



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 425 of 2008**

**ESTHER MUTHONI PASSARIS.....APPELLANT/APPLICANT**

**VERSUS**

**KULTAR SINGH HANSPAL..... RESPONDENT**

**RULING**

By chamber summons application dated 27.08.08 stated to be brought under Order XXXIX rules 1, 2 and 3 and Order XLI rule 4 (1), (2) and (6) of the Civil Procedure Rules; under section 3A of the Civil Procedure Act, Cap.21; and also under section 5 of the Distress for Rent Act, Cap.293, the appellant applied for temporary orders whose essence is:-

- a) To restrain the respondent or his agents including auctioneers from proceeding with distress for rent initiated through a proclamation carried out on 18.04.08 on issuing any proclamation against the appellant for the period of the appellant's tenancy of the residential house she occupies within L.R. No. 774/75 or in any manner whatsoever interfering with the appellant's quiet and peaceful possession thereof pending *inter-partes* hearing and determination of the present chamber summons application.
- b) To similarly restrain the respondent pending hearing and determination of the appellant's appeal.

Numerous grounds (19) were cited for the application but their essence may be condensed as under:-

- i. That at all material times the appellant/applicant was and continues to be a tenant in the house situated within the suit premises.
- ii. That on or about 01.09.06 the appellant/applicant took possession of the suit premises pursuant to a one-year lease executed between her and one Alka Sharma, respondent's wife on behalf of the respondent herein.
- iii. That at the inception of the lease the appellant/applicant carried out substantial repairs to the suit property which was dilapidated, with Alka Sharma's authority and supervision, and that the appellant/applicant agreed with Alka Sharma that the cost of repairs and renovations would in future be offset against the value of the property if the appellant/applicant exercised her option under the lease to purchase the property at a later date.
- iv. That the appellant/applicant fulfilled her obligations under the lease and paid all rents for the property to Alka Sharma covering the period up to July, 2007.
- v. That the appellant/applicant has become aware that the suit property had now become under acrimonious dispute between the respondent and his wife Alka Sharma.
- vi. That the appellant/applicant set off against the rent for August and September, 2007 the one month's rent deposit paid to Alka Sharma at the inception of the lease and a loan given to Alka Sharma.

vii. That subsequent negotiations between appellant/applicant and the respondent through his advocates led to a fresh lease agreement for a further two – year period on 01.01.07 on the same rent and terms of payment.

viii. That upon the lease being drawn and executed, the appellant/applicant vide cheque dated 12.10.07 paid to the respondent Ksh.900,000/= to cover rents for October – December, 2007 and deposit towards rent in the equivalent amount and that the appellant/applicant has continued to be in possession of the suit premises.

ix. That on 18.04.08 Keysian Auctioneers, under instructions of respondent's advocates, carried out a proclamation of appellant's/applicant's household property within the suit premises for purposes of distress for rent of Kshs.600.000/= allegedly in arrears for an undisclosed period of time, which distress the appellant/applicant deems to be unlawful and in contravention of section 5 of the Distress for Rent Act, the said distress having been levied more than 7½ months after expiry of the tenancy covered by the lease agreement between the appellant/applicant and Alka Sharma whose terms the appellant/applicant says the respondent approbated and for which he sought and demanded payment of rent for September, 2007.

x. That the appellant/applicant applied for an injunction before the lower court but that the application was dismissed on 21.07.08 and interim orders previously made were discharged.

xi. That there is no rent owed by the appellant/applicant to the respondent, that it is necessary that conservatory orders be granted as the appellant/applicant may suffer double jeopardy if no order for injunction is granted.

xii. That the appellant/applicant is ready to provide an undertaking as to damages if the court so wishes.

xiii. That no prejudice will be occasioned to the respondent if the orders sought are granted as all rents pursuant to the lease agreement between him and the appellant/applicant have been fully paid and previous rents paid to Alka Sharma.

The application is supported by the appellant's/applicant's affidavit sworn on 27.08.08.

