



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 675 of 2005

SHELL & BP (MALINDI) KENYA LIMITED.....PLAINTIFF

VERSUS

TAHIR SHEIKH SAID.....DEFENDANT

RULING

The plaintiff filed the plaint, hereof, and simultaneously filed an injunction application dated 24th June 2005.

That application sought to injunct the defendant from interfering with the plaintiff's possession and quiet enjoyment of property LR.. No. 209/8009 (the suit property).

That application was argued before justice Ochieng who delivered a ruling on 7th March 2006. The judge found that the plaintiff had made out a prima facie case with probability of success but declined to grant an injunction on his finding that the loss, the plaintiff might suffer, was quantifiable; and also on the basis that the balance of convenience tilted in favour of the defendant because the lease had just a few days before its term ran out. The injunction application was dismissed.

The plaintiff filed a notice of appeal but to date does not seem to have pursued the appeal.

The plaintiff then filed another application, by way of Notice of Motion, dated 12th April 2006.

The plaintiff, in that application, seeks two prayers. The first is that leave be granted to amend the plaint as per the amendments shown in the annexure to the application. The second prayer seeks; **“the defendant be restrained whether by himself, his agent servants or..... Otherwise from interfering with the plaintiff's possession and quiet enjoyment of the suit property L.R. No. 209/8009 pending the hearing and determination of this suit.”**

In regard to the prayer for amendment the defendant argued that they are **“afterthought calculated to mischievously and oppressively ensure the maintenance of the current status quo.....thereby unjustly inflicting irreparable hardship”** by keeping the defendant out of the suit property.

The court having considered the submissions on the prayer for the amendment to the plaint, and having considered the actual amendment sought is of the view that the prayer is merited and causes no injustice or prejudice to the defendant since the defendant will be entitled to file a defence to those amendments.

In support of the 2nd prayer plaintiff submitted that the intention of the plaintiff, in seeking that prayer, is to try to maintain the status quo, pending hearing of the suit scheduled for 3rd and 4th July 2006. Plaintiff stated that this prayer was provoked by the defendants letter dated 7th April 2006 by which letter, plaintiff argued, was clear that the defendant intended to walk into the suit property with intention of taking over possession. That, that defendants letter was written despite the plaintiffs letters which made it clear that the defendant's action were of a criminal nature.

Plaintiff's learned counsel Mr Kimani Kiragu submitted that the court is empowered to give an injunction order under its inherent power to stop blatant disregard of the law. Counsel in this regard relied on the cases, THE IRON & STEEL LIMITED CIVIL APPL NO. 48 OF 1958; NGANGA V KIMANI [1969] E.A. 67 and MULLA ON CODE OF CIVIL PROCEDURE VOL. 1.

The plaintiffs prayer to restrain the defendant from obtaining possession of the suit property was opposed by the defendant. The defendant submitted that even though the application is brought under the inherent power of the court, the plaintiff was essentially seeking an injunction and for this reason defendant stated that the application is bad in law and incompetent. Defence relied on the case: OLIVIA DA RITTA SI QUEIRA E. FACHO AND ANOTHER [1933] XV LAW REPORTS OF KENYA 34, which case defence said, showed that inherent power was invoked as a last resort. Defence further stated that, "inherent powers cannot be invoked where another remedy is available or a specified rule exists covering a particular procedure". (Judicial Hints on Civil Procedure Vo. I,R. Kuloba).

Defendant's learned counsel, Mr Maweu, read mischief in the application by the plaintiff, which application he said clearly sought an injunction, yet the same was seeking to invoke inherent powers. Defence counsel said that power to grant injunciton was to be found in order 39 of the Civil Procedure Rules.

Defendant also argued that the plaintiff could not rely on the amendments, in support of the application, since those amendments had not yet been allowed by the court. Similarly defence stated that an injunction could not be granted on the basis of section 90 of the Penal Code, since it was a prerequisite that there be entry to justify a claim of breach of that section. Defence stated that the plaintiff had failed to show such entry.

Defence invoked the defence of the doctrine of res judicata, that the present application was similar to the one dated 24th May 2005, which was heard by Justice Ochieng. Defence relied on the case HCCC No 966 of 2000 PASTIFICIO GAROFALO S.P.A. V SECURITY & FIRE EQUIPMENT COMPANY LTD & ANOTHER where the court found an applciaiton be to res judicata for seeking an order to set aside an injunction where as an earlier application, which had been heard and determined, sought the discharge of that injunction.

