



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO.30 OF 2015

RICHARD NYARWATI NYANDWARO.....PLAINTIFF

VERSUS

JACKLINE ONCHIRI..... 1ST DEFENDANT

MINMAX AUCTIONEERS..... 2ND DEFENDANT

MADGALINENYABOKE MWEBI.....3RD DEFENDANT

RULING

1. This ruling relates to two application dated 17th and 25th September, 2015. The application dated 17th September 2015 was filed by the plaintiff applicant under **Section 3A, 1A, 1B** of the **Civil Procedure Act**. The applicant sought the following orders:

1. Spent

2. **The Honourable court be pleased to restrain the Defendants by themselves, their servants from selling/disposing off the properties of the plaintiff/Applicant pending the haring of this application.**

3. **The Honourable court be pleased to order that the goods/properties of the Plaintiff which is remaining in the Hotel be kept safe by the plaintiff's padlock only pending the hearing and determination of this application.**

4. **The Honourable court be pleased to restrain the Defendants by themselves, their agents and or servants from disposing off the properties of the plaintiff pending the hearing and determination of the suit.**

5. **The Defendants be ordered to return all the properties wrongfully attached unconditionally.**

2. The said application is supported by the affidavit of the applicant sworn on 17th September, 2015 in which he states that the 2nd respondent/defendant attached his property without any notice of proclamation and that the respondents now intend to sell his goods unless they are restrained by this court's orders pending the hearing of the suit.

3. The plaintiff/applicant also filed a plaint contemporaneously with the above application in which he sought prayers as follows:

a. An order that the Defendants by themselves their agents and or servants be restrained and be stopped from selling or disposing of the plaintiff's properties and instead return the properties to the plaintiff.

b. Costs of this suit be provided.

c. Any other further relief that may be just in the circumstances.

4. The plaintiff's case, as stated in the plaint is that on 11th September, 2015 the defendants posed as customers in his hotel and attached his property and goods therein for no apparent reason which goods they now intend to sell at a public auction unless they are restrained by this court's orders.

5. On 22nd September, 2015, this court issued temporary orders of injunction to restrain the defendants from selling/disposing off the properties of the applicant pending the hearing of the application. The court also ordered that the applicant's goods which are remaining in the hotel be kept safe by the plaintiff's padlock.

6. On 28th September, 2015 M/s Mose Nyambega & Co. entered appearance for the defendants/respondents and on the same day filed a notice of preliminary objection setting down the following grounds of objection:

1. THAT the application as laid is incurably defective, a non-starter in law and the same ought to be dismissed ex-debito justitiae.

2. THAT the application as laid is devoid of merit as no sufficient reasons have been advanced to warrant the grant of the orders sought therein.

3. THAT this court has no jurisdiction to hear and dispose off this case as the same has been donated to the Business Premises Rent Tribunal pursuant to the provisions of Cap 301.

4. THAT the plaintiff/applicant's claim is remote and devoid of justiceability.

5. THAT the application is filed in bad faith, without disclosure of material information in order to hoodwink the court into believing that the plaintiff has a claim against the defendants.

6. THAT the application is an abuse of the court process and filed in blatant breach of substantive and procedural law.

7. The defendants also filed separate replying affidavits dated 25/9/2015 together with the grounds of preliminary objection. The 1st defendant/respondent depones that she lived with the plaintiff as husband and wife and they even had 3 children together but are currently separated. She states that she had a tenancy agreement with the 3rd respondent a copy of which she annexed to her affidavit and marked as "JO1".

8. The 1st respondent further depones that her tenancy with the 3rd respondent was duly terminated vide a notice to terminate tenancy issued by the landlord (3rd defendant) on 2nd June, 2015 after which she surrendered the leased premises to the 3rd defendant, but before such surrender, the 3rd defendant allowed her to sell her assets in the leased premises where she run a hotel business.

9. The 1st defendant avers that the plaintiff herein had no contract or landlord/tenant relationship with the 3rd defendant and that she is appalled by the plaintiff's unilateral decision to intrude into her affairs and sue her and the 3rd defendant for no justifiable cause.

