



**REPUBLIC OF KENYA**

**HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)**

**Civil Case 1289 of 2006**

**SPRA FUELS LIMITED ..... PLAINTIFF**

**VERSUS**

**DAVID GEORGE BELL ..... 1<sup>ST</sup> DEFENDANT**

**ESTHER GLORIA WHIHAKI BELL ..... 2<sup>ND</sup> DEFENDANT**

**Notes:**

1. Land & Environmental Law Division
2. Subject of main suit:- Ownership of property
  - i) Issue whether relationship of landlord and Tenant exists.
  - ii) Plaintiff M/s SPRA Fuels Ltd files suit as tenant to one A. Bashin owner of suit premises LR No.1870/Vol/85 Nairobi.
  - iii) Defendant wants to levy distress when in effect the owner of premises is that of A. Bashin.
4. Application dated 4 December 2006
  - i) Injunction orders sought against 1<sup>st</sup> and 2<sup>nd</sup> defendant restraining them from inter alia levying distress
    - ii) That a landlord tenant relationship does not exist.
5. Defendant 1 and 2 represented by one advocate ie defendant advocate M/s Githinji Kimamo & Co. Advocates later defendant No.1 represented by Gatheru Gathemi
6. Arguments by applicant
  - a) The suit property was transferred to another party from the defendant 1 and 2.

b) The defendant 1 and 2 are no longer owner of the property

6. Arguments by respondent

a) The defendant 1 and 2 objects to the issue of injunction

b) Element of fraud

7. Held/Finding

7.1. That the application for injunction be dismissed

7.2. Issue before court is that of fraud

7.3. Tenants rent to be paid in an interest earnings account held by both

Advocates failure to, tenant to deposit sum in court.

7.4. All suits are stayed under section 6 Civil Procedure Code. Main trial be held in first case of Hccc357/06 dealing with fraud.

8. Case law - nil

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9 Advocate:

Mutuga holding brief for Singh Gitau & Co. Advocates for the plaintiff

G. Gatheru for Gatheru Gathemia & Co. Advocates for the 1<sup>st</sup> defendant-respondent – present

J. Githinji for Githinji Kimamo & Co. Advocates for 2<sup>nd</sup> defendant – present

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**RULING**

1: Background to the application dated 4 December 2006 seeking injunction against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

1. I must state that this file has evolved from various acts of the plaintiffs advocate. I require to give a

full back ground of it. To do so I did call up the various files that have been filed in various courts for perusal. There is one file I have not obtained but the proceeding are within other files.

2. Originally, M/s Nutcracker Ltd was a tenant of David George Bell and his wife Esther Gloria Mwikali Bells in an apartment No RH001 situated at the Cannought Apartments LR No.1870/01/85 Nairobi. In August 2004, M/s Nut crackers Ltd through their director one Ashutosh Bhashin offered to buy the said flat at a price of Ksh.7,605.000/- less 10% or thereabouts. He paid a ten percent deposit and the balance was to be paid within 90 days. As per the conveyance, the documents were released to M/s Singh Gitau to hold with an undertaking that no transfer to the documents be made until the payments are made in full. Ashitosh Bhashin approached M/s Giro Bank for the balance of the sum due. No payments were due and or made. The defendants 1 and 2 issued a notice to terminate the said agreement on 24 March 2005. By 15 April 2005 the purchase price having not been paid the said agreement was duly terminated. What therefore was expected is for the transfer documents and title to be returned to the defendants Advocates M/s Githinji Kimano & Co. Advocates. Instead the property was transferred to Ashitosh Bhashin.

3. The Giro Bank entered into a settlement with the defendants and they now have no claim against them. The said defendants herein Mr. & Mrs. Bell then filed suit being Milimani High Court case 357/05 that was brought against Ashutosh Bhashin & Giro Bank in a claim for FRAUD. The basis being that the suit premises was transferred to the said Ashitosh Bhasin when in effect the contract of sale was terminated.

4. The said Mr & Mrs. Bell treated the occupants of the premises as tenants and levied distress for rent. M/s Nutcraker filed suit in the Milimani court case No.12702/05 in the Magistrates court and sort orders for an injunction from the said Magistrates court. This was of course irregular as there was existing already a high court case where the said application ought to be filed being Hccc357/05 that was filed in January 2005. The magistrate's court case was filed in November 2005.

5. The trial magistrate J. Were (Mr) Resident Magistrate heard the application in file CMCC12702/05 for an injunction and ordered that rents were due. That the said rent by the plaintiff M/s Nutcracker be deposited in an interest earning account in the joint names of the advocates being rents up to and including 1 April 2006 and thereafter on the 1<sup>st</sup> day of a month till determination of the said suit.

