



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.122 OF 2012

COURT BRAKES & CLUTCH LTD.....PLAINTIFF

VERSUS

1. MUSLIM ASSOCIATION, MOMBASA

2. MURPHY

MERCHANTS.....DEFENDANTS

RULING

1. There were as at 16.11.2015 pending in this file three applications namely;

- i. Notice of motion dated 9.6.2014 by the plaintiff seeking an injunction against distress for rent.**
- ii. Notice of motion by the plaintiff dated 23.2015 seeking the return of goods that were seized in distress for rent.**
- iii. A Notice of motion dated 21.10.2015 by the defendant seeking to strike out the suit for disclosing no cause of action.**

2. When the parties appeared before court on the 16.11.2015, it was proposed by Mr.Asige for the plaintiff and accepted by Mrs.Ali for the Defendant that the two applications filed by the plaintiff be kept in abeyance to await the outcome of the defendants application which if successful would collapse the entire suit.

3. The application dated 21.10.2015 is expressed in the following terms:-

- a) THAT this application be certified as urgent and be heard in the first instance.**
- b) THAT the plaint herein be struck out.**
- c) THAT this suit subsequently be dismissed.**

4. The grounds founding the application are that on the 20.9.2011 the Defendant, as Landlord over the suit premises served the plaintiff as his Tenant, with a notice to alter the terms of the lease by increasing

monthly rent from 15,000 to Kshs.70,600 under the provisions Cap 301; that the plaintiff failed to file a reference to the notice in time with the effect that under the Act the notice took effect and the rent was accordingly increased with effect from 1.12.2011.

5. Some six(6) months later, on 20.6.2012, the plaintiff moved the Tribunal, (BPRT) in cause No. 145/2012 seeking extension of time within which to lodge a reference. Using that application as a pedestal, the plaintiff filed this suit two days later on 22.6.2012 and sought an injunction. It would appear that the plaintiff was moved into filing this suit after the defendant having benefited from the notice taking effect sought to recover the resultant arrears of rent by distress for rent. It is disclosed in the plaintiff paper filed with the plaint dated 22.6.2012 that the plaintiff was proclaimed upon by the 2nd defendants on the 14.6.2012.

6. The plaint at at paragraph 7,8,9 and 10 pleads:

“The plaintiff disputes the intended increment of rent and has filed an application in the Business Premises Rent Tribunal, for grant of leave to file a reference out of time, pursuant inter alia to the provisions of section 6 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 of the Laws of Kenya the applicant is pending determination before the Business Premises Rent Tribunal.

The Plaintiff further avers that all the contractual rent has been paid and received by the Defendant upto the month of July, 2012.

There is accordingly no arrears of rent owing from the Plaintiff to the Defendant.

That in the premises, the levy of distress of arrears as demanded in the proclamation served upon the Plaintiff by the second Defendant is unlawful and illegal, and is intended to unlawfully terminate the Plaintiff's controlled tenancy to the detriment of the Plaintiff”

7. From reading the plaint in its entirety it is discernible that the purpose of this suit was to preserve the subject of litigation before the Business Premises Rent Tribunal on whether or not to enlarge time within which to file a reference.

8. The defendant application has disclosed on its face and on the annexures to the affidavit of NATASHA ALI that on the 7.12.2012 the application for enlargement of time was dismissed by the tribunal and no appeal was ever lodged to challenge that decision; that this court, Mwera J, on the 8/11/2012 dismissed the plaintiff application dated 22.6.2011 and upheld that the distress was lawful. A subsequent application for stay pending appeal was equally dismissed by Kasango J on the 15.5.2014.

9. On the basis of the disclosed substratum in the plaint, the finding that the notice had taken effect after the Tribunal declined to extend time to file reference, the finding by the court that the distress for rent was justified, the defendant contends that the plaint before the court discloses no case of action.

10. Order 2 Rule 15 Civil Procedure Act provides:

“15(1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the grounds that:-

(a) It discloses no reasonable cause of action or defence in law: or....

(2) No evidence shall be admissible on an application under subrule 1(a) but the application shall state concisely the grounds upon which it is made.”

11. This provisions has been repeatedly interpreted by the courts to the effect that in an application brought under it, the court concerns itself not with the minuted scrutiny of the evidence but by the soundness and purity of the pleadings: **see YAYA TOWERS LTD. -VS- TRADE BANK LIMITED,**

“In such a case the court's function is limited to scrutiny of the plaint. It tests the particular which have been given of each averment to see whether they support it, and it examines the averments to see whether they are sufficient to establish the cause of action. It is not the function of the court to examine the evidence to see whether the plaintiff can prove his case or to assess its prospects of success”

12. I have taken time to peruse the Grounds of Opposition Replying Affidavit by the defendant, the submissions filed and those offered orally before the court. From the Grounds of Opposition the Replying Affidavit of MOHAMED FAROOK DINI, the plaintiff contends that the application is incompetent in law and an abuse of the court process because it has been supported by an affidavit as evidence and that the court lack jurisdiction to entertain an application brought by a person without locus or legal capacity. The Replying Affidavit amplifies those contentions and add that the affidavit in support being sworn by Mrs Ali, an advocate, is incompetent null and void, that this court by its ruling of 8/11/2015, Mwera J, determined the rent at Kshs.35000 per month and not 70,600 and that the plaintiff has discovered that the defendant as sued had no locus standi to bring the suit as the property belongs to the Trustees of Mombasa Muslim Association, an Association whose constitution does not allow to institute legal proceedings with the consequence that the court lack jurisdiction to entertain the matter.

13. On that assertion on the legal capacity of the second defendant, the plaintiff has exhibited a copy of the constitution but no evidence on who is the registered proprietor of the suit property.

Determination:

14. My understanding of the matter before me is whether or not looking at the plaint as drawn and filed, the same disclosed a reasonable cause of a action.

15. In considering that issue the law confines, me to look at no more than the impugned pleading and apply the law on pleadings to it.

16. I have set out the excerpts of the plaint which I think bring out the plaintiffs cause of action. My reading and rereading of the pleading tell me that this matter was grounded on the pendency of the application for extension of time before the Business Premises Rent Tribunal. It is not lost to court that tribunal has no jurisdiction to entertain an application for injunction or indeed grant an interlocutory injunction. Therefore while the plaintiff awaited its decision on the application to extend time, it was well within the plaintiffs right to approach this court for an injunction to preserve the subject of litigation. To me that was all this suit could achieve because it is not within this courts mandate to determine the quantum of rent payable, the propriety or efficacy of the notice to alter terms of the tenancy. That is the presence of the Tribunal.

17. Now that pendency of the determination by the Tribunal having come to pass, I hold and find that as crafted and filed, there is no cause of action disclosed and that it would be futile to sustain the plaint before this court.

18. In coming to this conclusion, I have confined myself as the law dictates, to the wording and plain meaning as is capable of ascertainment on the face of the plaint.

19. I find that once the Business Premise Rent Tribunal refused to enlarge time, the plaintiffs claim herein died a natural death and it is incapable of injection with life even by an amendment. It is hopelessly bad and incapable of salvation from the only fate that stares on its face. I order it struck out with costs to the defendants.

Dated, signed and delivered at Mombasa this 04th day of March 2016.

P.J.O.OTIENO

JUDGE