



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 188 of 2012

HARDEV SINGH KALSI.....PLAINTIFF

VERSUS

MOHAMED AZAHAR.....DEFENDANT

RULING

1. The Plaintiff/applicant hereinafter referred as the applicant has filed two applications a Notice of Motion dated 10th April 2012 and 3/7/12. The one dated 10th April 2012 is brought under Order 40 Rule 1 and 4 and 51 rule 1 of the Civil Procedure rules, section 63(3) Civil Procedure Act, Under Limitation of Actions act and the Inherent Powers of this Honourable Court. The plaintiff seeks the following orders;

- i. That pending the determination of this suit, the defendant and his agents or whosoever be restrained from trespassing on LR. 209/4931/21 and attaching any goods to be found therein.
- ii. That the plaintiff does give an undertaking as to damages.
- iii. That costs be in the cause.

The application is based on the following grounds:

- i. The plaintiff has been continuous and exclusive possession of L.R 209/4931/21 Nyuki close, since 1987 and has acquired title to the property by way of adverse possession.
- ii. That the defendant has been aware of the plaintiff's occupation of the suit property as evidenced by the defendant's lawyer's letter dated 27th June 2006
- iii. That the defendant forcefully tried to take possession of the suit property in March 2012 but was advised by the Kamukunji police station to file a suit against the plaintiff if he felt aggrieved.
- iv. That the defendant has tried to obtain possession of the suit premises by filing a suit in Business Premises Rent Tribunal TR case number 147 of 2012 alleging outstanding rent of Kshs.15,000,000/-
- v. That whilst TR Number 147 of 2012 was pending, the defendant instructed auctioneers to levy distress for kshs.31,470,000/-
- vi. That a tenant and landlord relationship does not exist between the plaintiff and the defendant as evidenced by the distinct amounts the defendant alleges is owing.

vii. That the defendant is aware that the goods to be found in the sit premises belong to Balvir Kalsi who is not a tenant or in occupation of the suit premises.

viii. The plaintiff has never agreed to pay rent in respect of the suit premises.

ix. That it is inconceivable that a landlord would have allowed a tenant to stay in a property free from rent from 1987 to 2012.

Prayer 1, 2 & 5 have been dealt with.

2. The 2nd application dated 3/7/12 is brought under Sections 1A 1B of the Civil Procedure Act Order 40 Rule 1 and 4 & 51 Rule 1 of the Civil Procedure Rules, Section 63(e) civil Procedure Act, Under limitation of Actions Act and the Inherent Powers of this Honourable Court.

i. That in the first instance and pending interpartes hearing and determination of this application, this honourable court do injunct the defendants and or his agents/auctioneers going by the name of Muhatia Pala Auctioneers and or any other auctioneers or servants from, alienating, advertising for sale, selling, disposing by way of Public Auction, private treaty or at all goods illegally distrained as appearing on the notification of sale dated 2nd July 2012 serial numbers 1114,1115,1116 and 1117 and carted away from the plaintiff's premises that is LR209/4931/21 on 2nd July 2012.

ii. That in the first instance and pending interpartes hearing and determination of this application this honorable court do order the defendant and or his agents to unconditionally return to the plaintiff all goods attached on 2nd July 2012 as more particularly described in the notification of sale aforesaid and to remove the padlocks put at the warehouse that is on the suit premises upon service for this order failing the plaintiff be at liberty to remove the same.

iii. That prayer 2 and 3 be granted pending the hearing and determination of the application and further pending hearing and determination of the suit.

iv. That leave be granted to institute contempt of Court proceedings against the defendant and or his agents and advocates.

v. That costs of this application be borne by the defendant/respondent.

The application is based on the following grounds.

i. The application dated 10th April 2012 is still before this Honourable Court and has not been determined.

ii. That the defendant has instructed auctioneers to levy distress for rent and if the orders are not extended, the defendant will proceed to illegally distress for rent and attempt to attach the plaintiff's property.

iii. That this matter was stood over generally on 25th June 2012 when the parties to the suit tried to obtain a hearing date and were instructed to seek a date from the registry.

iv. That by an application dated 26th June 2012 the plaintiff applied for and obtained a reinstatement of lapsed interim orders preventing the defendant from levying distress fro purported rent arrears of Kshs.31470, 000/- as against the plaintiff.

v. That while the plaintiff through his advocates was in the process of extracting the same so as to serve the defendant; the defendant instructed his agents to levy distress and attach goods on 2nd July 2012.