10. The 1st defendant states that she voluntarily sold her hotel assets to one ONDIMU JARED OCHOKI and gave vacant possession of the premises to the said OCHOKI who intends to run a hotel business in the 3rd respondents said premises. The 1st defendant attached several annexures to her affidavit to attest to the sale of her hotel assets to the said Ondimu Jared Ochoki- (“J05a”), new tenancy agreement between the 3rd defendant and Jared Ondimu (annexture “J06”) and “JO3” being notice from the 3rd respondent to terminate her tenancy. In the 2nd defendants replying affidavit also sworn on 25th September, 2015, the 2nd defendant through one Josephat Nyachoti stated that he was not involved in an attachment of the plaintiff’s property as he had not been instructed by the 3rd defendant to act for her. He therefore states that he is a stranger to these proceedings and wonders why he has been enjoined to this suit in the first place.

11. The 3rd defendant in her replying affidavit depones that she had a tenancy agreement with the 1st defendant which agreement was terminated whereupon the 1st defendant gave her vacant possession of the leased premises but not before she allowed the 1st defendant to dispose of her goods and items therein.

12. The 3rd defendant denies that the plaintiff was her tenant in the leased premises and depones that the plaintiff is a stranger to her.

13. The 3rd defendant contends that she has since leased out the premises to a new tenant one JARED OCHOKI who has taken up possession of the same together with all the hotel assets sold to him by the 1st defendant. She has annexed copy of the lease agreement marked “MNM2” to the affidavit.

14. The 3rd defendant therefore denies that she attached or seized the property of the plaintiff, firstly, because the plaintiff is a stranger to her and was not her tenant, and secondly, that the hotel assets were sold by the 1st defendant who was the wife/girlfriend/former wife of the plaintiff.

15. At the time of filing the replying affidavits, the 3rd defendant also filed an application by way of Notice of Motion under **Order 40 Rule 7, Order 45 Rule 1 and 2, Order 51 Rule of the Civil Procedure Rules, Sections 1A and 1B, 3A, 63 (e) and 80 of the Civil Procedure Act, Sections 3, 13 (1), (2) and 7 of the Civil Procedure rules.** In the said application the defendants/applicants sought orders for:

1. Spent

2. THAT this Honorable Court be pleased to lift, discharge, review, vary and/or set aside the orders ex-parte injunctive Orders made on 22nd September, 2015 and or issued on 23rd September, 2015.

3. THAT cost of this application be in cause.

16. The application is supported by the affidavit of the 3rd defendant in which she states that the ex parte orders sought to be impugned were obtained through concealment of material facts and that she had no contract of lease with the plaintiff whom she contends is a stranger to her. In this new application, the 3rd defendant basically reiterates the issues she had deponed to in her replying affidavit to the plaintiff’s application dated 17th September, 2015.

17. The plaintiff filed a replying affidavit to the defendants application on 6th November, 2015 in which he has expressed shock at the 3rd defendant’s claim that he was a stranger to her yet he was the 3rd defendant’s tenant vide a lease agreement marked Exh. 1.

18. The plaintiff contends that he had purchased the hotel assets from one **ALI MOHAMUD IBRAHIM** for Kshs. 1 million as shown in a copy of sale agreement marked exh. 2, and that he had been paying rent

to the 3rd defendant as shown in a bank slip marked Exh. 3.

19. The plaintiff contends that his business has been crippled following the attachment of his goods.

20. When the matter came up for hearing before me on 9th November, 2015, parties agreed to canvass both the applications and the notice of preliminary objection by way of written submissions.

Plaintiff's submissions

21. In his written submissions filed by M/s Sagwe & Co advocates on 14th January, 2016, the plaintiff states that under **chapter 10 and Article 159 (2) (d)** of the Constitution this court has jurisdiction to hear and determine this case in line with the constitutional provisions that frowns upon procedural technicalities and emphasizes on substantive justice to litigants.

22. The applicant/plaintiff contends that the defendants jointly and severally evicted him from the business premises using dubious means and therefore he seeks orders to restrain them from selling his goods and instead, return them to him since the court has powers to stop the illegal repossession and sale.

23. The plaintiff has identified the issues requiring the court's determination as:

a. Whether or not the plaintiff's goods worth Kshs. 1,470,705/= were taken away by the defendants.

b. Whether or not the court has powers to stop the sale of the plaintiff's properties and order the same to be returned to the plaintiff.

Defendants/respondents' submissions

24. The defendants' submissions were filed by M/s Mose Nyambega & Co. advocates on 4th November, 2015.

25. The defendants submitted that this court lacks jurisdiction to hear and determine the instant application and suit and the basis that the same falls under the purview of Business Premises Tribunal pursuant to the provisions of Cap 301 Laws of Kenya and that although the High court has unlimited jurisdiction in civil matters, it is unsafe to entertain matters expressly vested in the jurisdiction of the Business Premises Rent Tribunal, in which case the High Court would come into the matter at an appellate stage.

