermarket Ltd. –vs- Kenya National Examinations Council [2002] 2 EARL 351** where the court held that even in the worst scenario where a tenant had lost its status as a protected tenant, ***“the Appellant was still obliged by law.”*** The reason behind the court’s findings was that Cap 301 was passed to protect the tenants of business premises from eviction and exploitation, and that a party seeking to act under the provisions of the said Act for his benefit must wholly comply with the Act. Counsel for the Defendants argued that the Plaintiff in this case did not comply with Section 106 of the Indian Transfer of Property Act; that the Plaintiff should have given at least 15 days notice to the Defendants before evicting them.

8. On the question as to whether the Defendants are properly before this court on their application, counsel for the Defendants cited **Re Hebtulla Properties Ltd. [1979] KLR 63**; where it was held that the tribunal has no jurisdiction under Section 12(1) (e) of the Cap 301 to make an order on the application of a tenant who has been forcibly dispossessed by his landlord. It was also held that the right of appeal to the High Court (conferred by Section 15(1) from an order or determination of a tribunal on a reference to it does not extend to an order of the tribunal made on a complaint. Counsel therefore contended that the Defendants are properly before this court on their application.

9. Counsel for the Plaintiff relied on the grounds of opposition as filed and submitted that the instant application is an abuse of the process of the court. She argued that this suit having been stayed by Ang’awa J cannot be brought to life just for the instant application. Counsel for the Plaintiff also argued that this application is vexatious; that this suit being dead should remain where it belongs. She also argued that the court can only act in this matter if the stay order is lifted.

10. In reply, counsel for the Defendants argued that the stay order was valid only pending hearing of the matter before the Tribunal and that once the Tribunal determined the matter, the stay automatically lapsed. Further, counsel argued that since the tribunal has no jurisdiction to issue orders of injunction, it

is only this court that can grant the relief sought by the Defendants (see **Caledonia Supermarket Ltd. – vs- Kenya National Examination Council** – supra). Counsel also argued that if the Defendants had filed a fresh suit to assert their rights such action would have amounted to abuse of the court process.

11. I have considered the pleadings in this matter. I have also considered all the authorities cited to me by counsel for the Defendants and the response thereto by counsel for the Plaintiff. After considering all the above, I can say the following:- on whether or not the Defendants are properly before this court, I am satisfied that they are. Counsel for the Plaintiff argued that since the suit was stayed, the proper course of action was for the Defendants to file a fresh suit. I have looked at Section 6 of the Civil Procedure Act and would agree with counsel for the Defendants that the stay herein was to allow the determination of the matter before the Tribunal. The tribunal made a finding and in my view, the stay was no longer necessary.

12. I have also established from the pleadings and the submissions that the Plaintiff did not comply with the law in evicting the Defendants. The Plaintiff took the law into his own hands and also stole a march on the court when it proceeded to evict without a court order and without any notice as provided for under Section 106 of the ITPA. Even if the Defendants were not protected tenants as alleged by the Plaintiff, the Plaintiff was still obliged by the law. It is therefore my view that the conduct of the Plaintiff created special circumstances in favour of the Defendants who have been thrown out of the business premises. As **Kwach JA** (as he then was) said in **Kamau Mucuha** case (above) the court cannot sit back and watch the Plaintiff, who

“Having got back into the house with strong hand and with multitude of people, he has established himself in the house.”

Say

“I ought not to have an injunction given against me to make me go out because I got back here and got my boys back and, therefore, I want the status quo preserved.”

13. The courts have held that mandatory interlocutory relief should not be granted unless there are exceptional circumstances. That indeed is the law. In the instant case, and as I have stated earlier, I do find and hold that the actions by the Plaintiff have created exceptional circumstances that would favour the granting of the mandatory injunctions against the Plaintiff in terms of prayers 2,4 and 5 of the application dated 17/11/2008. I decline to grant prayer No. 3 of the application as it is not necessary for the police to be involved in matters of this nature. The Defendants should act in accordance with Order XXI Rule 28 of the Civil Procedure Rules to give effect to these orders.

15. The Defendants also say that the Plaintiff has refused to accept rent from them. For this reason I would also grant and hereby grant prayer number 6 of the application that the Defendants do deposit their monthly rent in court pending the hearing and determination of the suit. Costs of this application shall go to the Defendants.

Orders accordingly.

Dated and delivered at Nairobi this 28th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:

..... For the Plaintiff

.....For the Defendants