6. The plaintiff M/s Nutcracker appealed to the High Court against this order and made application of 7 April 2006 for stay of execution of the trial magistrate's courts orders.

Namely, that M/s Nutcracker should not be made to pay the rents. This application came before me in the High Court Civil appeal file 195/06, on the 19 June 2006. I did call for the related files and in my ruling of 21 June 2006 held that the application dated 7 April 2006 be dismissed for stay of execution pending appeal.

7. The appellant/plaintiff, M/s Nutcraker took no further action on this files, nor did they deposit the returns in an interest earning account, but I am made to believe that some amount of money was thereafter paid.

8. Thus the status of the matters before court so far is that:-

i) M/s Nutcrackers Ltd offered to buy a flat from

Mr & Mrs. Bell

ii) That instead of paying the 90% of the sum due, a director of M/s Nutcraker Ltd transferred the suit premises into his name ie Ashiton Bhasin.

iii) The original defendants Mr. & Mrs Bell sued Ashiton Bhasin & Giro Bank for fraud

- iv) Giro Bank settled this issue out of court and the matter was withdrawn against them.
  - v) The case in question is Hccc357/05
  - vi) The Nutcracker Co Ltd filed suit for injunction in the Magistrates courts to restrain defendant 1 and 2 from issuing and levying distress (CMCC1202/05)
  - vii) The application for injunction was not granted but instead orders were made to pay the deposits in an interest earning account.
  - viii) M/s Nutcracker appealed to the High Court to stay these orders. The High Court in civil Appeal 195/2006 declined to make orders of stay of execution of the magistrate's orders.
9. There has been no sale of the suit property. The defendants 1 and 2 purports that the same was terminated. They recognize as their tenant as one M/s Nutcrackers Ltd.
10. In the meantime ownership is alleged to have been illegally transferred to the director on Ashitosh Bhasin.
11. From the proceedings, the advocate Mr. Singh Gitau states that in August 2005 the defendants agreed to accept an additional amount of sums of money to ksh.8.450 million. It was therefore an impression that the transfer could be done.
12. I did comment in the appeal ruling, as both advocates for the parties were involved in the transaction they should engage other advocates to represent the parties.
13. On the 5 December 2006 the advocate for the original plaintiffs M/s Nutcracker Ltd files suit Hccc1289/06 which is this before me through a new advocate being M/s Mukite Musagi & Co. Advocates. In the High Court case the plaintiff is one SPRA Fuels Ltd who is now the new tenant in the disputed suit premises being apartment RH001 Cannought Apartments LR 1870/VI/85 Nairobi.
4. The plaintiff filed a certificate of urgency and project for an injunction to issue against Mr. & Mrs. Bell the two defendants on grounds that the two defendants have never been their landlord. There relationship of land lord and tenant never has existed.
15. The question arises should an injunction issue or not?
16. Mr. Sigh Gitau came and argued the application and had the conduct in these proceedings herein.
17. The defendants No. 1 and 2 in the middle of this matter changed advocate for defendant No.1 to M/s Gathemia Gatheru & Co. Advocates whilst defendant No.1 retained the services of M/s Gathenji, Kemano & Co. Advocates.
18. The arguments put to this court was the same as was demonstrated in the magistrates court case 12702/05 for an injunction to restrain levying of distress against the tenant in the suit premises. It is the same as in the appeal case 195/05 at the High Court that came before me and is in effect seeking the same prayers in this Hccc1289/06.
19. The issues in the main suit of Hccc357/05 is that of fraud. The transfer to one Ashutosh Bhasin is alleged be irregular. The High Court requires to determine this issue before court.
20. In the meantime the occupants of the suit premises must obey the magistrate orders being that the rents of the suit premises must be deposited in an interest earning account in the joint names of the advocate till the determination of the suit.

21. My orders herein is that I confirm the magistrates orders with a slight variation that Hccc1289/06, Hccc 195/05 and CMCC12702/05 be and is hereby stayed under section 6 of the Civil Procedure Act till the determination of the High Court civil suit 357/05 at Milimani touching on fraud. That case being a land case should generally be heard within the Land and Environmental Law Division unless the judge concerned has began the suit and it is a part heard or is seized with the matters in question.

22. I order that for clarity the rents be deposited in an interest earning account in the name of both advocates. Failure to do so, the tenant be at liberty to deposit rents into the High Court of Kenya central registry.

23. I hereby dismiss the application for injunction with costs to the defendant.

Dated this 11 day of July 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

Mutuga holding brief for Sighu Gitau & Co. Advocates for the plaintiff

G. Gatheru for Gatheru Gathemia & Co. Advocates for the 1<sup>st</sup> defendant-respondent – present

J. Githinji for Githinji Kimamo & Co. Advocates for 2<sup>nd</sup> defendant – present