



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO.669 OF 2004

THURI BURTON KAMAUPLAINTIFF

VERSUS

THOMAS N. NGUGI T/A MIIRI BOOKSHOP.....DEFENDANT

RULING

On 7th July, 2004 the Duty Judge made the order that two applications within the instant suit be heard together: the Plaintiff's Chamber Summons application dated 22nd June, 2004; and the Defendant's Notice of Motion application dated 5th July, 2004.

In the Plaintiff's application he prays for orders –

(a) that, the Defendant, its agents and/or servants be restrained by issuance of a temporary injunction from demolishing, constructing on, damaging, alienating, altering, removing, subletting or disposing of the portion of block 9/1073, Thika Municipality commonly referred to as Miiri Bookshop measuring approximately 280 sq. ft. until the suit herein is fully determined on the merits;

(b) that, the Defendant, its servants or agents be restrained by a temporary injunction from altering, demolishing, alienating, removing, subletting or disposing of the portion of Block 9/1073, Thika Municipality commonly referred to as Miiri Bookshop measuring 280 sq. ft. approximately until Tribunal case No.30 of 2003, Nairobi in the Business Premises Rent Tribunal is determined on its merits;

(c) that, the Defendant be made to bear the costs of the application.

The application was brought under Order XXXIX rules 1 and 2 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21).

The Defendant's Notice of Motion was brought under Sections 3A and 63 (e) of the Civil Procedure Act (Cap.21) and its prayers were –

(i) that, a mandatory order do issue against the Plaintiff compelling him to reconnect water supply to part of the property in Block 9/1073 also referred to as Miiri Bookshop within Thika Municipality;

(ii) that, in the alternative and without prejudice to prayer (i), the Water Engineer within the Thika Municipal Council Water and Sewerage Department do reconnect the water supply to the suit premises;

(iii) that, the costs of this application be provided for.

The Plaintiff's grounds are set out as follows:

- (a) that, the Defendant has no authority of the Plaintiff to demolish, construct or alter the suit property;
- (b) that, Tribunal Case No. 30 of 2003, Nairobi is still pending;
- (c) that, the Defendant has not followed the prescribed procedure under the Landlord and Tenant (Shops Hotels & Catering Establishments) Act (Cap. 301);
- (d) that, the Defendant is in breach of trust, is malicious, and in negligent;
- (e) that, the said Block 9/1073 has been condemned.

The Defendant's grounds are that the Plaintiff has disconnected water supply to the suit premises, thereby causing annoyance to the Defendant as a tenant.

Further support for the Plaintiff's application is in the affidavit of Thuri Burton Kamau dated 22nd June, 2004; and for the Defendant's application, is in the affidavit of Thomas N. Ngugi dated 5th July, 2004.

Mr. Kahuthu for the Plaintiff made his submissions as follows. It is deponed in the supporting affidavit of the Plaintiff, sworn on 22nd June, 2004 that the suit premises is an old building already condemned by the Municipal Council of Thika, and so the Plaintiff intends to demolish it after Tribunal Case No.30 of 2003 is finalized. It is also deponed that the Defendant is engaged in an exercise to defeat the Plaintiff's intent, by undertaking new constructions that bring alterations to the suit premises. Annexed to the Plaintiff's affidavit is Statutory Notice No.1705 of 6th November, 2003 signed by both the Chief Public Health Officer and the Town Clerk of the Municipal Council of Thika, addressed to the Plaintiff. The Statutory Notice declares the suit premises to be a nuisance within the meaning of Section 118 of the Public Health Act (Cap.242). The Plaintiff is required within 21 days, to effect certain renovations, such as –

- replace the entire dilapidated floor;
- replace the leaking roofs;
- replace the sagging and missing ceiling boards;
- provide adequate sanitary facilities;
- provide water supply by connecting the premises to the municipal supply;
- replace the broken guttering system;
- repaint the entire premises;
- generally keep the premises tidy.