vi. The defendant's agents are in the process of disposing the said goods unless stopped by this

honourable Court.

vii. At all material times to the illegal distraint, there were interim orders in place safeguarding the plaintiff's goods until the hearing of the application dated 10th April 2012 seeking injunctive orders.

viii. The defendant's agents attached goods not proclaimed/appearing in their proclamation notice contrary to the law.

ix. The defendant auctioneers carted way goods worth Kshs.36, 589,000/- yet the proclamation was for goods worth Kshs.3, 303,500/- as per auctioneer valuation which is below actual value.

x. That the defendant's advocates were prior to attachment notified of the existence of the interim orders but nevertheless instructed auctioneers to attach the said goods.

3. The two applications are supported by the supporting affidavits of Mr. Hardev Singh Kalsi. In brief this is what he depones; he runs a business by the name Malva Engineering & Construction, MC Builders, Malavic Limited and Malva Construction Limited situated at L. R Number 209/4931/2. They have been in the premises since 1987. He is aware that LR 209/4931/21 is currently registered in the names of Ilam Din s/o Umar Din, Mohamed Aslam s/o Ilam Din, Asgiri d/o Ilam Din, Mohamed Akhtar s/o Mohamed Akram, Mohamed Azhar s/o Mohamed Adram. That in January 2012 Mr. Mohamed Azhar came and tried to forcefully occupy the property prior to that he never had any dealings with him whatsoever. That upon his instruction his advocates LJA Associates, on 8th February 2012 wrote to the OCS, Kamukunji Police station, protesting against the attempted entry by Mohammed Azhar. That thereafter Mr. Azhar filed a suit in the Business Rent Tribunal TR 147 of 2012 Mohamed Azhar Versus Balvir Kalsi seeking, inter alia, possession on grounds the tenants they had not paid rent amounting to Kshs.15,000,000.00 for the last 25 years. That the said Mohamed Azhar has not obtained any orders in the matter which was fixed for inter partes hearing on 10th May 2012. That notwithstanding the foregoing the said Mohamed Azhar on 29th March 2012, instructed his lawyers, Achach & Company Advocates, to levy distress for Kshs.31,470,000.00 being purported rental arrears from 1998 to March 2012 and owing from Balvir Kalsi and on the 30th March 2012, Muhatia Pala Auctioneers as agents for the defendant trespassed onto the suit premises and proceeded to levy distress against his goods found therein. It is odd and malicious that both the suit commenced in the business premises rent tribunal and the warrant for distress were against Balvir Kalsi even though his lawyers in their letter of 8th February 2012 to the police had clearly indicated that he was in possession. That from 1987 to date, he has been in continuous and exclusive possession of LR 209/4931/21 and exercised all rights for an owner over the property; that the defendant has been aware that he has been in possession of the suit property as by letter dated 27th June 2006, his lawyers A H Malik sought a copy of purported sale agreement between himself and the vendors. That he has obtained title to the property LR209/4931/21 and he has filed a suit in HCCC 3490 of 2012 (OS) in the matter of LR. No. 209/4931/1 Nairobi-Hardeve Kalsi Singh vs. Ilam Din & other seeking to be declared the owner of the property. That the trespass by the defendant and his agents onto LR no 209/4931/21 and the attempted attachment of his moveable for purported outstanding rent is wrong in law as he has never been a tenant of the defendant, neither has he ever agreed to pay rent and in any event, rent is not due. That it is obvious that the defendant is aware that no rent is due as in Tribunal Case No. 147 of 2012 Mohammed Azhar Vs. Balvir Kalsi, the amount of rent supposedly owing is Kshs.15,000,000.00 whereas in notice of Distress the amount owing is stated Kshs.31,470,000/-. That the purported distress is an attempt by the defendant to harass him try and obtain possession especially after he has failed to do so through Tribunal Case No. 147 of 2012 Mohamed Azhar vs. Balvir Kalsi. That it is self-evident from the documents filed in Tribunal Case No. 147 of 2012 Mohammed Azhar vs. Balvir Kalsi and by the Defendant's advocates letter of 27th June 2006 that the defendant is aware that he has been in occupation of the suit property since 1987. That it is inconceivable that the defendant as a landlord would have allowed him to occupy the suit premises from 1987 to date without paying rent. That he hereby give an undertaking as to damages.

