



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 788 OF 2012

BAKARI MOHAMMED ABDULRAHMAN.....PLAINTIFF

VERSUS

SADIK MUCHIKU IMAANA.....DEFENDANT

RULING

This court on 8/4/2013 issued mandatory orders of injunction as prayed by the Plaintiff directing the Defendant to give vacant possession of two shops erected on premises on known as L.R. No. 36/11/1027, 10th Street Eastleigh Section 11. It is this order that the Defendant in his application dated 26/4/2013 prays that it be set aside pending the hearing and determination of the suit. The Defendant also prays that he be granted leave to defend the matter and the draft statement of defence annexed to the application be deemed as duly filed. Thirdly, the Defendant prays that he be granted leave to cross-examine the process server, who is alleged to have effected service upon the Defendant.

The application is premised on grounds outlined in the application and supported by an affidavit sworn on 26/4/2013. The Defendant avers that he has never been served with any court process in the matter and that the process server, Mary O.G. Njue, lied under oath in respect to her disposition in her purported affidavit of service sworn on 30/11/2012. It is the Defendant's averment that the Court lacks jurisdiction to hear and determine the matter for reasons that he is a protected tenant within the confines of Cap 301 Laws of Kenya and also that there is a reference at the BPR Tribunal Case No. 441 of 2012 and BPRT No. 447 of 2012 where the Tribunal in its judgment delivered on 7/9/2012 declined to terminate the Defendant's tenancy hence he is still a bona-fide tenant with no rent arrears. The Defendant contends that the Plaintiff is guilty of non-disclosure of material information valuable to the court, to wit, that the suit offends the principle of *res judicata* since the issue of tenancy has already been disposed off at the BPRT Case No. 447 of 2012. The Defendant avers that he has an arguable case and that it is in the interest of justice that he heard.

The Defendant also filed written submissions dated 24/6/2014 in further support of his application. The Defendant reiterated the contents of the application that the Plaintiff obtained the orders, subject matter of this application by failing to disclose that the dispute between the parties is a subject matter in the BPR Tribunal. Consequently, that the Plaintiff deceitfully obtained the said orders with the intention of circumventing Order of the Tribunal. The Defendant also submitted that his Defence raises triable issues which also contain Counter-Claims on the various heads of damages pleaded by the Plaintiff. Further that the application has been brought without undue delay and therefore it is in the interest of justice that the orders sought be granted.

This application was unopposed despite service effected upon the Plaintiff's advocate. There is an affidavit of service sworn by **Hudson Chanzu** on 4/6/2014 detailing the mode of service. Annexed to the said affidavit of service is a copy of the hearing notice for this application scheduled for hearing on 9/6/2014, which bears a stamp indicating that the notice was received on 30/5/2014 at 2:16pm.

The Defendant has asked this court to set aside its orders of 8/4/2013 on grounds of material non-disclosure. It is the Defendant's contention that the Plaintiff deceitfully obtained court orders by failing to disclose that the dispute between the parties is subject of a reference at the BPR Tribunal. In the affidavit in support of the application, the Defendant annexed a copy of an order from the BPR Tribunal in case No. 447 of 2012 directing him (being the tenant) to send rent to the Landlord via M-pesa and in the event the same is returned, the rent be deposited in the Tribunal. The Defendant also annexed copies of his M-pesa statements showing transaction details to the Plaintiff's M-pesa Account.

The BPR Tribunal is a body established under **Cap 301**, Laws of Kenya to determine disputes of tenancy of a controlled nature. Thus, orders stemming therefrom are valid and binding upon the parties until such time the order is varied, discharged and/or set aside. It is my finding that the Plaintiff, in failing to disclose to this court of the existence of a pending reference at the Tribunal and orders issued therein still in force, obtained order from this court dishonestly, with the intention to circumvent the Orders of the Tribunal. In the event that the Plaintiff was aggrieved with the Tribunal Orders, he has an avenue of appeal to this court, which he cunningly opted not to explore. Nyamu J. in **Republic v Land Registrar, Kajiado & another ex parte Kirsek Investments Ltd [2004] eKLR** held that **the effect if failure to disclose material facts disentitles the applicant of the Orders sought**. I therefore find that there was non-disclosure on the part of the Plaintiff which disentitles him of the mandatory Orders of injunction issued on 8TH April, 2013.

The Defendant has also prayed that he be granted leave to defend the suit as he has an arguable case which is detailed in the draft defence annexed to the affidavit in support of the application. It is the Defendant's averment that he was never served with the Plaintiff's application and subsequent court processes as alleged in the affidavit of service relied on by the Plaintiff at the time of obtaining the orders. The application has been brought, inter-alia, under **Order 12 Rule 7 of the Civil Procedure Rules** which gives the court discretion to set aside or vary a judgment or order entered or where a suit has been dismissed. Based on the foregoing, it is my conviction that I shall be exercising my discretion judiciously in setting aside the order issued on 8th April, 2013 and affording the Defendant an opportunity to defend the suit.

Consequently the Court allows the applicants Notice of Motion dated 26th April, 2014 and orders as follows;

1. ***The orders granted by this court on 8th April, 2013 are hereby set aside***
2. ***The Defendant is hereby granted unconditional leave to defend the suit. He is therefore directed to file and serve the Defence within 14 days from the date hereof.***
3. ***Costs of the application be in the cause.***

Dated, Signed and Delivered this 13th day of **October** 2014

L. GACHERU

JUDGE

In the Presence of:-

.....For the Applicant

.....For the Respondent

Kamau: Court Clerk

L. GACHERU

JUDGE