REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND CASE NO.132 OF 2014

ST. MARYS SACRED HEART BROTHERS & SISTERS INTERNATIONAL

(SUING AS THE PROPRIETOR OF ST. MARYS SACREDCBSI TEACHERS

TRAINING .....PLAINTIFF

VS.

AKENYA INVESTMENT LTD.....DEFENDANT

RULING

1. This ruling is on two applications Viz:

   (a) Amended Notice of Motion filed here on 27/5/2014. In the application,the plaintiff - **ST. MARYS SACRED HEART BROTHERS AND SISTERS** international - are the applicant while the defendant is **A KENYA investment LTD**. The defendant is also the respondent.

   (b) Notice of motion filed here on 10/6/2014, which is actually challenging orders issued in the first application. The plaintiff is the respondent in the application while the defendant is the applicant.

2. In order to shed clear light, some history and background is necessary at this stage. The property in dispute is **KISUMU MUNICIPALITY BLOCK 4/147** (suit land hereafter). The plaintiff first entered the property as a tenant paying monthly rent of 232,000/=. A lease to that effect was executed between the plaintiff and the defendant. The plaintiff started paying rent but, according to the defendant, defaulted at some point.

   The defendant made demand for payment but upon finding that no rent was forthcoming, decided to distrain for it.

3. The plaintiff's story is however different. True, it started as a tenant. But defendant later offered to sell the suit property. An oral understanding was then reached that the plaintiff would buy the property at Ksh.45,000,000/=. Of that amount, 20,000,000/= was to be paid within one year. The balance – 25,000,000/= - was to be paid in installments within 5 years after payment of the first deposit of 20,000,000/=. A written agreement was to be made after some payment had been made.
4. The plaintiff alleges that it has made payments amounting to Ksh.19 million or thereabouts and as things stand, the plaintiff is a purchaser in occupation and not a tenant.
5. The defendant was vehement and categorical in denial of the plaintiffs allegation. To it, the plaintiff was, and still remains, a tenant in default. The plaintiff owes rent and the move to realise

its payment was justified.

6. When the plaintiff was threatened with distress for rent, it rushed to court Vide this suit. The suit was filed on 21/5/2014 and an application seeking for restraining orders was filed with it.

   It is that application that was amended and filed on 27/5/2014.

7. When the application was filed, the court granted a restraining order Exparte. This aggrieved the defendant, who then filed an application on 10/6/2014 to discharge the orders.
8. Later on, it was agreed that the two applications be handled together, hence this ruling.
9. The amended Notice of Motion filed on 27/5/2014 has 4 prayers but prayers 1 and 2 are moot, having been dealt with earlier at the exparte stage. For now therefore, only prayers 3 and 4 are for consideration. They are as follows:

   Prayer 3: Upon hearing of the application interpertes, the defendant and its agents, M/S Nyaluoyo Auctioneers and any other such agents not mentioned, be restrained by an order of injunction from terminating the plaintiff's occupation, evicting, distraining against or harassing the plaintiff in any manner whatsoever and howsoever from quiet occupation of the property **KISUMU MUNICIPALITY BLOCK 4/147.**

   Prayer 4: The cost of the application be provided for.

10. From the grounds set out on the face of the application and the accompanying supporting affidavit, it is clear that the plaintiffs beef with the defendant is that the plaintiff is threatened with eviction because of an alleged illegal rent said to be owing. And all this is happening despite the defendant having received deposits from the plaintiff in excess of 17 million shillings.

11. Various replying affidavits were filed in response to the application. It is rather laborious and hard-going to try and set out what each contains. A summation is more appropriate. Simply put, it was denied that sale of the suit property was ever agreed upon or even in the offing. The payments attributed to such sale were fake and non – existent, the only agreement known to defendant being tenancy whose monthly rent was 232,000/=.
12. The plaintiff's status, it was averred, was that of a tenant and at no time did it change to that of purchaser in possession as the plaintiff would like the court to believe. According to the deponent – ***PHILIP ADERA, GEORGE DEBE and ROSE OKACH*** – the status of purchaser in possession is a creation of the plaintiff calculated to delay re-possession of the premises by the defendant.
13. And now a look at the second application. As pointed out earlier this application is a logical sequel to the first application. It seeks to discharge a restraining order granted exparte in the first application. That order was meant to last until the first application was heard and determined interpartes.

    The main reason for seeking the order is that the plaintiff obtained a restraining order on the basis of forged documents purporting to show it was a purchaser in occupation.

