



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 70 OF 2016
THOMAS K'BAHATIPLAINTIFF/APPLICANT
VERSUS
FLORENCE SEYANOI KIBERA (ALIAS DOROTHY SEYANOI
MOSCHION.....DEFENDANT/RESPONDENT

RULING

1. The application dated 9th March 2016 seeks orders that the Defendant

“1. Spent

2. Spent

3. Spent

4.The Defendant, by herself, representatives, agents (including Westminster Merchants Auctioneers), her employees, servants, or whosoever is acting on her behalf be restrained from detaining, levying distress, attaching and or removing for sale the Plaintiff’s moveable goods proclaimed on 3rd March, 2016 or in any manner disposing of, selling or transferring the said Plaintiff’s properties pending the hearing and determination of this suit.

5. The Defendant by herself, representatives, agents, employees, servants, or whosoever acting on her behalf be restrained from selling, disposing of, letting, alienating, subdividing transferring, charging or in any other manner whatsoever interfering with the Plaintiff’s use, possession and occupation of the property known as LR. No. 5892/27, Nairobi pending the hearing of the suit.

6. An order for *status quo* to be maintained and referral of the dispute to arbitration pursuant to clause 15 of the Agreement dated 24th April, 2015.

7. The costs of this Application be in favour of the Plaintiff/Applicant.

8. Any other order as the court may deem fit and appropriate.”

2. The application is predicated on the grounds stated in the body of the application and is supported by the affidavit and supplementary affidavit sworn by Thomas K’bahati. It is the Applicant’s case that on

3rd March, 2016 the Respondent through Westminister Merchant Auctioneers purported to proclaim the Applicant's moveable property for purported rent arrears of Ksh. 11,500,000/=. According to the Applicant, he has never executed any tenancy agreement with the Respondent. It is stated that the relationship that existed between the Applicant and the Respondent was that of Advocate - client which started in mid 2012. That pursuant to an agreement for Remuneration dated 5th October, 2013, the Respondent agreed to pay the Applicant the sum of Ksh.32,565,000/= for legal services rendered and to be rendered in existing contentious matters and general non-contentious matters. That the Respondent agreed to pay a further Ksh.10,000,000/= to cover for further new contentious matters, whether criminal or civil in nature.

3. It is further stated that pursuant to the said agreement dated 5th October, 2015 and another agreement dated 24th April, 2015, the Respondent gave vacant possession and occupancy of the property LR No. 5892/27 to the Applicant to hold as security for the said legal fees. That the Applicant took possession of the premises and occupied the same. That the Respondent came up with a proposal to either sell the premises on LR No.5892/27 which was occupied and held as security by the Applicant or LR No. 5892/22 where the Respondent lived. The sale however never came to fruition as the Respondent trashed the valuation reports saying the property was undervalued. The Applicant's fees remained unpaid. That vide the agreement dated 24th April, 2015, the Respondent instructed the Applicant to secure a joint venture or the development of the properties LR No. 5892/22 to raise money to pay the outstanding legal fees and for the Respondent's own economic development. That the Applicant secured several prospective joint venture/ development proposals but the Respondent changed her mind and declined the offers.

4. It is the Applicant's contention that the purported termination of tenancy and the purported rent arrears is a stratagem by the Respondent to avoid paying the legal fees. The Applicant has further stated that he is ready and willing to relinquish the use and occupation of the house in question once his fees are settled. The Applicant has also deponed that the Respondent used trickery and took away two of her case files No. CRC 1519 of 2012 and CRC No. 1260 of 2012 from the Applicant's offices.

5. The application is opposed. The Respondent filed the grounds of opposition herein dated 16th March, 2016. The said grounds are as follows:

“1.That the entire suit and the motion are frivolous, scandalous and vexatious and do not disclose any cause of action against the Defendant/Respondent herein.

2. That the suit and the motion are a total abuse of this court's process.

3. That the Defendant has never at any one time entered into an agreement for payment of legal fees or any agreement for that matter with the Plaintiff and the purported legal fee agreements are a forgery and a fraud and therefore inadmissible in evidence.

4. That the Plaintiff is in arrears of rent and the defence offered or purported to be offered is a sham and discloses no defence at all.

5. That the motion is purportedly supported by an affidavit which is falseful, scandalous, misleading and oppressive and the same should be struck out with costs.

