



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL CASE NO. 38 OF 2008

FAIRMOUNT HOTEL LIMITED.....PLAINTIFF/APPLICANT

= VERSUS =

MARGARET WANJIKU HENRY.....DEFENDANT/RESPONDENT

R U L I N G

1. For determination is the notice of motion application dated 8th April 2019 premised on Order 7 rule 1 & 5 and 36 Rules 1(a) (b) of the Civil Procedure Rules. The application seeks orders that;

1) Spent

2) Summary judgment be entered for the plaintiff for recovery of possession of L.R Plot Number MSA/BLOCK/XVII/734 and mesne profits of Kshs.6,000,000 as prayed for in the Amended plaint.

3) The Officer Commanding Station Makupa Police Station to provide security to Court Bailiff in executing the decree for vacant possession.

4) costs

2. The application is supported by the affidavit of Peter Keragi Njuguna and several grounds listed on its face. The grounds include the following;

(a) The defendant has maliciously continued to use the plaintiff's business and the business premises in a wasteful and injurious manner by vandalizing and or causing/permitting vandalism at L.R Plot Number MSA/BLOCK/XVII/734 at the expense of the plaintiff.

(i) The defendant continues to occupy the suit property without permission of the registered owner Roadtouch Ltd or the plaintiff/ tenant herein and enriches herself with the proceeds from the plaintiff's business in the suit premises.

(ii) The premises have been dilapidated over time and are in need of major renovations because the defendant has continued to unlawfully use the plaintiff's business and the business premises in violation of the County Government Regulations.

(iii) The County Government of Mombasa has threatened to close down the plaintiff's business premises because of the defendant's unlawful actions of illegally connecting raw sewage from the suit premises directly into the County Storm Water Drains.

(iv) The County Government of Mombasa was demanding unpaid property rates amounting to kshs.1,692,084 and had threatened to auction the plaintiff's suit premises. This is despite the fact that the defendant has been profiting herself from all the monies generated as income from the plaintiff's suit premises and the business herein.

(b) The defendant cannot raise any triable issues in this suit because she did not file a statement of defense.

(c) In addition, any plea or issue that the defence could raise is res-judicata to Mombasa H. C. Matrimonial Cause No. 1 of 2008 Margaret Wanjiku Henry Vs Peter Kiragu Njuguna, Roadtouch Services Limited and Fairmount Hotel Limited since;

(i) The said Matrimonial Cause was between the same parties with the defendant herein as the plaintiff and the plaintiff

herein as the 3rd defendant.

(ii) The issues raised in the said matrimonial cause are the same or substantially the same issues as the issues raised in this suit since the defendant claimed title and possession of the suit property herein.

(iii) The said Matrimonial Cause was determined on 21/3/2018 by a decree dismissing the said claim with costs.

(d) The defendant truly owed mesne profits of Kshs.6,000,000 as at 7/7/2009 when the plaint was amended.

3. In the supporting affidavit, the applicant annexed the following documents in support of the application;

(a) Proceedings and judgement in MSA HC Matrimonial Cause No. 1 of 2008.

(b) Title to the suit premises MSA/Block XVII/734.

(c) Audited report dated 20/2/2018.

(d) Property rates statements and deposit slips for payment thereof.

(e) Letters to the County Government requesting permission to renovate the premises.

4. The applicant deposed that the defendant has no rights whatsoever to remain in the plaintiff's business premises. It is worse that she continues to unlawfully profit herself to the exclusion of other directors of the company who are not privy to the alleged former matrimonial relationship between her and Peter Kiragu Njuguna.

5. The Defendant/Respondent filed grounds of opposition dated 21st June 2019 but which grounds were struck out by the Court on 23/7/2019. The Respondent thus opposed the application only on points of law. Mr. Muyala advocate appearing for the Respondent submitted that under Order 36, the Court must have a clear mind before entering summary judgment. That the amended plaint seeks eviction orders which cannot be determined in a summary manner as the defendant has a right to cross-examine the plaintiff even where no defence has been filed.

6. Order 36 Rule 1 of the Civil Procedure Rules states thus,

“1. (1) In all suits where a plaintiff seeks judgment for - (a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”
(underline mine for emphasis).

7. In the Case of ICDC Vs Daber Enterprises Ltd (2000) EA 75 the Court of Appeal stated that the purpose of summary judgment is to enable a plaintiff to obtain quick judgment where there is plainly no defence to the claim. In the case of Katsuri Limited Vs Nyeri Wholesalers Limited (2014) eKLR, the Court of Appeal quoting E.H. Lewis and Son Vs Morelli (1948) 2 ALL ER 1021 where the Court found that a tenant who has been put in possession cannot challenge the title of the landlord held thus,

“that that a tenant has no triable issue in the counter-claim for vacant possession. It is the duty of the courts to ensure that no individual is prevented from taking possession or enjoying their property. A tenant cannot impose or force himself on a landlord”.

8. Similarly in the Case of DT Dobie Kenya Ltd Vs Muchina (1982) KLR 1, the Court of appeal held that if a suit discloses no reasonable cause of action and or discloses no defence then it ought to be struck out.

9. In the instant application, the defendant did not submit that she has a defence which is likely to raise a triable issue. Her only argument for objecting to the orders sought is on account that her right to cross-examine the plaintiff will be infringed. In my opinion and I so hold the right to cross-examine can only be exercised in line with the defence filed to the claim. Order 11 requires parties to share their claims/defences to enable a party prepare for the claim he is to face.

10. In the scenario where there is no defence to the claim or grounds to oppose the orders sought gives an inference that the application and the suit is not opposed. Therefore, nothing stops this Court from granting the orders sought to allow the plaintiff enjoy the rights bestowed upon him as of right and by law. Order 36(2) of the Civil Procedure Rules to grant vacant possession through summary judgement as has been prayed. Accordingly, I hereby allow the application and grant the prayers sought. The Costs of the application and the suit is awarded to the applicant.

Dated, signed and delivered at BUSIA this 12th day of May, 2020.

A. OMOLLO

JUDGE

Judgment delivered electronically through mail this 12th Day of May, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE