



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 97 OF 2005

MRS MWANGI GATITU T/A

GATITU TIMBER PLAINTIFF

VERSUS

WAMATU NJOROGE as

**Administrator of the Estate of the Late NJOROGE
WAMATU..... 1st DEFENDANT**

NYALGUNGA TRADERS..... 2ND DEFENDANT

RULING

This ruling concerns the aspect of the chamber summons filed on 31.01.05 seeking an order:

That this honourable court do issue a permanent injunction restraining the defendants themselves, their agents and assigns from proclaiming and attaching the plaintiff's goods in the suit premises or in any other manner interfering with the suit premises or any portion thereon until the final determination of the suit.

The chamber summons is an interlocutory application springing from the main suit herein also filed on 31.01.05 whereby the plaintiff seeks against the defendants jointly and severally orders for :-

- a) A permanent injunction restraining the defendants themselves, their agents and assigns from proclaiming and attaching the plaintiff's goods or in any other manner interfering with the suit premises or any portion thereon.
- b) A declaration that as there is no lease between the 1st defendant and the plaintiff, the plaintiff is a protected tenant and the 1st defendant is obligated to comply with the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap.301.
- c) Defendants to render a true and fair account of all monies received as payment of rent.
- d) Costs of this suit plus interest at court rates.

The chamber summons came up for hearing before me on 22.02.05 whereat the plaintiff/applicant was represented by learned counsel, Mr. J.N. Kuria while the defendants/respondents were represented by

learned counsel, Mr. K.K. Macharia. Both counsel made submissions in support of their respective clients' cases.

In the course of his submissions, counsel for the plaintiff/applicant informed the court that he or his client had responded to the 1st defendant's replying affidavit of 08.02.05 though a supplementary affidavit sworn on 16.02.05. This ruling was initially fixed for 27.04.05. However, while perusing the file to prepare the ruling, I found there was no supplementary affidavit as stated by the plaintiff's/applicant's counsel and the said counsel was on 27.04.05 ordered to furnish the court with a copy of the supplementary affidavit that day and he said he would do so. The ruling was then re-scheduled to 05.05.05. By 04.05.05 the supplementary affidavit had not been filed and the court proceeded to prepare the ruling without the benefit of the supplementary affidavit in question.

At the hearing of the chamber summons on 22.02.05, counsel for the plaintiff/applicant confirmed that the prayer for interim orders had already been granted and that he was now prosecuting the prayer for a permanent injunction. He relied on the plaintiff's supporting affidavit sworn on 31.01.05 and gave the following highlights in support of his case, namely:-

That there was no written lease agreement between the late Njoroge Wamatu as the then owner of the subject premises and the late Wilson Mwangi Gatitu who was tenant therein.

That the present tenant who is the plaintiff/applicant herein took over the tenancy also without a written lease on the same terms and that she has been making payments on the same plot but the payments have not been accounted for by the landlord. Plaintiff's/ applicant's counsel submitted that since there is no written lease, the 1st defendant is obligated to abide by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and urged the court to grant the application by the chamber summons of 31.01.05.

On the other hand, counsel for the defendants/respondents opposed the application. He relied on the 1st defendant's replying affidavit sworn on 08.02.05 and the plaintiff's/applicant's own pleadings. Defendants'/respondents' counsel maintained that rent was agreed between the parties and the plaintiff was paying rent and that when the 1st defendant instructed the 2nd defendant as auctioneer to levy distress, the plaintiff/applicant was in arrears and that the latter has not come to court with clean hands.