4. In the supporting affidavit to the application dated 3/7/2012; the applicant challenges the attachment that was done by the auctioneer instructed by the respondent's counsel and states that the auctioneer

attached goods which had not been proclaimed and the goods were attached when there were interim orders in place.

5. The respondent filed a Replying affidavits dated 18/5/2012 and 10th July 2012. He avers as follows; that he is the one of the owners of L.R. No. 209/4931/21 together with Ilam Din s/o Umar Din, Mohamed Aslam s/o Ilam din Asgiri d/o Ilam Din, Mohamed Akhtar and I s/o Mohamed Akram as tenants in common with equal shares. That he is aware that the applicant came into the property as a tenant and was dealing with one of the owners called Mohamed Aslam, who was receiving rent on behalf of the other owners. That at some point, Mohamed Aslam went to the United Kingdom, and thereafter the Applicant refused to pay rent to him on behalf of the other owners. That all his efforts to get rent payment from the applicant were unsuccessful as the applicant refused to pay rent on the basis that he had been dealing with Mohamed Aslam. That in the process of trying to get the applicant to pay rent, he suffered a stroke that caused him to be bedridden for a very long time, and which has since incapacitated him. That the applicant therefore took advantage of the fact that he was unwell and unable to follow the rent payment and stayed in the premises enjoying the facilities freely. That he has established that since Mohamed Aslam moved to the United Kingdom, the applicant has never paid rent to any of the owners. That his advocates on record have advised him that the issue of adverse possession cannot obtain as the applicant entered into the premises as a tenant hence he cannot acquire any title legally. That he has further been advised that the applicant has not stated the capacity in which he came into and/or got occupation of the premises. That the property herein is the only one that he has and his only source of income which at the moment, he is unable to get any financial benefits from it as the applicant has never paid rent. That he is aware that Harder Singh Kalsi and Bahir Kalsi are brothers and he has visited the premises severally and found Mr. Bahir Kalsi as the one carrying out business in the premises. That he is aware that the applicant has been suspected on previous occasions of having attempted to fraudulently transfer the original title to this property and as such the present application is made in bad faith. That his said advocates on record have advised him, that once a landlord's right to levy distress accrues under the Distress for Rent Act, Cap 293, he does not need any court order to carry out the said distress, and that the Tribunal case referred to was filed in error. That he has never attempted to forcefully take possession of the premises, and the only times he or his wife have visited the premises was solely for the purposes of demanding rent from the applicant.

In his replying affidavit to the application of 3rd July Mr. Azhar explains he has never been served with an order, how the Court orders were not extended and how the auctioneer moved to attach.

6. Counsels made oral submission Mr. Singh reiterated the applicant's averments in his affidavits and added from the bar how the applicant moved into the premises and stated further the property is registered under four names and that there was no letter or consent or instruction from the other co-owners for the respondent to file the affidavit, that if rent is owing it is contractual by virtue of section 4 of CAP 22 then the respondent are time barred and any right they had over the property have been extinguished by virtue of section 7 and 8 of the Limitation of Actions Act. The respondent counsels also reiterated what is deponed by the respondent and stated further that until an order of adverse possession is made the plaintiff has failed to demonstrate any interest other than that of a tenant and landlord relationship. Counsels also raise the issue that there is no competent suit as the plaint was filed on the 10th of April 2012, that no summons has been extracted by the plaintiff and that under order 5 of the new Civil Procedure Rules extraction of a summons is mandatory and has to be done within 30days. That if one fails to extract the summons under Order 5 (1) sub-rule 6 the suit shall abate. That the suit has abated and there is no competent suit upon which the plaintiff can seek injunctive orders and that there was no Court order when the attachment was done. In reply Mr. Singh stated that Order 5 Rule 2 (2) gives a requirement and provision for a validation of the summons and renewal of the summons therefore they have 12months within which to affect service. That after the defendants were served they filed a notice of appointment and there was no requirement to serve them with any other document. He concluded by saying that the applicant have a proprietor interest by virtue of section 7 & 8 of the Limitation of Actions Act CAP 22 and the applicant is in possession.

7. Before I deal with the main application I note that the defendants counsel raised the issue of the validity of the suit. From my perusal of the Court file the plaintiff filed suit on the 10/4/12. No

summons was attached to the plaint. I have not seen any summons exhibited by the plaintiff/applicant. Order 5 of the Civil Procedure Rule 2010 deals with the issue and service of summons.

