



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 17 OF 2019

IDEAL LOCATIONS LTD.....PLAINTIFF

VERSUS

DEACONS (E.A) LTD.....DEFENDANT

RULING

(Application to reinstate an application and preliminary objection dismissed for non-attendance; directions given on the hearing of the application and preliminary objection and time given for filing of submissions; counsel not filing any submissions and not appearing at the inter partes hearing of the application and preliminary objection; application and preliminary objection dismissed for failure to prosecute the same; applicant now wishing to have the same reinstated; counsel citing that he was unwell and also not aware that the matter was before the particular court; court not persuaded by the reasons given by counsel; court however in its own discretion so as to allow the defendant to be heard allows the reinstatement but subject to payment of throwaway costs and rent accumulated during the period of the application)

1. The application before me is that dated 18 September 2019 filed by the defendant. Despite it being lengthy and verbose, the principal prayer is to set aside the orders issued on same day, when I dismissed the applicant's preliminary objection dated 13 March 2019 and her Notice of Motion application filed on 25 March 2019. The preliminary objection and the said application were dismissed for non-attendance. In this application, the defendant seeks orders to have the same reinstated for hearing.

2. To put matters into context, this suit was filed on 6 February 2019. The plaintiff is the proprietor of the land parcels LR No. 14407 and 16088 whereas the defendant is her tenant through a lease agreement entered into on 18 April 2017 for one shop on the ground floor (the suit premises). This lease is to run up to October 2022 and the starting monthly rent was Kshs. 294,000/= which was to be graduated annually. As at October 2018, the defendant is said to have owed rent and service charge arrears of Kshs. 2,056,394/= and the plaintiff proceeded to levy distress which raised an amount of Kshs. 1,205,000/=. Before the plaintiff could realise the full arrears, it was informed through a letter received on 29 November 2018, that the defendant is under administration. The plaintiff complains that to date the defendant, despite notifying the plaintiff that she no longer wishes to occupy the premises, has refused to hand over vacant possession and execute a surrender of the lease, hence continuing to accumulate rent and service charges. In this suit, the plaintiff seeks orders to be allowed to levy distress to recover the rent owing, orders of forfeiture of the lease, and vacant possession. On 12 March 2019, the plaintiff filed an application for summary judgment.

3. The defendant filed a notice of preliminary objection on 13 March 2019 raising various points of law on the veracity of the plaintiff's suit. They also filed a defence and counterclaim on 14 March 2019. On 25 March 2019, the defendant filed an application to strike out the plaint. On 29 July 2019, directions were given by Yano J, that these applications and the preliminary objection be heard together and parties were directed to file their written submissions on the same. The applications and the preliminary objection were fixed for hearing on 18 September 2019. On that day, it turned out that no submissions had been filed by the law firm of M/s Ngonze & Ngonze Advocates, appearing for the defendant. Further, no advocate from the said firm was present in court. Only, Mr. Hassan, counsel for the plaintiff, was present, and he pointed out that he had filed his submissions which he did not wish to highlight and requested for a date for ruling on his application dated 12 March 2019 for summary judgment. I found that the defendant had failed to move its preliminary objection and its application filed on 25 March 2019 and I proceeded to dismiss the same with costs. On the application dated 12 March 2019, I gave a date for ruling on 25 September 2019.

4. It will be observed that through this application, the defendant wishes to have reinstated its application filed on 25 March 2019 and also its preliminary objection. The supporting affidavit to the application is sworn by Daniel M. Ngonze, who is counsel on record for the defendant. It is a lengthy affidavit but what I can discern is that he avers to have fallen ill and unable to lodge his client's submissions in time. He annexed a photograph of his medication, which I note is a photograph of Ascoril, a common cough expectorant. He deposed that he was not in my court on the day because he thought that the matter was to be before Yano J, and he also had another matter before the High Court. He asked that his non-attendance should not be visited upon his client.