Defendants'/respondents' counsel referred to various receipts annexed to the plaintiff's/applicant's supporting affidavit of 31.01.05 to demonstrate that the rent in question was Kshs.50,000/= per month. He took as an example part of annexure "M G 3", i.e. receipt No.752 of 31.12.02 for Kshs.125,000/= and submitted that this receipt plus various others establish that the subject rent was Kshs.50,000/= per month. Counsel pointed out that the plaintiff/applicant has not complained about the rent of Kshs.50,000/= per month since 2002; that the plaintiff/applicant has not annexed receipts for municipal rates in order that rates can be deducted from rent, so he (counsel) submitted that the plaintiff/applicant is in arrears for 2004. Counsel added, however, that most of the receipts attached to the plaintiff's/applicant's affidavit are not signed by the 1st defendant but he did not specify the questioned receipts. Defendants'/respondents' counsel urged the court to dismiss the application by chamber summons of 31.01.05 and allow the 2nd defendant to sell the attached items.

In reply, the plaintiff's/applicant's counsel reiterated that the defendants/respondents have not shown there is a written lease; that the plaintiff/applicant is a protected tenant under Cap. 301; and that the application by chamber summons of 31.01.05 should be granted with costs.

I have given due consideration to the rival arguments of the parties. Rules 1 and 2 of Order XXXIX which are among the rules under which the present application was brought, inter alia, provide:

"1. Where in any suit it is proved by affidavit or otherwise –

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit ... the court may by order grant a temporary injunction to restrain

such act, or make such order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposition of the suit or until further orders.

2. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property of right.”

There is a double-edged controversy between the parties as to whether the plaintiff is or is not in arrears in respect of the suit premises and as to what the monthly rent for the suit premises is. The defendants say the plaintiff is in arrears for the whole of 2004 and that the monthly rent is Kshs.50,000/= while the plaintiff denies being in any arrears of rent and also denies that the monthly rent is Kshs.50,000/=. It is ironical that the one receipt counsel for defendants/respondents picked to demonstrate that the monthly rent is Kshs.50,000/= does not in fact prove the point. The specimen receipt is No.752. It is dated 31.12.02 and is for Kshs.125,000/=. The description of the payment reads: “Being payment of rent for December 2002 – January 2003”. The period covered is two months and since the rent figure is Kshs.125,000/=, the monthly rent works out at Kshs.62,500/=! The next receipt, i.e. No.753 dated 22.09.03, describes itself as relating to rent for February – March 2003 and the figure indicated thereon is Kshs.100,000/=: which puts the monthly rent for each of those months at Kshs50,000/= as maintained by the 1st defendant . However, counsel for the 1st defendant informed this court that most of the receipts were not signed by the 1st defendant but he did not specify the questioned receipts.

I make the following main observations. Firstly, there is deep controversy between the plaintiff and the 1st defendant as to whether the plaintiff is in arrears of rent at all. Secondly, there is similar controversy as to the amount of the monthly rent. Thirdly, the 1st defendant does not seem to have made up his mind whether the receipts annexed to the plaintiff’s affidavit of 31.01.05, and which he (1st defendant) initially also sought to rely on, support his case or not.

I note that the injunction now sought in the chamber summons of 30.01.05 is intended to last until the final determination of the suit. In this regard, I further note that on 31.01.05 the plaintiff/applicant obtained a temporary injunction, so far as relevant, in the following terms:

“That a temporary injunction be and is hereby issued restraining the defendants themselves, their agents and assigns from proclaiming and attaching the plaintiff’s goods or any goods in the suit premises or in any other manner interfering with the premises known as Plot No.4953/459 situated along Muindi Mbingu Street Thika, or any portion thereon pending the hearing inter-pates ... on condition that the applicant pays into court a sum of Kshs.100,000/= as security against costs within 7 days failing which distress to continue.”

The controversies highlighted above raise weighty issues which can best be resolved at the trial of the main suit through viva-voce evidence. In the circumstances, I hold that there is a good case for the suit premises plus the attached items or goods to be preserved pending the hearing and determination of the suit. Accordingly, I hereby extend on the same terms the temporary injunction granted to the plaintiff/applicant on 31.01.05 to last until the final determination of the suit. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 5th day of May, 2005.

B.P. KUBO

JUDGE