Order 5 (1) (1) states that ***“Where a suit has been filed summons shall issue to the defendant ordering him to appear within the time specified herein”***

Order 5 (2) states that the said summons shall be signed by the Judge or an officer appointed by the judge and shall be sealed and with the seal of the Court without delay and that he will not give for his to be not done is not more than 30 days from the date of filing suit.

Order 5 (1) (6) states that “every summons except where the Court is to effect service shall be collected for service within 30 days of issue or notification whichever is late failing which the suit shall abate.

Order 5 2(1) deals with the validity of summons and provides that:-***2(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.***

(2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.

Mr. Singh relied on the provisions of order 5 (2)(2) and Mr. Achach the provisions of order 5(1) (6). These provisions are clear, that if no summons is issued within the period stated then the suit abates. Order 5 (2) (2) comes in only in a situation where the plaintiff/applicant has summons that was issued.

Counsel for the respondent has pointed out the correct provisions that deals with summons, and I do note that this is a procedure the applicant needed to have complied with. However I must not forget the provisions of the constitution articles 159(2) (d) which states that:-

“Justice shall be administered without undue regard to procedural technicalities”.

Justice shall not be defected by procedural technicalities and I therefore decline to order that this suit has abated. Having so ruled I will proceed to deal with the orders sought. The plaintiff moved to Court when the defendant according to him tried to take possession of that property. It is evident that the auctioneer attached the plaintiff’s goods. This brings me to the issue that I must deal with, that is, is the plaintiff the defendant tenant? The defendant claims the plaintiff is their tenant and used to pay rent to one of the owner who is in the United Kingdom. The plaintiff denies this. Although the defendant states this, the defendant has failed to show that the plaintiff paid rent as alleged.

There is no evidence of any payment of rent made before the said co-owner left for the United Kingdom or an affidavit from him stating the same. The issue of whether the plaintiff is a tenant of the defendant needs to be determined. Mr. Singh explained from the bar how the plaintiff got into the premises. What he stated ought to have been deponed by the applicant.

If the defendant is a landlord to the plaintiff he has a right to distain from rent. However I find that the issue of the plaintiff being the defendants tenant is not clear as the defendant has failed to show that the plaintiff is his tenant. I pose to ask why did the defendant wait for so long if he indeed the plaintiff was her tenant? There are other co-owners who would have dealt with the matter. The premises is registered in the names of the defendant but the defendant has failed to established the relationship they have with the plaintiff. The circumstances under which the plaintiff entered the said premises has not been explained. Is the plaintiff therefore entitled to the orders? The property is not the plaintiff’s as of now as the Court has not made that declaration. He is therefore not an owner nor has his suit of adverse possession been heard and determined. Since the defendant has failed to demonstrate that the plaintiff is herein tenant, I find that the defendant has no rights to levy distress. The plaintiff has established a prima facie case with a probability of success (see Geilla Vs. Cassman Brown Ltd 1973 E.A). His goods have

been attached, if they are sold he is likely to suffer loss of the said items even though he could be compensated. The balance of convenience in this matter tilts in the plaintiff's favour for now as his goods has been attached goods. I therefore order that the attached goods shall be released to the plaintiff as sought in prayer No 3 of application dated 3/7/12. The defendant or his agent shall unconditionally return to the plaintiff all goods attached on the 2/7/12 as described in the instructions of sale. I also note that the order issued by the Principal Magistrate S. Atemba on the 20/6/12 was for the defendant's agent to be accompanied by the OCPD Kamkunji to enable the land lord recover rent arrears of 31,470,000/- which I find is a sum way above the lower Court's jurisdiction. The defendant's agent ought to have moved to the High Court Order for such an order. On these reason again I find that the applicant is entitled to order 3 of the application dated 3/7/12.

On prayer No. 3 of the application dated 10/4/12, I find that the premises is registered in the defendants name and other co-owners. The plaintiff is in possession. The defendant is not in occupation. It is apparent that the defendant wants the plaintiff out. There are lawful ways to get such order from a Court of Law. To preserve the status quo awaiting the determination of this suit I order that the defendant shall be restrained from interfering with the plaintiff's quiet possession of the premises on L.R 209/493/21 and attaching any goods found therein. The plaintiff shall give an undertaking as the damages within 30 days from date of this ruling. The plaintiff shall take out summons within 30 days from the date of this ruling. Costs shall be in the cause.

Orders accordingly.

Dated, Signed and Delivered this **3rd day of October** 2012

R. OUGO

JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk