



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 20 OF 2013
(Formerly ELC 1402 of 2007)
SHADE MANUFACTURERS & HOTELS.....PLAINTIFF
VERSUS
SERAH MWERU MUTUU
JOSEPH KANGARI
GRACE GACIKU
VIRGINIA WANJIKU
LOUIS WAITHERA.....DEFENDANTS

RULING

1. The applicant through a Notice of Motion dated 7/6/11 prays for the suit to be struck out with cost and money be deposited in the account number 011301201952 Co-operative Bank of Kenya Moi Avenue Branch of Kenya Moi Avenue branch in the name of Wamahiu Kimeria & Co. Advocates & Kimani Githongo & Company Advocates together with all accrued interest be released to R.W. Chege & associates advocates for the defendants.
2. The application is based on the grounds that the suit is fatally defective, an abuse of the court process and that the suit is meant to delay expeditious disposal of the matter and that the Court lacks jurisdiction to entertain the plaintiff's claim.
3. The application is supported by the supporting affidavit of Kangari Muhu dated 7th June 2011; he depones that the respondent has refused to comply with court orders dated 2nd February 2005 & 18th February 2010; that the plaint lacks merit and is intended to delay the applicant in realizing the rent properly due and payable to the applicants by the respondents; that there is no rent dispute between the parties and if there is any this Court has no jurisdiction to determine the same as it lies with the Landlord & Tenant Act and that it is in the interest of justice that the application is allowed.
4. The application was opposed and the applicant filed grounds of opposition and replying affidavit dated 3/11/2011 sworn by David G. Thairu. It is deponed that the application is frivolous as it attempts to bring the suit under the landlords and tenants (Shops, hotel and catering establishment) Act cap 301 which does

not have any injunctive powers; that the defendants knowing the procedures of said Act still went ahead to levy distress contrary to the terms and conditions of the lease agreement dated 4/1/1998; that there is a rent dispute of Kshs.390,000/- deposited in a high interest earning account in favor of the plaintiff; that there is a dispute pertaining to developments and improvements and buildings valued at Kshs.10,887,000/- which the defendants have refused to refund the plaintiff contrary to the Lease Agreement dated 14th April 1988 and further lease dated 4th November 1998 and that the plaintiff as a registered protected tenant can only pay Kshs. 80,000/- as adjusted by the Justice Ransley 28/10/2004 followed by the order of Justice Kihara of 2/2/2005; that the application is a direct disobedience to the orders of Justice Muchelule to the Registrar High Court to have the suit listed for hearing urgently and on a priority basis; that this was pursuant to an injunctive order restraining the defendant's or agents from distressing or removing the plaintiff's property as proclaimed of distress of moveable assets until the hearing and determination of the suit is heard inter partes; that the parties have frustrated the compliance of the consent orders dated 16th February 2010; that the defendant's advocate never appeared to enable both advocates sign the relevant bank documents and that the reasons the applicant have made the application is to ensure that the respondent does not recover its costs of development and development amounting to Kshs. 10,887,000/- as valued by Gatheru Irungu and Mugo constructors on 30th June 1997 in terms of both the lease agreements dated 4th November 1998.

5. Louis Waithera in her affidavit dated 6/12/2012 reiterated the averments of the David G. Thairu in his replying affidavit she depones that the 2nd respondent is deceased and the claim against him can no longer be sustained; that the applicant has deliberately misrepresented and failed to disclose material facts to this Court; that the orders of 29/10/2004 were varied by the orders of 2/02/2005 and he subsequently the applicant applied for review via an application dated 1st March 2005 but the same was dismissed; that the applicant does not have any order for injunction persisting; that the applicant having failed to comply with order dated 2nd February 2005 cannot rely on the protection of the Court.; she sought to clarify that the rent was Kshs.90,000/- and not Kshs. 80,000/- and that it was the applicant's responsibility to prosecute his case under the law provided; that there was no agreement between the defendant and the plaintiff to develop the said property and the terms of lease provides that the tenants removes any structures on the leased property at the expiry of the lease and the applicant cannot impose himself on the respondent's property with the expectation to take over proprietary rights to the property.

6. Parties filed written submissions. The defendants/applicants in their submissions reiterated the grounds on the face of the application and gave a background of the matter culminating to the current application. It was submitted that Section 19 provides that any suit shall be instituted in a manner as may be prescribed by rules; that Order 4 rule 3(1) (current Order 5(1)(1))provides that when a suit has been filed a summons shall issue to the defendants ordering him to appear within the time specified therein. The applicants relied on the case of **HCCC 133/2005 ALFRED MAHONGHO & 3 OTHERS VS PROF BISHOP ZABLON NTHAMBURI & ANOR**, where the court held; *"no summons were signed and issued within 12 months of filing the suit, the suit is liable to be dismissed. This is because the Court has jurisdiction only to extend the validity of summons that have already been signed and issued where there is no service. Is there jurisdiction to sign and issue original summons after 12 months from the date of filing suit? It appears to me there is none. At any rate none is provided for in the rules."*

7. That since the suit was filed the plaintiff has been enjoying interlocutory orders with no summons being issued; the defendants argue this is an abuse of the court process and is prejudicial to them. That any issue on rent is referred to the Business Rent Tribunal for adjudication and since the plaintiff does not claim any rent from the defendants his case cannot fall there; that the lease agreement was for 5 years 3months and the Landlord Tenant Act only applies to agreements not exceeding 5 years. That the orders of 2nd February 2005 granted an injunction to the plaintiffs on condition that they deposited Kshs. 600,000/- to a fixed deposit account in the name of both parties advocates. The plaintiff sought to review these orders vide application dated 1st May 2005 which was dismissed, meaning that the previous orders were still existing and which the plaintiff refused to pay to-date.; that the plaintiff has refused to pay the defendants the rent of Kshs. 90,000/- from 1/1/2000 to-date. The difference of Kshs, 10,000/- 12 years later is 1,440,000/- .

