



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 166 of 2008

SYRUP DISTRIBUTORS LIMITED.....APPELLANT

VERSUS

LOKI DEVELOPERS LIMITED.....RESPONDENT

R U L I N G

1. Syrup Distributors Limited, the applicant herein, is dissatisfied with the ruling of the Senior Resident Magistrate delivered on 19th July, 2006 in CMCC No.12932 of 2005. In the ruling the Senior Resident magistrate gave orders in favour of Loki Developers Limited, (hereinafter referred to as the respondent), for an order of mandatory injunction directing the applicant to deliver immediate vacant possession of the premises registered in the name of the respondent under title No. LR 17870, (hereinafter referred to as the suit premises). The trial magistrate further ordered the applicant to remove all the structures which it had erected on the suit premises.

2. The applicant has lodged an appeal seeking to have the decision of the Senior Resident Magistrate dated 19th July, 2006, quashed and the application of the respondent dated 1st December, 2005 which was the subject of the decision, dismissed with costs.

3. By a notice of motion filed on 18th June, 2008, the applicant has now moved this court seeking *inter alia*, orders of mandatory injunction;

“That on the inter-partes hearing of this application, and pending the hearing and determination of this appeal, this honourable court be pleased to order: -

(a) that the respondent whether by itself, its agents, servants, directors and/or employees do deliver immediate vacant possession of all that piece of parcel of land in Dandora Nairobi known as TOL 108972/13 Railway Siding AGI NED 1214 property of the appellant. Failing which, the appellant to be at liberty to forcefully evict the respondent from the suit premises and the OCS Buru Buru Police Station to supervise such eviction to ensure peace and order is maintained.

(b) The respondent do reinstate all the structures onto the suit premises belonging to the appellant which it has pulled down illegally, as soon as possible.”

4. The applicant claims to be the lawful allottee from the Kenya Railways Corporation of a parcel of land known as TOL 108972/13 Railways Siding AGI NED 1214, which land is the same as the suit

premises herein.

5. The applicant contends that during the pendency of its appeal, the respondent has pulled down a building which the applicant had erected on the suit premises and carted away the heavy gauge iron sheets from the debris. The applicant contends that unless restrained, the respondent will continue harassing the appellant by carrying away its property from the suit premises, and if the appeal is successful the applicant shall suffer irreparable loss.

6. Counsel for the applicant submitted that although the respondent had an order from the lower court for eviction the orders were executed in the year 2006 and that there was no application made for fresh execution and the respondent has therefore no rights at all to disturb the quiet enjoyment of the applicant.

7. The application is opposed through a replying affidavit sworn by Sammy Boit Kogo, a director of the respondent. He depones that the respondent transferred the suit property on the 9th May, 2007 to Turbo International Ltd. He further maintained that the applicant having been ordered out of the suit premises through a court order, it cannot enjoy quiet possession of the suit premises unless it has been in contempt of the court orders. It was further contended that the respondent was the registered owner of the suit property and the evictions complained of were carried on the basis of a lawful court order. It was maintained that the applicant has no property on the suit premises and that in any case, if there is any theft, that is a matter for the criminal court.

8. Counsel for the respondent submitted that the applicant's prayer for orders of mandatory injunction were fatally defective and should be dismissed in *limine*. Counsel maintained that the respondent was given vacant possession of the suit premises by the court order dated 19th July, 2006, which order also granted the respondent leave to remove any illegal structures from the suit premises. It was contended that granting the orders now sought by the applicant would circumvent the appeal which has been lodged by the applicant against the orders of 19th July, 2006. It was contended that the orders now sought can only be made by way of a formal plaint should the applicant succeed in its appeal.

9. In a rejoinder to the submissions made by the respondent's counsel, counsel for the applicant maintained that the application was properly brought against the respondent as he still remains liable for any actions committed against the applicant by any 3rd party on the respondent's authority. Counsel maintained that the purported execution of the eviction orders, 12 months after the orders were made, without any notice to show cause having been issued, was irregular. He therefore urged the court to issue the orders sought.

10. Having considered the application and the submissions made by counsels it is evident that the applicant seeks to be reinstated into the suit premises and to have its structures which had been pulled down from the premises reinstated. It is an established principle that an interlocutory order of mandatory injunction can only be granted in very clear and exceptional circumstances. In the case of **Kenya Breweries Ltd vs Okeyo (2002) 1 EA 109**, the Court of Appeal approved the following test provided in Vol. 24 Halsbury's Laws of England 4th Edition par.948: -

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff mandatory injunction will be granted on an interlocutory application.”

11. In this case, a court of competent jurisdiction issued orders for eviction of the applicant from the suit premises. Those orders were issued on 19th July, 2006. Although the applicant lodged an appeal on 3rd April, 2008 against the orders issued by the lower court, no evidence was laid before me of any orders of stay of execution of the orders issued on 19th July, 2006 having been issued either by the lower court or this court. That means that the respondent was free to execute the orders of the lower court. It was contended that there was no notice to show cause prior to the execution of the decree although execution

was done more than one year after the order was issued. However, that is a matter for the trial court which has jurisdiction to deal with issues relating to the execution of its orders.

12. Further, the applicant maintains that it has a temporary occupation licence (TOL) over the suit premises, whilst the respondent claims to be the registered proprietor of the suit premises. It cannot therefore be said that the applicant has demonstrated a *prima facie* case upon which the mandatory orders sought can be anchored. The applicant has claimed that its goods have been damaged and certain of his goods have been stolen from the suit premises. That may well be so. The applicant has not however satisfied this court that the loss suffered is substantial or irrecoverable.

13. For the above reasons, it is evident that the applicant has not satisfied the conditions for granting a mandatory interlocutory injunction. For that reason, its application fails. The application is accordingly dismissed.

Those shall be the orders of this court.

Dated and delivered this 16th day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Wanjama N/B for the appellant/applicant

Advocate for the respondent absent