



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.316 OF 2012

FRANCIS THAIRUAPPLICANT/APELLANT

-VERSUS-

NICHOLAS WAIYAKIRESPONDENT

KAREN W THUMBIRESPONDENT

MUHATIA PALA T/A

NATHAN AUCTIONEERS1ST DEFENDANT

GEORGE MBUTHIA2ND DEFENDANT

PETER MUIGAI THUMBI3RD DEFENDANT

RULING

1. The application before this Court is a Notice of Motion dated 18th September 2013. The same is brought under Order 1 rule 10(2) and 22, Order 40 rule 1 and 2, Order 51 rule 1 of the Civil Procedure Rules, section 1, 1A&3A of the Civil Procedure Act. The applicant seeks the following orders;
 - i. Spent
 - ii. Spent
 - iii. That the injunction issued by this Court on the 4th of December 2012 restraining the 1st defendant whether by herself, her servants or her agents the 2nd defendant and or any other agents from attaching, carrying away advertising and/ selling the items proclaimed by the 2nd defendant on the 18th June 2012 or in any other way interfering with the plaintiffs tenancy on Title No. Ruiru Town/70 pending the hearing and determination of the suit do apply mutatis mutandis as against the 3rd and 4th defendants in relation to the illegal distress of 13th September 2013.
 - iv. That the plaintiff be granted leave to amend the Plaint and enjoin the 3rd and 4th defendant as defendants to this suit in terms with the draft amended plaint annexed herein and marked “ FT4”
 - v. That the intended defendants be at liberty to put their defense within 14 days of service of the amended plaint and summons to enter appearance if they so wish.
 - vi. The costs of the application be borne by the intended defendants.

2. The application is grounded on the six grounds on the face of the application as follows;

- i. That the plaintiffs/applicants are tenants of the Title No. Ruiru Town /70 owed by the landlord Eunice Wanjiru Thumbi.
 - ii. That the plaintiffs under the authority of the landlord Eunice Wanjiru Thumbi renovated and upgraded the landlord premises to the tune of Kshs. 2,600,000/= and an agreement was reached that the same be offset from any rent arising in the future.
 - iii. That by the orders issued by the Court on 4th December 2012 the 1st defendant whether by herself, her servants or her agents the 2nd defendant and or any other agents from attaching, carrying away advertising and/ or selling the items proclaimed by the 2nd defendant on the 18th June 2012 or in any other way interfering with the plaintiffs tenancy on Title No. Ruiru Town/70 pending the hearing and determination of the suit.
 - iv. That during the pendance of the suit the 1st defendant the intended 3rd and 4th defendants who are all children of the landlord have in an attempt to circumvent the orders issued on the 4th December, 2013 had the suit premises transferred to themselves and now the proposed 3rd and 4th defendant are once more trying to levy distress of rents injuncted by this Court through their new agents M/s Tigwoods Auctioneers.
 - v. That under the circumstances the proclamation is irregular, illegal, oppressive, in blatant disregard of this Court's order of 4th December 2012 and the intended sale by public auction can only be null and void and gross undermining of the Court's integrity.
 - vi. That should the illegal distress proceed the plaintiffs will suffer irreparably and their business will be gravely interrupted.
3. The plaintiff /applicant filed a supporting affidavit sworn by Francis Thairu dated the 18th of September 2013, plus a supplementary affidavit sworn on the 8th day of October 2013.
 4. The application was opposed. The 1st Defendant / respondent Karen W. Thumbi filed a replying affidavit dated the 25th of September 2013. The 4th defendant/ respondent Peter Muigai Thumbi filed a replying affidavit dated the 24th of September 2013.
 5. The application was opposed. Peter Muigai Thumbi and Karen Wanjiku filed replying affidavits dated 24th September 2012 and 25th September, 2013 respectively. Karen in her affidavit deponed that 3rd and 4th defendant are demanding for rent accruing from August 2003 and not the period he had obtained rent and indicated that the 3rd and 4th defendants have their own legal ownership and can also demand rent; that the orders being referred to by the applicant of the said Court were granted against her and she denies that the said transfer is meant to defeat the plaintiffs' rights as the same was an independent transaction. She further denies being in contempt of the said orders or interfering with the plaintiff's quiet enjoyment of the property. She deponed further that enjoining the 3rd and 4th defendant in the said suit will prejudice her defence and that she has been pressurizing the plaintiffs to finalise the suit as they became indolent upon obtaining injunctive orders and the plaintiffs should file the said suit before the Rent Tribunal.
 6. Peter Muigai on his part joined issues with the 1st defendant and denied having any knowledge of any Court orders related to Civil Case no. 316 of 2012 and denies being served with the same. He avers that the transfer from the previous owner of the premises was a legal transaction that was in no way tainted with fraud and that they are legal owners of the said property and hence have a tenancy/landlord relationship with any existing tenant. He deponed that the said suit is not against them and as such opposed being enjoined therein as the same will be prejudicial to them. He averred that the plaintiffs never informed him of the rent agreement but opted to rush to Court when he demanded rent from them; that Tigwood Auctioneer was acting on instructions from his previous advocates to distress for rent from the plaintiffs when they refused to pay. He further deponed that there was no order barring them from collecting rent or levying distress and vowed to continue with the same unless the plaintiffs paid the rent; that there was no registered tenancy in **Plot No. Ruiru/70** in favor of the plaintiffs and that the plaintiffs should not be allowed to use a pending matter with previous owners of the premises to frustrate them in obtaining their rightful income.
 7. Parties filed written submissions, the plaintiff/ applicant filed theirs on the 17th of December 2013, the 1st defendant / respondent on the 28th of January 2014 and the 3rd and 4th defendants/ respondents on the 28th January 2014.

8. The plaintiffs in their submissions reiterated the contents of the application and the Court order of 4th December, 2012 and added that the suit premises were transferred fraudulently and without value and that the distress by the 1st defendant was clearly sought to defeat the said order. It was submitted that the transfer did not address the issue of the plaintiffs not to pay rent for Kshs. 2,600,000/- they used in upgrading the premises and added that the said orders were still in place and had neither been varied nor set aside. He further submitted that the transfer of the premises to the 3rd and 4th defendants cannot defeat the said Court order and urged the Court to apply the same mutatis mutandis against the 3rd and 4th defendants. In regards to enjoining the 3rd and 4th defendants it was submitted that enjoining them will enable the Court effectively and completely adjudicate and settle all questions involved in the suit. He relied on Order 1 rule 10 of the Civil Procedure Rules which provides that;

“10. (1) Where a suit has been instituted in the name of the wrongpersons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.”

9. On injunctions the applicant submitted that the applicants had met the threshold as stated in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973. E.A. pg 358**, and urged the Court to find that the applicant have a prima facie case and have demonstrated that they stand to suffer irreparable loss as they heavily invested in the suit premises and are yet to recoup their capital gain on investment which cannot be easily quantified. On balance of convenience it was submitted that the balance tilts to the applicants favor as they spent Kshs. 2,600,000/- in upgrading the suit premises and that since the 3rd and 4th respondents were transferred the property for no value they have nothing to lose if the said orders are extended to them.
10. The 1st defendant submitted that in order for a party to be enjoined as a necessary party one must consider whether the party must be a necessary party; that there must be a right to some relief against such a party in respect of the matter involved in the proceedings in question and that it should not be possible to pass an effective decree in the absence of such a party and added that enjoining the 3rd and 4th defendants will cloud issues and delay expeditious trial of this suit. It was further submitted that the gist of their suit is that the 1st defendant was illegally demanding rent from the plaintiffs yet she is no longer the owner of the premises as the same has already been transferred to the 3rd and 4th defendant and as such she submitted that the plaintiffs claim has been overtaken by events. It was submitted that the alleged plaintiffs' interest was never registered and the transfer to the 3rd and 4th defendant was done free from encumbrances and that the previous owner of the said premises has since reported forgery of the lease agreement the plaintiffs are said to be relying on; that enjoining the 3rd and 4th defendants seeks to prolong the suit for the plaintiffs to continue using the premises for free.
11. The 3rd and 4th defendants reiterated Peter Muigai's replying affidavit and further submitted that; the applicant's application had not sought to suspend tribunal proceedings meaning they had faith in the proceedings and urged the Court not to be misled by the applicants' selfish interest; that the applicants have not evidenced rent *vis a vis* capital as alleged. It was submitted that the applicants were to recover the amounts from rent on upper floor and this left a deficit of Kshs. 1.5 million owing in rent; that attempts to enjoin the 3rd and 4th defendant is prejudicial to them. It was further submitted that the applicants are relying on a forged lease agreement which is subject of ongoing criminal investigations and that the applicants have failed to enjoin Eunice Njeri the previous premises owner who would give vital evidence to clarify the Court's triable issues raised by the plaintiffs and defendants.
12. I have read the affidavits filed and submissions and this is what I find; the plaintiffs/ applicants aver that they are tenants Title No. Ruiru town /70 owned by the landlord Eunice Thumbi. On the authority of the landlord the plaintiffs renovated and upgraded the said premises to the tune of Kshs.2,600,000/- which amount was to be offset from the rent arising in future. On 4th December

