



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 15 OF 2020

TATECOH HOUSING AND CO-OP SACCO LIMITED.....APPLICANT

VERSUS

QWETU SACCO LIMITED.....RESPONDENT

RULING

(Suit commenced by way of miscellaneous application seeking eviction and orders of distress; preliminary objection raised that the suit is incompetent; preliminary objection upheld; orders of eviction cannot in the circumstances of this case be sought through a miscellaneous application; application dismissed)

1. On 9 July 2020, the applicant, Tatecoh Housing Co-op Sacco Limited, filed a miscellaneous application inter alia under Sections 3 and 14 of the Distress for Rent Act, Cap 293 Laws of Kenya. In that application, it has sought the following substantive orders which are prayers 3 and 4 in the application (slightly paraphrased for brevity) :-

(3)That the court do issue orders of eviction against the respondent and persons working under its business of a savings and credit, bank, a bookshop, and microfinance pending hearing and determination of this suit.

(4)That the court do issue an order of distress for rent pending hearing and determination of this application.

2. The application is supported by the affidavit of Rachel Mghoi Adam, and is based on the grounds that the respondent is tenant of the applicant; that the respondent has refused to pay rent on frivolous grounds; that the respondent has refused to sign a new tenancy agreement since the previous agreement lapsed; that the respondent has only paid up to March 2020; that the failure to pay rent is crippling the operations of the applicant. In her affidavit, Ms. Adam has deposed that the respondent has been paying rent quarterly in advance of KShs. 444,096/= and has paid until March 2020. She avers that the applicant wrote a demand for rent and the respondent replied saying that it has instructions from the Sacco Societies Regulatory Authority (SASRA) not to pay rent. She believes that the letter from SASRA did not inform the respondent not to pay rent and that their tenancy agreement is outside the scope or authority of SASRA. She asserts that the applicant is entitled to its rent and because the respondent has refused to pay, it should be evicted. She has also urged this court to issue orders of distress for rent.

3. The respondent appointed counsel and filed a notice of preliminary objection in the following fashion :-

(i) This court lacks the requisite jurisdiction to hear this matter.

(ii) There are no proceedings known in law in which a Notice of Motion can originate a suit hence the current suit offends the provisions of Order 3 Rule 1 of the Civil Procedure Rules, 2010.

(iii) The suit herein is premature and fatally defective for failure to accord to the doctrine of exhaustion of other avenues of dispute resolution provided for in law.

(iv) As a consequence the suit herein is incompetent, frivolous, fatally defective and an abuse of the court process hence should be struck out with costs to the respondent.

4. In addition, the respondent filed an application of its own seeking orders of temporary injunction to restrain the applicant from proceeding to sell its goods pursuant to a proclamation done on 1 September 2020. In the said application, the respondent avers that the disputed property was registered previously in the name of Taita Taveta Teachers Investment Company Limited but subsequently the plot was transferred to Taita Taveta Teachers Cooperative Society Limited in 1991 (these institutions are insinuated to be predecessors of the

respondent). They then appointed an architect and builder to construct the building thereon with construction starting in 1998 and completing in the year 2000 at the cost of about KShs. 40,000,000/=. On completion, it (respondent) occupied part of the building and rented part to other tenants who paid into a special rent account. Its Board also decided to pay rent as if it was a tenant for purposes of determining the viability of the project. Subsequently, the respondent decided to form a subsidiary society to manage the building and in the year 2002, it registered TATECOH Housing Cooperative Society Limited (the applicant herein). There was however an outstanding debt on the construction costs, with the respondent's members having raised only KShs. 8 Million and it had shares of KShs. 9 million leaving a balance of about KShs. 23,000,000/= from the building cost of about KShs. 40 million. It is said that this KShs. 23 million was deemed a loan to the applicant. It avers that this balance of KShs. 23 million is payable to them and has never been paid. It is also contended that the applicant has never paid any dividends to the respondent. It avers that under its agreement the respondent is to own 25% of the building. It states that it approached SASRA who advised them not to pay rent as the building is not owned by the applicant. The respondent thus stopped paying rent in March 2020. It is further mentioned that on 5 September 2020, the respondent passed a resolution cancelling the applicant's authority to manage the building. It is also pointed out that the respondent has filed suit for ownership of the building vide Mombasa ELC No. 125 of 2020.

5. There is another affidavit sworn by Ms. Adam for the applicant. She basically asserts that the suit property is owned by the applicant. There is another additional replying affidavit sworn by Mr. Alfred Mwadime who refutes what Ms. Adam has sworn and more or less reiterates what is in the affidavit in support of the application for injunction.

6. Counsel were invited to file submission and I have taken note of the submissions of Mr. Gekonde, learned counsel for the applicant, and Mr. Muthami, learned counsel for the respondent.

7. Without much ado, I will agree with the position of the respondent, as raised in the preliminary objection and buttressed by Mr. Muthami in his submissions, that the applicant cannot seek the orders sought in its miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought in the motion are orders of eviction. One will ordinarily only obtain an order of eviction after a full hearing of a case. What the applicant needed to do was therefore to file a substantive suit for eviction through a plaint. It is upon hearing of such suit, and if successful, that an order of eviction would issue. The other order sought, that is of distress for rent, is covered by the Distress for Rent Act, and I have not been pointed to any provision in that statute which requires the court to issue orders before distress may be levied. The suit as commenced is therefore a non-starter and is hereby struck out. Having struck out this miscellaneous application, there is really no need for me to determine whether this was a dispute to be referred to the Cooperatives Tribunal under Section 76 of the Cooperative Societies Act.

8. There is the application for injunction filed by the respondent. That was filed to prevent the applicant levying distress and proceeding with eviction pending hearing of this miscellaneous application. I have already dismissed the miscellaneous cause and therefore the application for injunction is spent for there is also no suit to anchor it.

9. Where does this leave the parties? I can see that there is a substantive suit filed by the respondent, being Mombasa ELC No. 125 of 2020. Parties should move the court through that suit for any orders that they deem appropriate.

10. Given the relationship that the parties have, I make no orders as to the costs herein.

11. Orders accordingly.

DATED AND DELIVERED THIS 10TH DAY OF MARCH 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA