REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 35 OF 2015

SHAH MOHAMMED.....PLAINTIFF/APPLICANT

VERSUS

NAZIR SHAH MOHAMED.....DEFENDANT/RESPONDENT

RULING

1. The Applicant **Shah Mohammed** is the registered owner of the suit premises known as **Nakuru Municipality Block 5/293.** On the property stands, but under construction, a commercial building known as **Zum Zum Plaza.** Two floors are competed and several tenants have entered into lease agreements in respect of various spaces therein. The lease agreements show the Respondent, **Nazir Shah Mohammed** as the landlord by virtue of a purported power of attorney donated to him by the landlord who is his father. From the 30th July 2014, the property is under the management of JoJean Properties Limited who were appointed by the Respondent to collect and to manage matters related to the tenancy of the property.

2. By his application filed under certificate of urgency and dated the 20th May 2015, the Landlord/Applicant sought orders:

a. that pending hearing and determination of the suit, this court do restrain the defendant by himself, his agents or servants from in any way whatsoever from interfering with the plaintiffs management of Zum Zum Plaza either by collecting rent, entering into the building or holding any documents in connection to ownership or tenancy of the said building.

b. That pending hearing and determination of the suit the defendant do deliver to the plaintiff or his advocate the Title deed/lease certificate for **Nakuru Municipality Block 5/293** plus all lease agreements and a list of tenants and the rent they pay.

The application is supported by the applicants affidavit sworn on the 20th May 2015 and grounds at the face of the application. The application is brought under Order 40 rule 1 and 2 of the Civil Procedure Rules.

3. **Grounds for the application and submissions**

The main grounds are that the applicant has revoked the power of attorney to the Respondent on grounds of misconduct and lack of respect, that he has failed to account for rent collected, failed to deposit the rent collected in the the loan account with First Community Bank resulting to the security being under threat of public auction and that the Respondent has denied the applicant access to the property title documents.

4. The Applicant in his plaint dated the 20th May 2015 prays for an order of permanent to injunction restrain the defendant/respondent, his agents and employees from interfering with the management, running and building of or any development and/or entering, coming near all that property known as **Zum Zum Plaza** standing on **Nakuru Municipality Block 5/293.**

5. The Applicant in his affidavit deposes that he commenced construction of the property in 1999 but his sons, including the Respondent approached him and it was agreed that the Respondent would be incharge of the construction and procuring an extension of the lease and that he mobilised funds for the constructions by mortgaging his property **Nakuru Municipality Block 12/17** to the First community bank where he secured funding of KShs.3 Million to be repaid from the rent collection from the property, Zum Zum Plaza. That around 2013 the Respondent who was collecting the rent from two finished floors failed to pay the loan and other debts and failed to account for the rent and development forcing the bank to advertise the security for sale. Thereafter, the Respondent purportedly revoked the power of attorney, recalled the authority to collect the rent and manage the property, but the Respondent became difficult, and failed to release the title documents to the property and/or render an account of the funds utilised for the construction of the property and rent collection.

6. In his submissions, counsel for the applicant urged this court to allow the application as the authority given to the Respondent was not absolute, and that the Respondent has conferred ownership of the property to himself and has shut the applicant out of all dealings in the property yet he is the one who provided for funds for the construction. He further submitted that the Respondent despite collecting the rent has failed to pay just debts including the loan. It is his submission that the management of the property should revert back to him together with all the debts and liabilities that he is willing to take over and service.

7. In opposing the application, the Respondent filed a Replying Affidavit on the 12th June 2015. He states that he is the one who has been following up extension of the lease to the property and that none of his brothers and his father, the Applicant was interested in the construction of the building so the applicant authorised him to continue with constructions and that he is the one who sourced construction funds by requesting the applicant to charge his property and donate full control of the funds and property to him, that after construction and sourcing for tenants, the family started demanding back the control and management of the property – yet he had spent a lot of money and time on the property. It is his statement that the Applicant started interfering with the tenants and the operations of the premises and that in a family meeting, the family and the Applicant agreed vide a Management Agreement marked "**NSW7**" and annexed to his affidavit that the would clear debts owed to third parties and manage the property. He further states that he appointed some agent to collect the rent and manage the property in July 2014, but again the applicant, continued to interfere with the agents and revoked the agreement and stopped them from collecting the rent.

It is his statement that the Applicant and his siblings wish to take over he property yet they did not participate in the construction.

8. Counsel for the Respondent submitted that the Respondent had a power of attorney since the commencement of the construction and that the applicant cannot now purport to revoke it after completion and demand the property back – as he has an interest in the property, has invested his money and time in the construction. It was submitted that he is upto date with servicing the loan and all other debts and payment of utilities. That it is mischievous that the Applicant has come to court to demand the premises back and that issues raised can only be decided in a full hearing, that he has not demonstrated any loss to warrant grant of the orders sought and that he has access of all the title documents. He urged that the application be dismissed as incompetent, *mala fide* and an abuse of court process.

9. The application is brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules. The applicable principles for the grant of temporary injunctions are well settled in **GIELLA -VS- CASMAN BROWN (1973)** that:

a) An applicant must show a pr*ima fac*ie case with a probability of success.

b) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury/loss.