5. Ms. Natasha Ali, counsel for the plaintiff, filed a replying affidavit to oppose the motion. She did not understand how counsel could not have filed submissions for a period of 51 days since directions were taken for counsel to do so. She pointed out that all counsel has done is to take a photograph of a cough mixture and paracetamol, which does not contain the date of the medication and does not contain the name of counsel for the defendant. She stated that she herself has been unwell but had ensured that her submissions were filed.

6. Mr. Ngonze filed a supplementary affidavit where he now exhibited some hospital tests which I note were taken on 7 September 2019. He deposed further that he developed malaria like symptoms with persistent cough from the month of August spanning through September, and these would appear and disappear intermittently. All this time he would deal with court work in the morning then retire in the afternoon. He has reiterated that failure to lodge his submissions was because of his illness.

7. Ms. Ali filed a further replying affidavit and thought that Mr. Ngonze's account was pretty inconsistent.

8. I have taken note of the above and also the submissions of Mr. Ngonze and Mr. Hassan during the inter partes hearing of the application.

9. What the applicant wants is to reinstate its dismissed application and preliminary objection. The main reason given is illness of counsel. I understand that we all fall ill and get incapacitated. But having gone through the material presented by Mr. Ngonze, I regret that I am unable to believe that all this time he was ill and completely unable to work. He himself has stated that he would proceed to court in the morning and then rest in the afternoon. I don't believe this statement, which I can only believe if there is something more to back it up, but even assuming that this was true, it means that Mr. Ngonze was not incapacitated and could work on the submissions if he was minded to do so. He concedes that he would go to court and engage in other matters and also he would visit his office to attend to issues. Why he opted to go to court and deal with other matters, but neglect this case, is not mentioned. If he could not write the submissions, he could very well have deputed another counsel to work on them on his behalf, as the applications in issue were filed under Certificate of Urgency. I am not moved by the photograph of a cough mixture and paracetamol, which are common over the counter medications, and not persuaded that Mr. Ngonze took this concoction for over 50 days, before he thought of getting treatment on 7 September 2019. I just don't believe it, and it seems and sounds to me like a made up story which I can only believe if there is cogent evidence to back it up, of which I do not think there is any, save for Mr. Ngonze's word. My own conclusion is that Mr. Ngonze is trying to cover up for his own hebetude and/or tardiness.

10. The above aside, I am also not persuaded by the reasons that Mr. Ngonze has given for not appearing in court at the inter partes hearing of the application. Yano J, when he gave directions on the hearing of the applications and preliminary objection, clearly indicated that the same will be before this court. These directions were given in the presence of Mr. Ngonze himself. The cause list of the day reflected as much. Whichever way you look at it, even if counsel could not file submissions, surely he could have attended court on the appointed day to make submissions.

11. I would have dismissed this application outrightly if it is not that I take the right to be heard seriously and do not want to shut out the defendant from the seat of the court. I will thus allow the application, not based on what the reasons given by Mr. Ngonze, but in my own discretion so that the defendant may exercise its right to be heard. However, the defendant will need to pay throwaway costs to the plaintiff, which I assess at Kshs. 15,000/= and will also need to deposit in court the amount that it ought to have paid as rent from the month of September 2019 to January 2020, which is the time between the filing of this application and the time of delivery of its ruling. I do not see why the defendant should benefit for the duration that it has argued its application at the prejudice of the plaintiff. I have looked at the lease of the parties, and from it, I see that rent due for the period 1 November 2018 to 31 October 2019 was Kshs. 339,753.75/= per month. The rent for the period 1 November 2019 to 31 October 2020 is Kshs. 365,235.30/= per month. The rent therefore due for September, October, November and December 2019, and January 2020, is a total of Kshs. 1, 409,978.10/=. These, together with the throwaway costs should be settled within 14 days of today, and if not paid, the order dismissing the preliminary objection and the defendant's motion filed on 25 March 2019 will stand. If the monies are paid, within this 14 days period, the application and the preliminary objection be reinstated for hearing and time will also be extended to Mr. Ngonze to file his submissions on the plaintiff's application of 12 March 2019.

12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JANUARY 2020.

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MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Ms. Mwainz holding brief for Mr. Ngonze for the applicant.

Ms Ali for the respondent.

Court Assistant; David Koitamet.