2012 the Court issued orders barring the 2nd defendant and her agents from attaching or carrying away advertising or selling items proclaimed on 18th June, 2012. The applicant claims that the 3rd and 4th defendants the landlords' children were trying to circumvent the said orders issued and have had the property transferred to themselves and are trying to levy for distress for rents injunctioned by this Court through a different agent in disregard of the existing Court orders which the plaintiffs argue is illegal and in blatant disregard of the said Court orders.

13. The applicant in his application seeks an injunction order against the defendant and also seeks to enjoin the 2nd, 3rd and 4th defendants. For the Court to issue orders sought they must prove that they have a prima facie case, they stand to suffer irreparable loss incapable of being compensated by costs if not the orders sought are not granted and the balance of convenience tilts in their favour. From the facts what I gather is that the agreement was between the applicants and the previous owner Eunice Njeri who is not a party in this matter. It is not in dispute that there is no registered interest in favor of the applicant and that the property has since been transferred to the 3rd and 4th defendants. The 3rd and 4th defendants refute being served with the copy of the said order and the applicant does not counter this. In this regard I give them the benefit of doubt that they did not have knowledge of the said Court order. However, I find that the 3rd and 4th respondents claim of lack of knowledge of the agreement of set off of rent accruing and the applicants costs of repairing the said premises cannot stand as from the affidavits filed it has come out clearly that the defendants are the children of the Eunice Njeri, I do not wish to comment on the issues raised on how the property was transferred to the 3rd and 4th defendants. The issue of enjoining the 3rd and 4th defendant falls under Order 1 Rule 10 of the Civil Procedure Rules, am guided by the case of **Central Kenya Limited vs Trust Bank Ltd and Others Civil Appeal No.222 of 1998**, wherein the Court of Appeal stated that;

“the paramount consideration in an application under Order I Rule 10(2) of the Civil Procedure Rules, is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit”.

I find that the applicants' prayer to enjoin the 3rd and 4th defendants who are said to be the current owners of the suit property is necessary for the effectual and complete adjudication of all the questions involved in the suit.

14. Now that the plaintiff seeks orders against the 3rd and 4th defendant I find it quite in order to grant their prayer to amend their plaint. I therefore grant prayer 4 and 5 of the application dated the 18th of September 2013.

15. On the issue of granting an injunction Justice Odunga in his ruling stated the reasons of granting the injunction, the issue of the monies spent on the suit property is yet to be resolved by the parties, and hence the issue of rent owing if any. In my view it is in order to grant the injunction as sought in prayer 3 of the application dated the 18th of September 2013. I urge the parties to sit and agree on the way forward in the matter as concerns the monies the plaintiffs state they spent on renovation and rent to be paid since the plaintiffs are occupying the premise. The application has merit and I grant prayers 3, 4 and 5. Cost shall be in the cause.

Orders accordingly.

Dated, signed and delivered this **14th** day of **May** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiffs/Applicants

.....For the 1st Defendant

.....For the 3rd& 4th Intended Defendant/Respondent

.....Court Clerk