



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1041 OF 2012

KENYA METHODIST UNIVERSITY.....PLAINTIFF/RESPONDENT

VERSUS

NEW CHOTA RAHA INVESTMENTS LTD.....DEFENDANT/APPLICANT

RULING

1. This is the notice of motion dated 23rd July 2018 brought under section 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 40 Rules 1, 4, 5, 8, 10 and Order 50 Rule 1 of the Civil Procedure Rules 2010.

2. It seeks

1. Spent.

2. Spent.

3. Spent.

4. Spent.

5. Pending the hearing and determination of this suit, the honourable court be pleased to issue an injunction restraining the plaintiff through its directors, agents, employees assigns or through whomsoever or howsoever from selling, advertising for sale, disposing of or in any other way interfering with the defendant's goods and tools of trade illegally carted away from the suit premises on 20th July 2018.

6. Pending the hearing and determination of this suit, the honourable court be pleased to issue an order directing the plaintiff through its directors, agents, employees, assigns or through whomsoever to open the premises at the Ground floor, mezzanine floor of KEMU Towers on LR No. 209/0566.

7. Pending the hearing and determination of this suit, the honourable court be pleased to order the plaintiff/respondent through its directors, agents, employees, assigns or through whomsoever or however to return the defendant/applicant goods and tools of trade illegally carted away on 20th July 2018 to the premises at the Ground Floor and mezzanine Floor or KEMU Towers on LR No. 209/0566.

8. That costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraph 1 to 20.

4. The application is supported by the affidavit of Johnson Njoroge, Director of the Defendant/Applicant sworn on the 23rd July 2018

5. The application is opposed. There is a replying affidavit sworn by Caroline Ndumia, Legal officer of the plaintiff/respondent sworn on the 6th August 2018. There are also grounds of opposition dated 30th July 2018 and filed in court on 6th August 2018. There is also a replying affidavit sworn by Lilian Mutuma, Legal Officer of the plaintiff/respondent sworn on the 19th June 2019.

6. On the 28th May 2019, the court directed that the application be canvassed by way of written submissions.

The Defendant's/Applicant's Submissions

7. The defendant/applicant seeks an order of temporary injunction against the plaintiff/respondent restraining it from selling, disposing of or in any other way interfering with the applicant goods and tools of trade carted away from the suit premises on 20th July 2018. The applicant's contention that the goods were carted away in the wee hours of the morning has not been controverted. Section 3(2) of the Distress for Rent Act prohibits in unambiguous terms distress between sunset and sunrise. No proclamation notice was served upon the defendant/applicant as required by law (under Section 12(2) of the Distress for Rent Act. The procedure under Rule 12 of the Auctioneers Rules, 1997 was not complied with. It has put forward the **Mrao case** as the test for prima facie case.

8. The defendant/applicant will suffer substantial loss because it risks losing its property. The court should grant injunctive relief to ensure the plaintiff does not reap from its wrongful acts. It has also put forward the case of **Mary Wanjiku Y Challa Holdings Limited vs Kenya Commercial Bank Ltd, Msa HCC, No. 250 of 2000**. The whole process of alleged levying distress was charged with irregularities. It prays that the application be allowed with costs.

The Plaintiff/Respondent's submissions

9. The law in injunctions requires those who seek them to be candid with the courts. The applicant was not candid when he came to court on 23rd July 2018. The defendant/applicant failed to disclose that it was in arrears of rent payment to the tune of Kshs.4,006,510/-. It has put forward the case of **Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 Others [1995] eKLR; John Muritu Kigwe & Another vs Agip (K) Ltd Nairobi HCCC No. 2382 of 1999; Abraham Lenauia Lenkon vs Charles Katekeyo Nkaru [2016] eKLR**.

The court ought to have been informed of the fact that the dispute between the plaintiff and defendant extended beyond the costs ordered to be paid. The defendant is not entitled to the reliefs sought on the basis of non-disclosure of material facts.

10. The defendant seeks to find its case on its own wrong taking the form of failing to pay the costs awarded to the plaintiff by the Business Premises Rent Tribunal before the expiry of 14 days. This is not allowed in law. It has put forward the case of **Nabro Properties Ltd vs Sky Structures Ltd & 2 others [2002] 2 KLR 299** where the Court of Appeal held that no party can be allowed to benefit from his own wrong. The defendant is guilty of disobedience of the court orders and should not be entertained by this court. The Business Premises Rent Tribunal ordered the defendant to pay the plaintiff's costs and it declined to do so. It has put forward the case of **Mawani vs Mawani [1977] KLR 159**. The plaintiff prays that the application be dismissed with costs.

11. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the affidavit in reply and the annexures, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination are:-

(i) Whether or not the plaintiff/applicant's application meets the threshold for grant of temporary injunction.

(ii) Who should bear costs?

12. At this juncture it is necessary to briefly examine the legal principles governing the applications of the nature. In an application for injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

13. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was)** held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

14. It is the defendant's/applicant's case that plaintiff/respondent intend to illegally evict it, from the premises, that it is not in any rent arrears and neither a proclamation for distress no eviction was served on the defendant/applicant. The plaintiff/respondent on the other hand states that the defendant has failed to disclose material facts that it is in rent arrears that the defendant has also failed to pay the costs awarded to the plaintiff by the Business Premises Rent Tribunal.

15. The defendant/applicant has not challenged the averments in the affidavit in reply. I find that the defendant/applicant has not disclosed all the facts relating to the dispute between it and the plaintiff. In the case **Abraham Lenauia Lenkon vs Charles Katekeyo Nkaru [2016] eKLR**. It was held that:-

“There is no controversy that there exists a court made rule that if a party moves the court for restraining or injunctive orders ex-parte (without notice) then the party is obligated to disclose the facts which the court thinks are most material to enable the court to fairly form its judgment. Where a party does not observe this rule, he disentitles himself from the relief which he asks the court to grant and such relief will not even be visited by the court at the interpartes stage”

I am not satisfied that the defendant/applicant deserves any protection from this court. I find that it has failed to establish a prima facie case with a probability of success.

16. I also find that the defendant/applicant does not deserve the order sought. It has not obeyed the orders of the Business Premises Rent Tribunal requiring it to pay Kshs.100,000/- being costs to the plaintiff/respondent. In the case **of Mawani vs Mawani [1977] KLR 159** it

was held that:-

“The fact that a party to a case has disobeyed a court order...then the court may in its own discretion refuse to hear him until the impediment is removed or a good reason is shown why it should not be removed.”

I am guided by the above authority in finding that the defendant/applicant herein does not deserve this court’s protection.

17. The defendant/applicant did not rebut the averments of Lilian Mutuma, Legal Officer, of the plaintiff/respondent in her affidavit sworn on the 19th June 2019 in which she depones that the defendant/applicant has already vacated the premises.

18. All in all I find no merit in this application and the same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 21ST day of MAY 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

No appearance for the Defendant

Kajuju - Court Assistant