

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC NO. 306 OF 2014

JAMES M. MULINGE.....PLAINTIFF

VERSUS

BIG VIEW INVESTMENT LIMITED.....DEFENDANT

RULING

1. The plaintiff filed his suit against the defendant and along with it the notice of motion dated 2nd December 2014. The motion is anchored on the provisions of order 40 rule 1 and Order 5 rule 1 of the Civil Procedure Rules with the prayers pending for determination being in (c) and (e). In (c) an order is sought to restrain the defendant from collecting rent, soliciting for rent, trespassing or in any manner dealing with the management of the plaintiff's property known as Mombasa/Block XIX/22 pending determination of this suit and (e) is asking this court to issue an order of injunction restraining the defendant acting in person or by agent/servant from registering a purported lease between the plaintiff and the defendant pending determination of this suit.

2. The Notice of Motion is based on the 19 grounds listed on the face of it and on the supporting affidavit sworn by the applicant. The grounds include inter alia that the suit premises is the only source of income and livelihood of the plaintiff hence he risks losing the premises. Secondly that a purported lease between him and the defendant was executed under coercion and undue influence. Further the plaintiff sought a loan from the defendant to offset arrears to K.C.B Ltd on condition he surrender his original title deed for his land Kimana/Kinondo/152 which he did.

3. The Replying Affidavit filed in opposition thereto was struck off as having been filed late without leave of the court. The respondent has therefore opposed the motion based on the oral submissions on matters of law made by Counsel. Ms. Abuodha counsel for the applicant submitted that the directors for the defendant are the plaintiff's sons. That there are two draft leases, for 5 1/2 years which the plaintiff has but the plaintiff /applicant has learnt the defendant has another lease for 15 years. The applicant uses income from the suit premises for his up keep and he is willing to refund the monies paid on his behalf by the defendant in repaying the loan.

4. The applicant submits that if the orders are not granted he will suffer irreparable loss as he will not be able to take care of himself and his family and that he has given the defendant an alternative title as security. Mr. Mutubia counsel for the Respondent submits that from the applicant's own documents, there is a valid lease not a loan agreement. For this lease to be set aside, proof of fraud or forgery is required. Further he submitted that the applicant has admitted receipt of Kenya Shillings Three Million Four hundred thousand (Kshs 3,400,000/=) from the defendant to save the suit property from a public auction. He said further that the lease relied on by the applicant is not registered or witnessed by an advocate therefore the court should not rely on it. That the lease is for ground floor only and the applicant has not disclosed rental income of the other floors to verify that he will indeed suffer irreparable loss.

5. The Respondent's case is that the loss if any; can be quantified therefore this is not a suitable case for injunction. Lastly, the Respondent submits that the prayers sought in the motion are equivalent to the prayers contained in the plaint. If this motion is allowed, it will conclude the suit at an interlocutory stage

thus denying parties an opportunity of being heard. The applicant in response submitted that it is not in dispute he is the sole proprietor of the suit property and that the defendant can always recover their money's from rent and lastly the applicant depends on the rental income.

6. Besides the submissions rendered, the parties agreed to put in the rental income being collected from the ground floor being the part in dispute. The Respondent figure gave KShs. 493,400/= as the monthly rents from the various tenants while the applicant's figure is KShs. 500,000/= for 2014 from the same tenants. The applicant went ahead to state that this year rent increase to Kshs. 1,000,000/= but he did not annex any documents to support why the rent suddenly doubles in the year 2015. The amounts collected were for information to clarify how much in relation to repayment the debt owed between the parties.

7. From the submissions on record, the applicant is keener on stopping the defendant from collecting rent from the disputed premises and not stopping registration of the lease. However since both were prayed for in the notice of motion, I will deal with both. The applicant annexed as "**JMM 10**" a lease agreement leasing the ground floor of premises to the defendant for a period of 10 years. The applicant has explained the history of how the lease came to be executed in paragraph 14 - 24 of his affidavit and he deposes that he was coerced and deceived into executing the lease. This is an admission that a lease was executed albeit under duress and coercion. The applicant also deposed that this is his only source of income for upkeep and also to service a bank loan with due installments of KShs.340,000/ per month although the bank to whom the loan is owed was not disclosed.

8. In paragraph 3 of the supporting affidavit, the applicant described the premises as "**a true state of the art building comprising of a hotel and other business premises for rent.**" The lease the subject of this suit refers to the ground floor only. The photographs annexed as '**JMM 2**' particularly the one referring to "**front elevation of the property**" shows it is a storied building. The applicant did not disclose how much rent is collected from the upper floors. The picture shows the plaintiff does access income from parts of the building and therefore it is not true for him say as deposed in paragraph 9 of the supporting affidavit "**that he has no other alternative means of income to sustain himself, his 2nd wife and son who is in school.**" As submitted by Mr. Mutubia injunctive orders are equitable reliefs and he who seeks equity must come with clean hands. I agree that the plaintiffs own documents' reveal he is seeking equitable remedy with unclean hands.

9. The applicant admitted some funds were advanced to him by the respondent and he gave out his title deed for Kimana/Kinondo/152 as security. He has also admitted his willingness to repay the money over a period of time. This admission in my view tilts the balance of convenience in favour of the respondent. The question whether the lease was signed under duress or otherwise is a subject that requires proof and which cannot be determined in an interlocutory application. Until the contrary is established, this court can only refer to the lease annexed on its face value to be valid. The effect of this that the prayer seeking to restrain the respondent from receiving rent on the ground floor of the premises fails.

10. On the prayer for an order seeking to restrain registration of the lease, the lease annexed by the applicant is undated making it difficult for this court to verify when it was made. The applicant did not annex a copy of a recent certificate of official search to confirm whether registration of the lease had been effected or not by the time he came to court. From the documents contained in the replying affidavit which was struck off, it showed the lease was already registered. However in the event the applicant shall confirm with the registry of lands that the alleged lease between him and the defendant has not been registered at the time this ruling is delivered then the order stopping registration issued shall apply. In effect I do grant prayer (e) of the motion for on condition that it is not over taken by events and therefore shall not be applied retrospectively. This application succeeds only to the extent stated herein above. Prayer (c) of the motion is refused for the reasons stated in the body of the ruling. I order that costs of the motion shall be in the cause.

Dated and Delivered in open court at Mombasa this 10th day of March 2015.

A. OMOLLO

JUDGE