



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 373 of 2011

NAKURU CITIMEGA LIMITED.....PLAINTIFF

VERSUS

KENYA FARMERS ASSOCIATION LIMITED.....DEFENDANT

RULING

This ruling is on an application made by the Plaintiff, Nakuru Citimega Limited, by way of Notice of Motion dated 19th December 2011 under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21, Laws of Kenya), seeking an order for a temporary injunction to restrain the Defendant by itself, its agents, officers and/or employees from advertising for sale, engaging in sale negotiations and/or selling or completing the sale, transfer or lease or in any way alienating the property, **LR No. 4/35 Nakuru Municipality**, (hereinafter referred to as the suit property) until the hearing and determination of this suit, as well as costs of the application.

This application is based on the following grounds:

- a) **THAT** the Plaintiff is the lessee of the suit property having leased the same from the Defendant herein
- b) **THAT** the Plaintiff has carried out substantial improvements and repairs on the suit property
- c) **THAT** the Defendant has sold the suit property to a third party while the period of lease is still subsisting
- e) **THAT** the Plaintiff will suffer irreparable loss and damage with regard to the cost of the improvements and repairs undertaken on the suit property

Mr Otieno, holding brief for Mr Ogola, counsel for the Plaintiff, in making this application relies on the affidavit of one Samuel Towett, general manager of the Plaintiff company, who swore, *inter alia*, on 19th December 2011 that:

1. A tenancy agreement was entered into between the Plaintiff and Defendant on 14th August 2009 for the lease of the suit property from the Plaintiff by the Defendant at a monthly rent of Kshs130,000/= for a period of 5 years 3 months commencing on 1st September 2008.
2. The Plaintiff took possession and found out that the premises were not fit for the purpose of business. The Plaintiff therefore undertook substantial repairs on the suit property, with the authority of the

Defendant as shown in the letter marked "ST 4", worth Kshs 30 million, and that at the expiry of the lease, the repairs and improvements would be valued by the property manager and the Defendant would reimburse the Plaintiff of the same.

3. It was further agreed that the Plaintiff would have the first option to purchase the suit property should the Defendant wish to sell it

4. As a result of the repairs and improvements, the suit property appreciated in value from Kshs 37,000,000 to Kshs 120,000,000/=.

5. In the month of November 2011 the Defendant without the knowledge of the Plaintiff advertised the suit property for sale through a daily national newspaper.

6. The Defendant has now reneged on that mutual agreement and is now offering the suit property to a third party together with the developments, improvements and additions carried out by the Plaintiff which includes the said developments, improvements and additions undertaken by them.

Counsel for the Plaintiff maintains that the orders were sought because they were apprehensive of the sale to a third party. He maintains that the Plaintiff is still a tenant because they have been paying rent. He relies on the further affidavit sworn by Samuel Towett on 21st November 2012, and relies on several documents: a valuation report marked "ST 2" showing the value of works done, and a letter and cheque marked "ST 3" to show rent payments. Counsel also submits that the Defendant was bound by a covenant not to do anything that would prejudice the Plaintiff's occupation of the premises; and by terminating the tenancy and selling the suit property, the Defendant has done that.

Counsel for the Defendant, Ms Magana, opposes the application and urges the Court to dismiss it with costs. She relies on the replying affidavit sworn by Symon K. Cherogony, managing director of the Defendant, on 19th November 2012, in which the Defendant states that:

1. No repairs or improvements ever took place as alleged by the Plaintiff,
2. There was no any authority given by the Defendant to the Plaintiff to carry out these repairs, nor was there an increase in the value of the suit property, and whatever valuation report that was prepared to show the same, the Defendant claims that they were not consulted in its preparation.
3. There was no agreement to reimburse the Plaintiff for the repairs done
4. There was no agreement that the Plaintiff should exercise the first right of purchase should the Defendant wish to sell the suit property. In any case, the Defendant maintains that they were without prejudice, and that it was a verbal agreement, that there is no written evidence to prove the same.

Counsel for the Defendant also maintains that the Defendant acted according to the terms in the tenancy agreement by terminating the lease without notice to the Plaintiff, and that the Defendant would pay the Plaintiff one month's rent in lieu of notice as evidenced by the letter marked "SKC 1".

Counsel also submits that the orders cannot be enforced against the Defendant since the transfer has already taken place, and that the Defendant no longer has any interest in the suit property, and has submitted various authorities, which I have taken into consideration in the making of this ruling, to support this position.

Counsel also contends that the orders were regarding sale, not eviction, and that parties are bound by their pleadings. As to the matter of the cheque, counsel maintains that the termination and the rent paid out to the Plaintiff, was not for the month of October.

Counsel for the Defendant closes their submissions by stating that injunctions are guided by the principles in **Giella v Cassman Brown [1973] EA 358**, where there must be a *prima facie* case with a probability of

success, and whether the applicant could be adequately compensated by way of damages; none of which are present here.

I have carefully considered both counsels' submissions, and the issues before the Court in the determination of this application are:

- i. Whether an application can be allowed against a party (in this case, the Defendant) who no longer has an interest in the suit property
- ii. Whether orders can be issued against a person not a party in a suit without being heard

As the record will show, the matter was certified urgent and temporary orders as prayed for in the Notice of Motion were granted by Justice Emukule on 4th January 2012. Orders to maintain the status quo were further extended at each mention of this matter as the record will show, except on 14th March 2012, where it seems that they were not as the change of advocates was taking place. The suit property was indeed sold to a third party during this period. The transfer has already taken place. I agree with one of the authorities submitted by counsel for the Defendant, where the Court of Appeal in **CYRUS NYAGA KABUTE V HOUSING FINANCE COMPANY OF KENYA LTD & ANOTHER [2009] eKLR**, where it was held that a Court cannot restrain a sale that has already taken place. The Court cannot act in vain. The natural consequence of the sale of the suit property is that the interest the Defendants had in the suit property has been extinguished, and therefore any orders that this Court would make against the Defendant would be rendered nugatory.

It would be a breach of the rules of natural justice to proceed with the case without the third party heard. As learned counsel for the Defendant has pointed out in another of her authorities **HAAS V WAINAINA [1982] eKLR**, in which the Court of Appeal held that a Defendant must be told what the Plaintiff's claim against him is, for the court cannot enter judgement against a Defendant *in vacuo*. At this point in time, the Court is at a loss to establish how much of the original suit can be determined without the third party's involvement. The prudent thing to do would be to enjoin the third party in this suit.

For the reasons I have given above, I regrettably rule in favour of the Defendant, and decline to allow the application. No orders as to costs as at this particular juncture.

Dated and delivered this 1st day of February 2013

**L N WAITHAKA
JUDGE**

Present

N/A for plaintiff

N/A for defendant

CC: Stephen Mwangi

**L N WAITHAKA
JUDGE**