When the application came up for hearing before me on 14.10.08, the appellant/applicant was represented by learned counsel, Ms Z. Janmohamed and Mr. T.T. Tiego while the respondent was represented by learned counsel, Mr. F.K. Athuok.

Appellant's/applicant's counsel sought leave to cross-examine the respondent, Kultar Singh Hanspal on his replying affidavit sworn on 05.09.08. Appellant's/applicant's counsel said her application to cross-examine the respondent was under Order XVIII rule 2 of the Civil Procedure Rules. She acknowledged that the court has discretion to grant or refuse the leave sought. Appellant's/applicant's counsel said the purpose of the cross-examination was to establish the credibility or otherwise of the deponent/respondent and also to test the truth or otherwise of the replying affidavit. Counsel relied on High Court (Milimani Commercial Courts) Civil Case No.255 of 2000, Freshco International Limited –vs- Pioneer Overseas Corporation. It was appellant's/applicant's counsel's contention that there are contradictions in the replying affidavit going to the basis of the application now before court and that she wished to cross-examine the respondent on paragraphs 4, 6, 8, 10, 11, 12 and 13 regarding the court orders alluded to in those paragraphs. In the appellant's/applicant's counsel's view, the issues she wished to cross-examine the respondent on are relevant in determining the application before court. Appellant's/applicant's counsel added that she would through the proposed cross-examination also endeavour to ascertain if there is perjury on the part of the respondent.

Appellant's/applicant's counsel urged this court to grant her leave to cross-examine the respondent on his aforesaid replying affidavit.

On the other hand, respondent's counsel opposed the application to cross-examine the respondent, terming the application to do so a side-show and waste of time. He said of paragraph 4 of the respondent's replying affidavit that it annexes a lease between the appellant/applicant and respondent's estranged wife and that there is nothing strange in it. Respondent's counsel pointed out with regard to paragraph 6 that the respondent maintained vide the said paragraph that he never consented to the first lease agreement, executed between the appellant/applicant and the respondent. As for paragraph 8, respondent's counsel said that vide it the respondent maintains that he never consented to the lease or mandatory option to purchase the suit premises without his (respondent's) consent.

Regarding paragraph 10, respondent's counsel said it annexed letter dated 14.05.08 from appellant's/applicant's advocates to the respondent's estranged wife; that the respondent had learnt through that letter that the appellant/applicant had agreed to enter into the lease with the applicant on the clear understanding that she would obtain necessary court orders to authorize her to sell the property; that the applicant then went ahead to facilitate commencement of proceedings by the respondent; and that the letter indicated that the applicant had withheld rent for

June, July, August and September, 2007. Respondent's counsel said of paragraph 11 that it is a summary. I interpose here to note that paragraph 11 of the replying affidavit concludes that the appellant/applicant knew all along that the respondent was the registered owner of the subject property but chose instead not to pay rent to the respondent and that the respondent gave the applicant the benefit of doubt until when he (respondent) came fully into the picture in June, 2007. With regard to paragraph 12, respondent's counsel said it annexes letter of 09.07.07 from the appellant's/applicant's advocates to his (respondent's) advocates stating that the applicant had not paid rent for June and July, 2007. Regarding paragraph 13, respondent's counsel said that vide the said paragraph the respondent maintains that the appellant/applicant had no basis to pay rent to the respondent's estranged wife.

It was respondent's counsel's contention that the dispute is about rent for 4 months when the respondent's estranged wife was no longer in the picture regarding rent for June – September, 2007 at the rate of Kshs.150,000/= per month and that the issues raised by appellant's/applicant's counsel between the landlord/respondent and his estranged wife are not before this court. Respondent's counsel said that the respondent does not want to sell the suit property but that the appellant/applicant insists on buying it. Respondent's counsel said that what is before this court is contained in the respondent's replying affidavit plus supporting documents and that if the appellant/applicant did not agree with anything therein she should have applied for leave to file a further affidavit, which was not done. Counsel submitted that the application under Order XVIII rule 2 could have been entertained if there was an issue of credibility and truth but that there is no such issue in paragraphs 4, 6, 8, 10, 11, 12 and 13 of the respondent's affidavit.

