REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 620 of 2001

LUCY WAMBUI MUTURI…….....…..….PLAINTIFF/RESPONDENT

-VERSUS

JEZA ZHOMU UMOJA PRIVATE CO. LTD....1ST DEFENDANT/APPLICANT

MASTERWAYS PROPERTIES LTD. …….....……2ND DEFENDANT

KINDEST AUCTIONEERS…….....……..3RD DEFENDANT

RULING

The 1st defendant's application was brought by Chamber Summons under Order XXXIX, rules 1, 2 and 9 of the Civil Procedure Rules and s.3A of the Civil Procedure Act (Cap.21), dated 13th April, 2005 and filed on 14th April, 2005. The applicant prayed for orders as follows:

> (a) that, the plaintiff be restrained by an order of injunction from collecting any rental income or proceeds from the tenants occupying premises on L.R. No. 209/2788/16 otherwise known as Wamu House, in Nairobi until the suit is heard and determined;
>
> (b) that, pending the determination of the suit, all rental proceeds paid by the tenants occupying premises on L.R. No. 209/2788/16 be deposited in an interest -earning joint-account to be opened in the names of advocates representing the parties in this suit; (c) that, pending the determination of this suit, the parties be at liberty to appoint a joint property manager to manage the premises on L.R. No. 209/2788/16;
>
> (d) that, the cost of this application be in the cause.

As supporting grounds, are, firstly, that there is a dispute as to who, between the plaintiff and the 1st defendant, owns the suit premises — as both the plaintiff and the defendant have laid claims to ownership of the same. Secondly, although there is this dispute, since 1998 the plaintiff alone has been collecting and using for her own benefit, all rents from the suit premises which amount to Kshs.150,000/= every month. Thirdly, the applicant is apprehensive that should it win the case herein and in consequence the suit premises revert to it, it will not be possible to recover all the rents which will have been collected by the plaintiff in respect of the suit premises since 1998. Lastly it is stated that, it is in the interest of both parties that the rental proceeds earned from the suit premises are secured for the benefit of the party which will ultimately win this case.

The application is supported by the affidavit o***f Harrison Ngugi Njenga,*** the director of the 1st defendant dated 13th April, 2005. He avers that the suit herein is about the ownership of the suit property, L.R. No.

209/2788/16, between the plaintiff and the 1st defendant — with each claiming to be the *bona fide* registered owner. The two contenders are relying on different title documents, as the basis of their respective ownership claims. The suit property comprises some 16 commercial units, with a gross monthly income of Kshs.150,000/=. It is deponed that since 1998 when she alleges she had purchased the suit property, the plaintiff has been collecting and utilising for her own benefit all the rental proceeds received from the tenants. It is averred that the 1st defendant has a good claim in the suit, based on a certificate of title, L.R. No. 34370 dated 18th February, 1980, duly signed by the Registrar of Titles. A certificate of search shows that the 1st defendant was the proprietor of the suit premises even as late as 16th May, 2003 — though the plaintiff claims to have been registered as owner of the suit premises in 1998.

The plaintiff filed a replying affidavit on 23rd May, 2005 averring that a search had been conducted at the Companies Registry which showed that the 1st defendant company is not in existence, having been wound up. She deposed that ownership of the suit property by the 1st defendant had been extinguished by way of a vesting order, registered as entry No. 21 in the title to the suit property. She avers that, subsequent to the vesting order she purchased the property from the then registered owner ***(Mwangi M. Kamathe***), and a transfer was duly registered as No. 26 in the grant of the suit property. The deponent avers that after filing suit herein, she had applied by Chamber Summons, dated 18th April, 2001 for a temporary injunction to restrain the defendants from interfering with the tenancies of premises on the suit property until final determination of the suit; and on 11th December, 2001 a consent order of temporary injunction was entered, restraining the defendants from interfering with the tenancies and tenants carrying on business on L.R. No. 209/2788/16. It was averred that the said consent order has not been varied or set aside. The deponent avers that the effect of the consent order was to maintain the status quo with respect to the suit property until the determination of the suit; and that on this account, she was entitled to manage and control the suit property, which right entitled her to collect rent and control the tenancies until the determination of the suit.