Defence argued that the plaintiff's application was misconceived because the finding of justice Ochieng had not been set aside, reviewed or appealed. The plaintiff in response, argued that the ruling of Justice Ochieng was not final and therefore their present application cannot be said res judicata.

That summarises the arguments before me. As stated herein before ht court will grant the prayer for amendment of plaint.

Having granted that prayer the court accepts the defendant's argument that, that amendment cannot be the basis to grant an injunction as sought by the plaintiff.

The plaintiff made an application for injunction dated 24th May 2005 which application was ruled

upon by Justice Ochieng.

The present application dated 12th April 2006 for all intents and purposes seek the very prayers that were considered by Justice Ochieng. The fact that it is brought under the inherent power, rather than order 39, of the Civil Procedure Rules, is not material. The court would look at the effect of the prayers sought to know whether the doctrine of res judicata is being infringed. In this case the first application heard by Justice Ochieng sought an injunction to stop defendants eviction of the plaintiff pending the final determination of the suit. In the present application being considered by this ruling, the plaintiff sought orders to restrain the defendant from evicting it until the final determination of the suit. The effect of both applications and their prayers are the same. To entertain that application as drawn would indeed be sitting in an appeal against Justice Ochieng's ruling and such prayers certainly are caught by the doctrine of res judicata. I reject the plaintiff's reliance on the case of BULHAN & ANOTHER V EASTERN AND SOUTHERN AFRICA TRADE AND DEVELOPMENT BANK [2004] 1 KLR. In that case the court found that an order for temporary injunction did not make orders therein final, because the trial court was not bound by such orders.

On the other hand the plaintiff did annex a letter written by the defendant, to the plaintiffs counsel, dated 7th April 2006. The letter at paragraph 3 stated:

“The pendency of our client’s counter claim herein is no bar to our client’s imminent re-entry into the suit premises in lawful exercise of self help towards abatement of continuing nuisance and/or ejection of a trespasser vide reasonable force and without unnecessary resorting to court.”

That paragraph is very damning against the defendant. It clearly shows that the defendant intended to forcibly evict the plaintiff without recourse to the law. That letter was written after the ruling of Justice Ochieng, where after finding that an injunction would not be granted to the plaintiff, the judge stated:

“But, at the same time, I must emphasise that although I have declined to grant the injunctive reliefs, the defendant must nonetheless comply with the law, if it is still desirous of obtaining possession of the suit property.”

The judge made it quite clear that the rejection of the plaintiffs prayer was not a licence for the defendant to take the law into his own hand, if parties were allowed, or for that matter members of society, to do whatever they wished without regard to the law, there would be lawlessness and no society left to talk about.

The defendant's response to the letter annexed by the plaintiff, as stated herein before was in the replying affidavit paragraph No. 8 as follows:

“That in the premises, I verily believe that the applicant need only do the honourable thing and ensure the delivery of vacant possession of the suit property in terms of my letter.....since I have neither committed nor threatened to commit any illegality/lawfulness in my quest to re-enter the suit property as against illegal and unlawful trespasser, squatters and nuisance thereon”.

The paragraph did not diffuse the 'sting' in the letter. The court finds that the defendant is not intent on following the legal procedure of obtaining possession of the suit property, even in the replying affidavit the defendant described the plaintiff as **“illegal unlawful trespassers, squatters and nuisance thereon.”** This description put together with the words in the letter, that is, **“imminent re-entry into the suit premises in lawful exercise of self help.....”** Clearly shows the defendant's intention.

The court cannot stand by and allow the law to be breached. The court can invoke its inherent power to prevent transgression of the law, such action would be necessary for the ends of justice and to prevent abuse of the process of the court.

The court's orders therefore are: -

- (1) That the prayers sought in the Notice of Motion dated 12th April 2006 are rejected as prayed in prayer No. 3 and 4.**
- (2) That the court does invoke its inherent powers hereof, and does hereby restrain the defendant from unlawfully evicting the plaintiff from property L.R. No. 209/8009 unless and until a lawful order of the court is made granting the defendant possession of the said property. Once such lawful order for possession is issued as aforesaid the order restraining the defendant from unlawfully evicting the plaintiff will automatically cease to operate.**
- (3) The plaintiff is granted leave to amend the plaint as prayed in prayer No. 2. Such amended plaint to be filed within seven days from todays date.**
- (4) The costs of the application dated 12th April 2006 shall be in the cause.**

MARY KASANGO

JUDGE

Dated and delivered this 25th May 2006.

MARY KASANGO

JUDGE