8. The plaintiff/respondent in his submission dated 26/6/2012 reiterated the averments on its replying affidavit and grounds of opposition. It was submitted that the main issue in this suit is the Kshs. 390,000/- which was deposited in a high interest earning account in co-operative bank and that the defendants want to avoid paying the plaintiff the cost of development and improvements and buildings amounting to Kshs. 78,500,000/- as per the valuation report by Paragon Property Valuers dated 23rd November 2011; that the application is offensive and in disobedience of the direct orders of Justice Muchelule and that rent continues to accumulate exorbitantly.

9. Parties argued the application before me on 9/7/14. Miss Chege for the applicant/defendant submitted that the suit is fatally defective as no summons have been taken out before the Tribunal to deal with the issues and the plaintiff has not referred to any rent dispute for determination and it was superfluous for the applicant to come to Court seeking an injunction pending the determination of the rent. The Court cannot determine the rent payable. The 1st orders were issued on 2/5/2005 ordering the plaintiff to deposit Kshs.600,000/- but instead of doing so the plaintiff filed an application reviewing the said decision but the application was heard and dismissed. This left the order that the plaintiff pays Kshs. 600,000/- subsisting and to-date the applicant has not complied with the Court order but has only paid Kshs. 390,000/- ; that the order so given was on conditional in that if the plaintiff failed to pay the said sum the said orders stood vacated and the defendants were at liberty to execute for rent arrears the subject of the plaintiff's complaint. The applicant has further come up with an application dated 31/10/12 which is opposed by the defendants replying affidavit dated 6/12/12.; that the plaintiff claims there is a rent dispute and the defendant argues that this is not the Court to deal with the rent dispute; that the lease dated 4/11/1998 states the terms of rent and the Court cannot come and re-write the lease and that the lease clearly states that at the termination of lease the tenant will remove the development on the leased property and that a tenant cannot impose on a landlord a structure that he puts up on leased property and cannot acquire proprietary rights of a rented premises by putting up a structure; that these are not contempt proceedings as the procedure of the same is clearly set out and the party must serve the order. The Court orders the plaintiff is seeking to execute has since lapsed; that the defendant are being denied the right to their property since 2004 as the tenant is occupying the place without increment of rent for more than 10 years which amounts to injustice.

10. Mr. Kimeria for the plaintiff/respondent submitted that the amount of Kshs. 600,000/- was reviewed by Justice Ransley to Kshs. 390,000/- and by consent of parties before Justice Njagi the amount of Kshs. 390,000/- was deposited to an interest earning account and that the injunctive orders by Justice P. K. Kariuki; that Cap 301 does not provide for injunctive orders and hence they approached the High Court for the said orders; that Justice Ransley reviewed amount payable to Kshs. 80,000/-. The plaintiff relied on Article 259 of the Constitution . It was further submitted that that the defendant levied distress for Kshs. 90,000/- in total disobedience of the Court orders, the consequences of which the plaintiff was forced to pay a sum of Kshs. 792,920/- in fear of having its goods of trade being removed from the premises which they sought refund from the same.

11. Ms. Chege argued that the existing lease is the one dated 4/11/98 and therefore the plaintiff should not refer to expired leases and admitted that the said premises fell under controlled tenancy and Cap 301 is the applicable law and the injunction granted has since lapsed.

12. I have read and considered the parties affidavits, written and oral submissions. I concur with the defendants submissions in that the orders of 2/5/2005 ordering the plaintiff to deposit Kshs.600,000/- still stood after the applicant's application seeking to review the same was heard and dismissed by Hon. Muchelule. It is not in dispute that the plaintiff only paid Kshs. 390,000/- and not Kshs. 600,000/- as order by the court on 2/5/2005. Bearing in mind that there is a dispute on rent, rent is owing , it is my view that the applicants are entitled to the amount deposited in the joint account No. 011301201952 at Co-operative Bank of Kenya Ltd held by both parties' advocates. I order the release of the said sum to the defendants/applicants forthwith.

13. On the issue of summons. I have perused the file and have found though the same were taken out there is no evidence that the same were signed or ever served upon the defendants for them to enter appearance. Order 5 rule 1 (1) provides that; ***when a suit has been filed a summons shall issue to the***

defendant ordering him to appear within time set therein.

Order 5 rule 1 (3) provides that, *every Summons shall be accompanied by a plaint*. The wordings of these provisions are mandatory summons were to be taken out and served within 12 month and in the absence of compliance I hold view that the plaintiff's suit is liable to be dismissed. The plaintiff's plaint is therefore stuck off with costs to the defendants/applicants.

Orders accordingly.

Dated, signed and delivered this **4TH** day of **November** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff/Respondent

.....For the Defendants/Applicants

.....Court Clerk