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

The applicant is said to have donated a power of attorney to the son, the Respondent. The court has not seen any **"power of attorney"** in the legal sense of the document but an undated agreement, an annexture to the Respondents affidavit marked "**NSM5**" and "an unregistered revocation of Power of Attorney marked "**SMIV**" dated the 22nd July 2014–revoking the power to the Respondent. What comes out clearly is that there was an arrangement between the two parties, that the Respondent was to help the Applicant push for renewal of the lease of the property and construction of the building and possible management of the same. That arrangement cannot be construed to be a power of attorney.

Also clear is that the funds for the construction was provided by the Applicant, partly through loan proceeds from his property and partly from rent proceeds. It is also clear that the Respondent after part completion of the building sourced for tenants and collected rent but did not pay the loan on its due dates and also fell into debts prompting the Applicant to recall the authority given to the Respondent, so as not to continue falling into debts. Indeed his house was up for public auction that would have caused him to suffer loss. But that did not happen as the loan installments were paid and property agents were engaged to collect and manage the property.

10. It is not in dispute that the Respondent helped construct the building with authority of the Applicant. But does this authority confer to the Respondent ownership rights? It cannot be so. The court has not been shown any agreement to ascertain the terms and conditions attached to the authority. That as it may be, the Respondent is entitled to reap some benefit from the "**help**" he offered to his father – in terms of money and time, but and more importantly, the Respondent is obligated to render an account to the Applicant, the registered owner and provider of the construction finds an account ought to be provided and a rent account from all the tenants from inception to date. On the other hand, the Respondent if as he says, spent his money in construction costs, he too should render an account of what he contributed personally towards the construction of the premises.

11. The court finds that shutting out the Applicant from the rent proceeds from his property under the guise that the Respondent had full control of both the property and rent cannot be said to be fair and just; more so, that his mortgaged property stands to be sold in public auction should the loan repayment fall into arrears as it happened in the past.

12. The Applicant, in my view has established a *prima facie* case and prospects of irreparable loss should the loan repayment fall into arrears as stated above. Also being the owner of the property, being shut out of the proceeds therein have exposed him to loss, and prejudice.

On the other hand, the Respondent has not shown any loss that he may suffer if an order of interim injunction is granted. He failed to give an account of what he says has spent as his money towards the construction of the suit premises. Time too is quantifiable.

See the case **Bedrock Security Services Ltd -vs- Nzoia Sugar Co. Ltd (2013) KLR.**

13. The ***status quo*** in place, as I understand it, is that the Respondent holds himself as the owner of the property. This cannot be said to be legally correct. I have not seen any document in whatever manner that purports to have transferred ownership to the Respondent. It cannot be sound submission as it was submitted that, now that the construction is complete the applicant cannot turn round and claim it(the property) back and that it is mischievous that he has come to court to demand the premises back! If the applicant had intentions of passing ownership to the Respondent, he would have done so through a duly registered assignment or transfer of the Lease.

14. This court finds some mischievous intention by the Respondent to transfer the property to himself. To that extent, an order of injunction would be proper pending full hearing and determination of the suit.

Order 42 rule 2(1) of the Civil Procedure Rules gives power to the court to make an order of injunction to restrain a party from committing a breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the property or right, on terms as it may deem necessary. See **Stephen Kimani Muhu -vs- Savings & Loan Kenya Ltd – (2009) KLR.**

It has been submitted that the management and Rent collection and application of the same is with JoJean Properties Limited and an account of rent collected has been provided. It appears like the estate agents were appointed by the Respondent without the authority and consent of the Applicant.

For the rent proceeds to be properly managed and accounted for in the interim, I am of the view that a neutral property manager be appointed by both parties, to collect rent and manage the property, with clear mandates as to the application of rent proceeds pending hearing and disposal of the suit. This results from the submissions that neither the applicant nor the Respondent can trust each other on the rent collection use and accountability of the same.

15. Having analysed the issues as presented and bearing in mind that this is an interlocutory application, I find that the balance of convenience tilts in favour of the Applicant. As held in the case **Stephen Kimani Muhu -vs- Savings & Loan(Supra)**, the court will not sit back in the face of threatened loss where the applicant's charged property is threatened with sale due to mismanagement of rent proceeds from the suit property from whence repayment ought to come from. The most equitable action in the circumstances is to allow the application in the following terms:

1. That pending the hearing and determination of the suit herein, the Respondent by himself, his agents and servants are hereby restrained from the management and rent collection from all tenants in **Zum Zum Plaza** standing on **Nakuru Municipality Block 5/293,** the property of the Applicant.

2. That the Applicant and the Respondent are to jointly appoint a property agent or firm to manage and collect rent from **ZumZum Plaza on Nakuru Municipality Block 5/293** with clear and agreed terms and mandate on the application of rent proceeds pending the hearing and determination of this case.

3. That the above orders are to take effect forthwith, such that the rent to be paid for the month of August 2015, and any arrears that may be outstanding at the date of this order shall be the responsibility of the manager/firm to be jointly appointed.

4. That costs of this application be costs in the cause.

Delivered, dated and signed in open court this 9th day of July 2015

JANET MULWA

JUDGE

In the presence of:

Gakinya for the Applicant

Mr. Onyanja holding brief for Mukira for the Respondent

Court clerk – Linah.