6. That the purported agreements exhibited by the Plaintiff in support of the motion are or were not executed by the Defendant or any of her recognized agent and as such are not agreement(s) contemplated under Section 45 of the Advocates Act and are therefore a nullity *ab initio*.

7. That on the basis of the aforementioned grounds, the Defendant/Respondent shall seek for dismissal *in limine* of the Plaintiff's Motion dated 10th March, 2016 with costs.”

6. The Respondent also filed a replying affidavit. According to the Respondent, in the year 2012 she sought legal services from the firm of Lumumba, Mumma, & Kaluma Advocates. That if the Applicant appeared and/or acted in the Respondent's cases he did so in his capacity as an associate in the firm of Lumumba Mumma and Kaluma Advocates under the instructions of George Peter Kaluma (hereinafter Mr. Kaluma) who personally handled the matters on behalf of the Respondent.

7. The Respondent's contention is that in September 2012, the Appellant proposed to rent the Respondent's house which is situated on the property LR No. 5892/27 Ololua Ridge, Karen at a proposed rent of Ksh.300,000/= per month increasing at the rate of Kshs.320,000/= annually. That the Applicant drew up the tenancy agreement which the Respondent executed for the Applicant to forward the same to Mr. Kaluma for safe custody. That in November 2013 the Applicant defaulted in the rent payment. That the Respondent complained in writing to the Applicant's employer, Mr. Kaluma. The Respondent also requested the Applicant to vacate the house. In February the Respondent instructed her Advocates to demand from the Applicant rent arrears amounting to Ksh.11,460,000/=. The firm of Westminster Merchant Auctioneers was instructed to levy distress for rent. The Plaintiff's moveable property was proclaimed by the auctioneers. The Respondent denied having entered in any agreement with the Applicant for the payment of any legal fees.

8. Hon George Peter Kaluma swore an affidavit in support of the Respondent's side. It is stated that the firm of Lumumba, Mumma and Kaluma was registered in the year 2004. That Prof Lumumba left the said firm of Advocates in the year 2008 and Prof Mumma left in the year 2010. That the Respondent became his client in the year 2012 in several cases. That the said deponent (Kaluma) personally handled the matters including taking instructions, drawing pleadings, filing pleadings, litigation and handling necessary correspondence. That the Applicant's appearances or action in the said matters were in his capacity as an advocate in the firm, acting on instructions of the firm or of the Defendant and not in any other separate capacity. According to Mr. Kaluma, the Respondent has settled all the fees due.

9. It is further stated that the Applicant has been a tenant of the Respondent in LR No.5892/27, Ololua Ridge Karen and even used to instruct him to pay rent on his (Applicant's) behalf. That when the Applicant left the firm of Lumumba, Mumma and Kaluma, he carried away client files which included the Respondent's files, title documents and personal documents. That the matter was reported at Kilimani Police station and is now to be referred to the Law Society of Kenya Disciplinary Tribunal. That if the Applicant continues to appear in cases of the clients of Mr. Kaluma, he does so without instructions.

10. The Applicant filed a supplementary affidavit in response to the affidavits filed by the Respondent. It is averred that the Respondent never paid any fees to Lumumba Mumma & Kaluma and if she did she can produce evidence of such payment. The Applicant's contention is that he was the managing partner of Lumumba Mumma & Kaluma Advocates at the material time and as the firm's custodian of the bank books and a signatory to the firm's bank accounts, he would have been aware if the fees were settled by the Respondent. The Applicant posed the question that if indeed he was the Respondent's tenant from September, 2012 to November 2013, why has the Respondent not provided any evidence of payment of the rent of Ksh.300,000/= per month?

11. The Applicant has termed the affidavit by Mr. Kaluma as self-serving, giving selective information while concealing essential facts and containing falsehoods. According to the Applicant, the said Mr. Kaluma has found a forum to advance his vendetta and personal grudges which emanate from the severance of their partnership in the firm of Lumumba Mumma & Kaluma Advocates. The Applicant stated that he became a partner in the said firm on 1st September 2008. That the partners as at September 2005 were Prof Albert Mumma, Peter Kaluma and the Applicant. That Prof Mumma left the partnership in July, 2010, leaving the only partners as Kaluma and the Applicant. That the said Mr. Kaluma only represented the Respondent for about four months from early 2012 to March 2012 and thereafter the Respondent was represented by the Applicant until his services were terminated in February, 2016. The Applicant further stated that he is not aware of any report made to the police by Mr. Kaluma and wondered how a partnership can be a disciplinary issue to be referred to the Law Society of Kenya Disciplinary Tribunal. The Applicant urged the court to strike out and expunge Mr. Kaluma's affidavit as being false, scandalous, vexatious frivolous and meant to embarrass the fair hearing of the case.