26. On jurisdiction, the defendants cited the celebrated case of **Owners of Motor vessel "Lillians" vs Caltex Oil (Kenya) Ltd [1989] KLR 1.**

The defendant/respondents case is that the tenancy that is the subject matter in this case was a controlled tenancy within the meaning of Section 2 of the Landlord Tenant (shops, Hotels and Catering Establishments) Act Cap 301 (hereinafter in this ruling referred to as "the Act"). The respondents state that there was no Landlord/tenant relationship between the applicant and the 3rd defendant as the tenancy contract was rather between the 1st respondent and the 3rd respondent, which tenancy had been terminated.

27. On the injunctive orders sought, the respondents relied on the principles of injunction as set out in the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 374** as follows:

a. The applicant must show that he has a prima facie case with a probability of success.

b. The applicant must show that he will suffer irreparable injury that cannot be compensated in damages.

c. When the court is in doubt, it will decide the application on a balance of convenience.

28. The respondents submitted that the applicant had not satisfied the criteria set above and could therefore not obtain the orders sought.

29. The respondents concluded their submissions by stating that the applicant had not demonstrated that his goods were attached or that he had any lease agreement with the 3rd respondent and therefore the application of 17th September, 2015 ought to be dismissed with costs.

Analysis and Determination

30. Upon perusing the pleadings filed in this case, the submissions by counsels for both sides and the authorities cited, I note that the issues that arise and that crave for my determination are as follows:

a. Whether this court has jurisdiction to hear and determine this suit and by extension whether the preliminary objection raised by the respondents is merited.

b. Whether the plaintiff's application dated 17th September, 2015 is merited.

c. Whether the defendants' application dated 25th September 2015 has merit.

Preliminary Objection

31. The respondents raised an objection to the filing of the main case and the application dated 17th September, 2015 before this court citing want of jurisdiction. The respondents contend that the case and application ought to have been filed at the Business Premises Tribunal in line with Section 2 of the Act which states:

“(1) For the purposes of this Act, unless the context otherwise requires— “catering establishment” means any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded persons other than those who reside and are boarded on such premises; “controlled tenancy” means a tenancy of a shop, hotel or catering establishment—

(a) which has not been reduced into writing; or

(b) which has been reduced into writing and which—

(i) is for a period not exceeding five years; or

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof;

32. The respondents at the same time submitted that there was no landlord tenant relationship between the plaintiff and the 3rd defendant.

33. I have looked at the plaint and the application filed by the plaintiff in this matter. Nowhere in those pleadings does the plaintiff allude, even remotely, that there existed a landlord/tenant relationship between him and any of the defendants.

34. The plaint is worded as follows at paragraphs 5, 6, 7 and 8.

“5. That on the 11th day of September, 2015, the defendants posed as customers in the Hotel and attached the properties of the Plaintiff while with security officers from Kisii, took away the properties from the Hotel and are going to sell by public Auction.

6. That the Plaintiff avers that the 1st Defendant and the owner of the building had colluded with a view to disinherit the properties of the Plaintiff hence this suit.

7. That the plaintiff does not owe any balance in the form of rent to the said Hotel at St. Jude's house.

8. The plaintiff's claim against the Defendant is for an order to stop the Defendants from illegally repossession (sic) and the said properties and sale of the properties be stopped."

35. From the above contents of the plaint and the prayers sought in the application, one cannot tell for sure if there was a tenancy agreement between the plaintiff and the defendant (s) so as to qualify the argument that this suit falls within the jurisdiction of the Business Premises Tribunal.

36. Furthermore, the subject of a landlord and tenant relationship is introduced by the 1st and 3rd defendants in their replying affidavits to the plaintiff's application but only to the extent that a tenancy agreement existed between the 1st defendant and the 3rd defendant.

37. From the above foregoing, I find that since the plaintiff is not clear about the circumstances that led to the alleged attachment of his goods, it is not easy for this court to determine at this preliminary stage, if indeed he was the defendant's tenants, a claim that has also been denied by the respondents.