Respondent's counsel urged this court to allow the application now before court to proceed, on the basis of the affidavits on record.

In reply, appellant's/applicant's counsel said that the purpose of the cross-examination sought is the *locus* of the deponent of the replying affidavit, i.e. the respondent herein. Counsel said that the valuation of Kshs.50,000,000/=, alluded to at paragraph 8 of the respondent's affidavit, is for 5 acres while the respondent owns only 2.5 acres of the suit land. Appellant's/applicant's counsel essentially reiterated her earlier submissions, said her application to cross-examine the respondent is not a side-show and urged to be granted leave to cross-examine the respondent on his subject affidavit.

I have given due consideration to the appellant's/applicant's application to cross-examine the respondent and the respondent's opposition thereto.

The appellant/applicant sought to rely on High Court (Milimani Commercial Courts) Civil Case No.255 of 2000 (*supra*) for his application to cross-examine the respondent on his replying affidavit. The aforesaid decision was by the High Court (Onyango Otieno, J – as he then was). Being a decision of a court of concurrent jurisdiction, it is of persuasive but not binding authority on this court. In that case the applicant applied for leave to have the deponent of two affidavits sworn on 09.02.2000 called to be cross-examined on their affidavits. The applicant there contended that cross-examination of the deponents was:

‘necessary in view of the allegations by Captain (Rtd) James G. Karanja in an affidavit sworn by the same Captain (Rtd) James G. Karanja on 19<sup>th</sup> February 2000 ... stating that the two affidavits by the Respondents and sworn as aforesaid on 9<sup>th</sup> February 2000 were distorted as the same deponents were not in Kenya on 9<sup>th</sup> February 2000 and so could not have sworn the same affidavits that day.’

Later in his submissions, Mr Nagpal, counsel for the applicant in that case submitted that the applicant wanted to have the same two people cross-examined to establish their credibility or otherwise, and also on the contents of their affidavits. The court in that case made the following finding:

‘ I do find that what the Applicant wants to establish is mainly the credibility or otherwise of these deponents and as Mr Nagpal later said, they also want to test the truth or otherwise of the contents of the averments as the Applicant is challenging the same in their own affidavits.’

The court in H.C.C.C. No. 255 of 2000 (*supra*) granted the applicant leave to cross-examine the deponents of two affidavits sworn on 09.02.200 and 21.02.2000.

The scenario in High Court (Milimani Commercial Courts) Civil Case No.255 of 2000, as I understand it, is that the applicant there challenged, by his own affidavit(s), the affidavits whose deponents he sought to have cross-examined. His challenging affidavit provided an evidentiary basis upon which cross-examination of the deponents of the challenged affidavits was to be premised. The situation of the case now before me is different in that the appellant/applicant here has not sought and obtained leave to file a further affidavit to depone to facts that would pose a challenge to factual averments in the respondent's replying affidavit. The appellant's/applicant's application for cross-examination of the respondent on his replying affidavit has been made in a factual vacuum.

Order XVIII rule 2 under which the application to cross-examine the respondent on his affidavit was brought provides as follows:

‘2. (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the court otherwise directs.’

Appellant’s/applicant’s counsel, rightly, acknowledged that the court has discretion to grant or refuse an application for cross-examination of a deponent of an affidavit. That discretion has, of necessity, to be exercised judicially. The appellant/applicant ought to have sought and obtained leave to file further affidavit to place on record facts that would pose a factual challenge to facts deponed to vide paragraphs 4, 6, 8, 10, 11, 12 and 13 of the respondent’s replying affidavit. Omission to do so leaves me with no facts to aid me in exercising my discretion in favour of the appellant’s/applicant’s application for cross-examination of the respondent on his replying affidavit judicially.

In view of the foregoing, I decline to grant leave for cross-examination of the respondent on his replying affidavit sworn on 05.09.08. The appellant’s/applicant’s application to cross-examine the respondent on his aforesaid affidavit fails and is hereby dismissed.

Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 3<sup>rd</sup> day of November, 2008.

**B.P. KUBO**

**JUDGE**