Counsel contended that the Defendant was conducting illegal construction on the suit premises for the purpose of pre-empting the Plaintiff's "Landlord's Notice to Terminate or alter Terms of Tenancy" made by virtue of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act (Cap.301), Section 4 (2) and pending at the Business Premises Rent Tribunal. To the affidavit of the Plaintiff is annexed photographs showing on-going demolition and reconstruction at the suit premises, notwithstanding a Notice to the Defendant dated 21st June, 2004 from the Plaintiff's estate agents, Cornerstone Real Estates

Ltd. The notice reads as follows:

“we note that you have removed ... your stock from the shop and have started renovations without consent from the landlord or his agents.

“Your action is illegal and we are under strict instructions to demand that [the] works going on cease immediately.”

This letter was copied to both the Plaintiff and the Plaintiff’s Advocates.

Counsel contended that the Defendant was endeavouring to alter the use of the suit premises from a bookshop to something else, at a time when the Plaintiff had already submitted a development application to the Municipal Council. By a letter dated 24th February, 2004 the Municipal Town Planner acknowledges the application and states as follows:

“The above application was submitted on 3rd November, 2003 under D.P. No.110307. The plan has been circulated and found technically acceptable. The plan would be presented to the next Works and Town Planning Committee meeting for approval”.

Mr. Kahuthu stated that even with all the actions already taken by the plaintiff regarding the suit premises, the Plaintiff had to await the decision of the “business Premises Tribunal and could not evict the tenant.” Counsel submitted that the Defendant had, in effect, taken the law into his own hands and was working to retain possession of the suit premises against the lawful steps taken by the Plaintiff as landlord. Counsel noted that the Duty Judge had, on 23rd June, 2004 given interim orders and determined the hearing date; but in the meantime the Defendant has proceeded with unlawful demolition of the suit premises.

Counsel disputed the Defendant’s claim in his Notice of Motion application of 5th July, 2004 that the Plaintiff had disconnected the water supply to the suit premises. Counsel relied on the replying affidavit of Rakesh Shah dated 12th July, 2004. The deponent, who is the managing director of Kilimo Kenya Ltd which occupies neighbouring premises to the suit premises, depones that it was Kilimo Kenya Ltd that had disconnected water supply to the suit premises, after it was discovered that the Defendant had made illegal connections through which he enjoyed water supplies from Kilimo Kenya Ltd. For as much as six years, ending sometime in June, 2004. Counsel impugned the Defendant’s Notice of Motion application for its failure to disclose this fact of illegal water connection. Counsel submits that the supply of water was entirely the responsibility of the Municipal Council, and that this Council should have been enjoined in the Defendant’s claim.

Such would be a strange preposition, considering that the Defendant’s Notice of Motion application was brought as an interlocutory matter within the framework of a suit to which the Municipal Council of Thika was **not** a party. So, how could a relief possibly be obtained against that Council, on the basis of this suit? Yet it is indeed true, as I must take judicial notice, that the supply of water within the Municipality of Thika is the responsibility of that Municipality. The Defendant did not indicate how the water supply had not been connected and did not indicate who was responsible for the non-connection. Since only the Municipality of Thika would be supplying the water, I agree with counsel for the Plaintiff that the Municipality would have been enjoined; yet this could not be done in an interlocutory application in a suit to which the Municipality was not a party. This position points to the existence of an abuse of the process of the Court by the Defendant, in the claim for the supply of water through the said application of 5th July, 2004. The Defendant should have long ago filed a substantive suit against the Municipal Council. But he never did.

Mr. Kahuthu has, besides, challenged the propriety of the said Notice of Motion of 5th July, 2004 on another point. The contention, which is in my view justified, is that a mandatory injunction could only have been properly claimed under Order XXXIX, and by Chamber Summons. I think counsel is, with respect, right, considering that the Defendant’s Notice of Motion fails to cite any provision of the law that

would confer upon him a **right**; he contents himself with prayers founded on just the Court's **discretion**, by virtue of Sections 3A and 63 (e) of the Civil Procedure Act (Cap. 21). Counsel for the Plaintiff contends, and with justification, that the Defendant's Notice of Motion application is fatally defective and should be dismissed.