14. In my view, it is not appropriate to dwell so much on the second application at this stage. The order sought to be discharged was meant to run upto the present stage where the first application is set to be determined. It is therefore obvious that even without the second application, the order being challenged by second application would lapse when this ruling is delivered. But I may point out that the reasons given for challenging the order would not lead to the craved – for discharge. As I have said, the issue raised is that the plaintiff posed as purchaser in possession. Whether or not the plaintiff is such purchaser can not, and should not, be determined at the interlocutory stage. It is a matter for trial.
15. In my view, the defendant should await trial. It would not be proper for the court to delve into such an issue at this stage. The court would be reluctant to allow the application even if it were to turn out that considering it is proper. In short, what the defendant allege does not demonstrate the merits of the application.
16. That said, focus is now left to the first application. I have considered the application, the various

responses made on behalf of the defendant, and the rival submissions. I have had a look too at the suit as filed. After reading what was availed, I realise that the principles enunciated in the decided case of **GIELLA VS CASSMAN BROWN & CO LTD**: **{1973**} EA 358, will not find easy applicability. The principles require establishing a prima facie case with a probability of success, showing the likelihood of suffering irreparable loss not compensable in damages, and in case of doubt, adopting balance of convenience as the last option.

17. The case is seriously contested. The parties have approached it from totally different standpoints; with the plaintiff as purchaser in possession and the defendant as landlord in a tenancy relationship. Trying to establish which position is the correct one is not easy at the stage. Yet it is clear that it is either one or the other.
18. Alot of material availed by both sides would be useful for the main trial of the suit. An attempt to take position on such material at this stage would be premature. I have decided not to use such material. Such of the material as I use here is the one I deem suitable at this stage. As pointed out in the case of **SHITAKHA VS MWAMODO & 4 others {1986} KLR 445**, the court should not decide substantive issue at the interlocutory application stage. This ought to be left for the trial.
19. And in view of my observations concerning applicability of the principles in Giella's case (Supra) I will endevour to find succor in one of the observations made in

KENYA HOTELS LIMITED VS KENYA COMMERCIAL BANK LTD & another: (2004) 1 KLR & O. In the case, the court took the position that an injunction being an equitable remedy, the court may, while remaining guided by the principles in Geilla"s case (supra) also look at all the coicomstances including the conduct of the parties. All this may entail a departure from what the parties have availed.

20. I need then to state that a look at the prevailing coicomstances in the case will be a major consideration. It is clear that parties started their relationship as Land lord and tenant. The defendant is of the view that the relationship is still as such. But the plaintiff insists that it is now a purchaser in possession.
21. It seems clear to me that the plaintiff is in occupation of the property. It runs a college there and any activity associated with distress for rent is bound to interfere with the smooth running of the college. But it is also obvious that the defendant is the registered owner of the suit property. The plaintiff alleges purchase but there are formidable arguments raised against allegations of purchase. The suit property therefore is, as things stand, the defendant investment and the defendant is entitled to rent. These are the circumstances prevailing.
22. The defendant's counsel made a proposal which seems sound to me. The counsel proposed that the plaintiff can continue paying rent.

If it later turns out that the plaintiff is a purchaser, the money paid can be converted into purchase money.

23. In my view, the issue of purchase can stay pending until trial. The parties started their relationship on the basis of tenancy. That is the relationship that assumes primacy at this stage.
24. But it must be stressed that the plaintiff can not continue paying rent with threats of distress for rent, eviction and harassment hanging over its shoulders. The business the plaintiff is running on the suit property requires a tranquil environment. And if auctioneers come calling, the plaintiffs business reputation may suffer.
25. That is why in my view a retraining order of the kind asked for by the plaintiff is necessary. But that order must be conditional upon continued payment of rent by the plaintiff because the defendant as an investor is entitled to such rent. This is something that calls for understanding from the plaintiff. The plaintiff is itself an investor. It only needs to consider the pain it would feel if the students in the college it runs on the suit property are restrained from paying fees.
26. I therefore make a finding that the first application herein is allowed in terms of prayers 3. But the plaintiff should continue paying rent. The issue of purchase is for consideration during trial.

By its own admission, the plaintiff has not finished paying purchase money. If the court finds in

plaintiffs favour on the issue of purchase, the rent paid can be converted into purchase money.

27. This much should be clear to the plaintiff though, if there is default or refusal to pay rent, the defendant would be entitled to institute legal measures to recover it.
28. Costs of the application should abide the outcome of the trial.

A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

7/5/2015

7/5/2015

A.K. Kaniaru J.

John Ogendo court clerk.

Plaintiff present

Defendant present

M/S Oyango for Kopot fr plaintiff

Court: Ruling on Amended Notice of Motion filed on 27/5/2014 and dated 10/6/2014 read and delivered in open court.

Right of appeal 30 days.

A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

7/5/2015