The plaintiff filed, besides, grounds of opposition in which she asserted as follows:

(i) that, the application is an abuse of Court process;

(ii) that, the application is frivolous, vexatious and devoid of any merit;

(iii) that, the applicant lacked locus standi to make the application;

(iv) that the applicant had not given sufficient grounds to support the prayers made.

This matter came up for hearing before me on 13th June, 2005 when the 1st defendant/applicant was represented by ***Mr. Mutur***i, while the plaintiff/respondent was represented by ***Mr. Mamicha.***

In his submissions ***Mr. Muturi*** contended as follows. The rental income from the suit premises ought to be deposited in an interest-earning joint-account in the names of the advocates for the plaintiff and the 1st defendant, and in the interim period, the parties should be at liberty to appoint a property manager to manage the suit property. While ***Harrison Ngugi Njenga*** in the supporting affidavit had averred: “That I am the director of the 1st defendant herein and duly authorised by the other directors to swear this affidavit on their behalf,” ***Lucy Wambui Muturi*** in the replying affidavit deposes: “That I have been informed that a search has been undertaken at the Companies Registry and which information I take to be true, that the applicant/1st defendant has long been wound up” (para.3). Learned counsel disputed the averment in the relying affidavit: because no evidence had been tendered to show that the 1st defendant company had ceased to exist.Counsel noted that it was true there had been a temporary injunction issued to restrain the 1st defendant from interfering with the tenants on the suit property; but he urged that it was not now the intention of the 1st defendant to disturb the tenants, and the only concern was that“the plaintiff should desist from collecting the rents.”

Mr. Mamicha for the plaintiff/respondent, relying on his client’s grounds of opposition, contended that the application was an abuse of the process of the Court, and was frivolous and vexatious. He stated that

the plaintiff had earlier moved the Court, by Chamber Summons of 18th April, 2001 and secured orders that the 1st defendant be restrained from interfering with tenants of the suit premises, and that non-interference in this regard meant non-interference either *by way of management* or distress or otherwise, until the suit was heard and determined. The said orders of injunction were made by ***Mr. Justice S. Amin*** on 18th April, 2001 and issued by the Deputy Registrar on 19th April, 2001. The temporary injunction was thus couched:

> **"THAT a temporary injunction be and is hereby issued restraining the defendants by themselves, their servants and/or agents from in any way whatsoever and howsoever interfering with [tenants] carrying on business on L.R. No. 209/2788/16 otherwise known as Wamu House in the City of Nairobi either by way of management or distress or otherwise…**"

Learned counsel submitted that it was improper for the 1st defendant now to move the Court on the question of management, which had been determined in an earlier application.

It is shown on record that on 11th December, 2001, Mr. Justice Visram had made the following order:

> **"Prayer (b) of the Chamber Summons dated 18th April, 2001 be confirmed until the final determination of the suit. Hearing date to be taken at the Registry."**

The effect of this order was to confirm the order made by ***Amin, J*** on the 18th of April, 2001 up till the hearing and determination of the main suit. While that position clearly favours the plaintiff, it is not a position of any licence to the plaintiff. The plaintiff is responsible for the conduct of her own suit; and it is in the first place her responsibility to prosecute her suit, and if she fails to do so, then an abuse of the process of the Court will have been committed.

Mr. Mamicha stated that, before ***Visram, J***. on 11th December, 2001 the 1st defendant, of its own volition, kept itself out of the management of the suit property: and this shows that the applicant must then have appreciated that it lacked title to the property. ***Mr. Mamicha*** disputed the propriety of the 1st defendant coming up, two years since the consent order, with a search of 16th May, 2003 which now shows the applicant as true owner. This search held out by the applicant, counsel submitted, "cannot stand the scrutiny of the law."