12. The parties opted to canvass the application by way of written submissions. I have considered the said submissions.

13. On whether to issue the restraining injunctive orders sought, the principles applicable were well settled in the case of **GIELLA –VS- CASSMAN BROWN & CO. (1973) EA**. To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss would be suffered and if in doubt, the court will decide on a balance of convenience.

14. It is common ground that the property LR No. 5892/27 is registered in the Respondent's name. It is also common ground that the Applicant is currently the one in possession and occupation of the said property. How the Applicant came to occupy the said property is the main issue in contention herein. The Applicant's position is that the Respondent surrendered the possession and occupation of the property in question for him to hold as security for the legal fees as the Respondent was not able to pay the legal fees at the time they entered into the agreement for the sum of Ksh.32,565,000/= as legal fees. On the other hand the Respondent's position is that the Applicant entered the premises in question as a tenant at a monthly rent of Kshs.300,000/= per month.

15. The applicant was exhibited an agreement dated 24th April, 2015 wherein the Respondent agreed, *inter alia* to pay the sum of Ksh.32,565,000/= as legal fees and also gave vacant possession and occupancy of the premises in question to the Applicant. The said agreement on the face of it is executed by way of a thumb print. The thumb print appears on each and every page of the said agreement. The Respondent is also said to have agreed to a further payment of Ksh.10,000,000/= Legal fees according to the schedule to the agreement dated 5th October, 2013 which agreement also enumerates the particulars of the cases that the Applicant says he was handling on behalf of the Respondent. At this stage of the case, there is no evidence to prove whether the thumb print in question belongs to the Respondent or not.

16. On the other hand, the Respondent has not exhibited any lease agreement with the Applicant. According to the Respondent, she executed a lease agreement and left it with the Applicant for onward transmission to Mr. Kaluma for safe custody. Although there are allegations and counter allegations concerning who removed which files from which office, it is noted that there are no copies of any reports made to the police exhibited herein. There is also nothing shown to be before the law Society of Kenya Disciplinary Tribunal yet. The Respondent has also not been able to produce any document to confirm that the Applicant paid Ksh.300,000/= monthly rent during the period said to be covered by the lease agreement. It is noteworthy that Mr. Kaluma's affidavit evidence is that he issued cheques at least three times for cash drawings to pay the rent to the Respondent yet there is no documentary evidence of the same. There is no evidence of the mode of payments received directly from the Applicant by the Respondent. What is exhibited by the Respondent that mentions the rent payment is her own letter dated 11th February, 2015 in which letter the Respondent also complains about her files being handled by the Applicant.

17. The Applicant has also demonstrated how the firm of Lumumba Mumma & Kaluma was no longer in existence as from December, 2014. The Applicant has also shown that he was a partner in the firm of Lumumba, Mumma & Kaluma from the year 2008. That as a partner in the said firm the Applicant was taking instructions from clients, including the Respondent. These averments have not been controverted by any other evidence. If the Respondent paid any fees to the firm of Lumumba Mumma and Kaluma, there is no document exhibited herein to confirm the same.

18. Taking the foregoing into account, this court is satisfied that the Applicant has established a *prima facie* case. As espoused in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** case:

“.....a *prima facie* case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

19. In the circumstances of this case, if the orders sought are not allowed, the Applicant will suffer loss that cannot be compensated in monetary terms.

20. On the prayer that this suit be referred to arbitration, it is noted that the Respondent's position is that she has never at any time entered into an agreement for the payment of the legal fees with the Applicant. Ultimately, the issue whether there is a valid agreement between the parties herein has to be determined first. I therefore decline to allow the prayer that this suit be referred to arbitration.

21. The upshot is that the injunctive orders sought are allowed in terms of prayer No. 3, 4 and 5 of the application with costs in cause.

Dated, signed and delivered in Nairobi this 4th day of April, 2017

B.THURANIRA JADEN

JUDGE