Counsel for the Plaintiff has also cited the case **Mawani v. Mawani** (1977) to support the proposition that a Defendant such as the present one, who had been duly served with the orders made by the Duty Judge on 23rd June, 2004 and with penal Notice, but who had disregarded those orders requiring maintenance of the status quo and had gaily proceeded with his unauthorized demolitions and reconstructions, could not be heard in his own supervening application until he purged his contempt.

Now although the Plaintiff has not brought a formal application against the Defendant for contempt of Court, I will certainly take judicial notice of the injunctive orders made against the Defendant's course of conduct by the Honourable Mr. Justice Kihara Kariuki on 23rd June, 2004 and extended by the Honourable Mr. Justice Nyamu on 7th July, 2004. From all the evidence before me, the said Orders have not been complied with by the Defendant. Therefore, it cannot be but preposterous that the selfsame Defendant would seek interim relief before the Court in the manner in which this is now sought by the application of 5th July, 2004.

Mr. Njoroge for the Defendant contended that the Plaintiff as landlord has so conducted himself as to run afoul of the Public Health Act (Cap.242), and that this showed want of good faith.

Counsel contended that S.3A of the Civil Procedure Act (Cap.21) should be applied in dealing with the annoyance to the Defendant occasioned by the disconnection of water supply to the suit premises. Obviously there is no valid factual basis to this claim, as I have already stated that available evidence does not disclose that the Plaintiff disconnected water to the suit premises. But more significant still is that the supply of water is the public duty of the Municipal Council of Thika, which is not and could not be a party to the contest in the instant application, given the scope of the suit and its joinder of parties. The effect is that annoyance to the Defendant, as the main ground of the Notice of Motion application, is simply not available as a route to any relief at all.

Counsel denied that the Defendant had made any constructions or alterations to the suit premises; but Mr. Kahuthu for the Plaintiff then referred specifically to para.6 of the Defendant's replying affidavit of 5th July, 2004. This paragraph reads:-

“THAT, a tenant in possession requires no licence and/or authority of the landlord to do partitioning of demised premises unless the same are to affect the status of the demised premises.”

Mr. Kahuthu then made reference to rule 5 in schedule 1 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap.301), which makes the lessor responsible for repairs to the roof, main drainage, etc. Counsel stated that the doors are part of the structure; but the Defendant had taken it upon himself to make alterations on structures of this type.

The line of analysis adopted in this Ruling leads me inevitably to the following orders:

1. The Defendant's application by Notice of Motion dated 5th July, 2004 is dismissed with costs to the Plaintiff.
2. The Defendant, its agents and/or servants are hereby restrained by a temporary injunction from demolishing, reconstructing, damaging, alienating, altering, removing, sub-letting or disposing of the portion of Block 9/1073, Thika Municipality commonly referred to as Miiri Bookshop measuring approximately 280 sq. ft. until the suit herein is fully determined on the merits.
3. The Defendant, its servants or agents are hereby restrained by a temporary injunction from altering, demolishing, alienating, removing, sub-letting or disposing of the portion of block 9/1073,

Thika Municipality commonly referred to as Miiri Bookshop measuring 280 sq. ft. until Tribunal case No.30 of 2003, Nairobi in the Business Premises Rent Tribunal is determined on its merits.

4. The Defendant shall bear the costs of this application.

DATED and DELIVERED at Nairobi this 15th day of October, 2004.

J.B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk : Mwangi

For the Plaintiff: Mr. Kahuthu, instructed by M/s Kahuthu & Kahuthu Advocates

For the Defendant: Mr. Njoroge, instructed by M/s Njoroge & Co. Advocates.