Learned counsel noted that entry No. 16 in the copy of grant exhibited by the applicant, shows that the applicant became the registered proprietor as lessee of the suit premises on 25th October, 1974. There are subsequent entries showing that the said proprietorship was extinguished (by entry No. 25) and the premises were transferred to a different legal person.

Entry No. 26 shows a transfer to the 2nd respondent, a purchaser of the title without notice of any defect. Learned counsel contended that the inclusion of the name of the applicant in the grant was improper and was not in compliance with the requirements of the Registration of Titles Act (Cap.281) — as it bore no number and was not signed by the Registrar. Counsel submitted that the applicant had no proprietory interest in the suit property.

Learned counsel relied on the content of the 1st defendant's defence and counterclaim: a declaration was being sought that the purported sale and transfer of the suit property to the plaintiff is null and void. From that position, counsel contended, the 1st defendant could not partake of the rent proceeds, since it had acknowledged the *transfer* (and thus the formal ownership of the suit land by the plaintiff). Counsel contended, besides, that there had been no evidence to show that the plaintiff would be unable to satisfy orders of the Court, in the event that she fails in the main suit. Counsel noted that the main suit had been fixed for hearing in *October, 2005,* but the 1st defendant had done nothing to show urgency such as would justify bringing that date forward. In these circumstances, ***Mr. Mamicha*** urged that the consent order of 11th December, 2001 should remain in place.

In his response, ***Mr. Muturi*** for the applicant, stated that as each party was relying on a title document,

the proceeds of rent ought not to inure to one party to the exclusion of the other, pending hearing of the suit. Learned counsel argued that the applicant had not acknowledged that a sale of the suit property to the plaintiff had taken place, and had perceived such sale only as a "purported sale".

There are factual statements made in the application and, in the course of hearing the same their veracity cannot be established at this interlocutory stage; and without the missing information, it is not possible to allow the 1st defendant's application. For instance, *is it true that the 1st defendant/applicant, which is a company, is no longer existent? If it is not existent, how could it file the instant application? And how could it authorise the swearing of the supporting affidavit on its behalf? Is there a valid title deed for the suit property? If so, who holds it — the plaintiff, or the 1st defendant? Had there been a valid transfer of the suit property to the plaintiff?*

As those vital questions can only be answered at the trial stage, this interlocutory stage must necessarily be disposed of only appearances, and on prima facie considerations.

The first prima facie consideration is that the parties are subject to a consent order made by ***Mr. Justice Visram*** on 11th December, 2001 restraining the applicant from interfering with the tenancies on the suit property; and the practical implication is that the plaintiff may continue receiving the rents as she has done before.

No evidence has been shown that the plaintiff would, if she lost the main suit, be unable to satisfy such Court orders as may be made in favour of the 1st defendant.

Rightfully or wrongfully, a *transfer* of the suit property is acknowledged to have taken place in favour of the plaintiff. Therefore, *prima facie*, the party who is to be expected to be receiving the rents for the property is the plaintiff — not the defendant.

I believe that justice in this case will be arrived at only through the hearing, which is coming due in October, only three months away. The record as it stands today, would favour *preservation of the status quo,* and for this reason I will make the following orders:

1. Prayer 1 of the applicant's Chamber Summons of 13th April, 2005 is dismissed.

2. Prayer 2 is similarly dismissed.

3. Prayer 3 is likewise dismissed.

4. Plaintiff's costs to be borne by the 1st defendant/applicant, in any event.

DATED and DELIVERED at Nairobi this 15th day of July, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the 1st Defendant/Applicant: Mr. Muturi, instructed by M/s. Muturi Kamande & Co. Advocates

For the Plaintiff/Respondent: Mr. Mamicha instructed by M/s. Mamicha & Co. Advocates;

Mr. Amuga, instructed by M/s. Amuga & Co. Advocates