38. In that regard, I find that the provisions of the Act in respect to jurisdiction may not be applicable in this case.

39. In any event, I find that the dispute before the court is not purely a landlord and tenant affair, but also involves other parties, being the 1st and 2nd defendants whom the plaintiff claims participated in the attaching of his goods. For this reason, I find that even if there existed a landlord/tenant relationship between the plaintiff and the 3rd defendant, the involvement or participation of the 1st and 2nd defendants in the actions that the plaintiff complains about would remove the claim from the purview of a landlord and tenant dispute under the Act.

40. It is for the above reasons that I hereby find that this court has jurisdiction to entertain this suit and I therefore dismiss the preliminary objection raised.

Application dated 7/9/2015

41. Even though the plaintiff does not state, in the body of his application, the sections under which it has been filed, a reading of the prayers sought clearly shows that he plaintiff seeks orders of injunction to restrain the defendants from, firstly, selling off his properties and secondly, an order that the properties be locked under the plaintiff's padlock.

42. I am however not satisfied that the plaintiff has established that he has a prima facie case against any of the defendants with high chances of success, or that he will suffer irreparable loss if the orders sought are not granted and lastly if the balance of convenience tilts in his favour. **(See Giella vs Cassman brown and Co. (supra)).**

43. The plaintiff's application and supporting affidavit merely mentions that his goods were attached by the defendants from the hotel without any proclamation notice. The plaintiff does not show the inventory of the goods attached, if any, and proof that they belonged to him in order to satisfy this court that he is indeed in danger of losing his property.

44. At the very least, the plaintiff's affidavit is full of mere allegations without any sort of proof by way of annexures or at all.

45. The 1st defendant, on her part attached annexures to her replying affidavit to show that she was in

fact, the legal tenant of the 3rd defendant, that the tenancy was terminated and she sold off the goods and assets to a third party who entered into a tenancy agreement with the 3rd defendant.

46. The 1st defendant has further stated in the affidavit that the plaintiff was her former husband with whom she had 3 children but that they are currently separated. The averments by the 1st defendant on her relationship with the plaintiff has not been controverted in any way by the plaintiff.

47. I find that the contention by the 1st Defendant that she had in fact, sold the hotel goods and assets to a third party known as ONDIMU JARED OCHOKI throws the plaintiff's instant application into a spin thereby making it take a completely different turn, because if that is the case, and the plaintiff has not denied it, there would really be no need to issue restraining orders in this case as the issue of sale of the affected property has already taken place and the suit premises are at the moment in the hands of a different person who is not a party to these proceedings.

Clearly therefore orders of injunction cannot be granted to stop an event that has already taken place.

48. In view of the 1st defendant's own admission in her replying affidavit that she sold off the hotel goods to one Ondimu Jared Ochoki, I find that if there was any wrong done to the plaintiff, then he ought to have sued his wife/former wife as an individual without involving the 2nd and 3rd respondents whose role in the entire saga has not been clearly stated or proved.

49. It is for the above reasons that I find that the plaintiff/applicant's application dated 17th September, 2015 lacks merit and the same is hereby dismissed.

Application dated 25/9/2015

50. In this application, the defendants seek orders to lift, discharge, review, vary and/or set aside the exparte injunctive orders made on 22nd September, 2015. Having dismissed the plaintiff's application dated 17th September, 2015, I see no need to delve into the merits of this application by the defendants which has automatically been overtaken by events following the dismissal of the plaintiff's application.

51. I however find that the said application lacks merit and was filed prematurely since the grounds therein already formed the basis of the defendants' grounds of opposition to the plaintiff's application dated 17th September, 2015.

52. I find that there was really no need for the defendants to file a fresh application to vary, review or set aside exparte orders that were still pending confirmation after the interpartes hearing of the plaintiff's application.

Allowing the defendants' instant application would have been akin to denying the plaintiff a chance to have his application heard on merit.

53. In view of my above findings, the order that commends itself to me is to strike out the defendants' application dated 25th September, 2015.

54. In the end, I make final orders in both applications as follows:

- a. The plaintiff's/Applicant's application dated 17th September, 2015 is hereby dismissed.**
- b. The interim orders made on 22nd September, 2015 are hereby vacated.**
- c. The defendants'/respondents' application dated 25th September, 2015 is hereby struck out.**

d. Each party will bear their own costs in both applications.

Dated, signed and delivered in open court this 6th day of June 2016

HON. W.A OKWANY

JUDGE

In the presence of:

- Mr. Sagwe for Plaintiff/Applicant
- Nyagwencha for Defendant/Respondent
- Omwoyo court clerk