REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 171 OF 2008

PAUL OJIGO OMANGA……..…….PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL……....DEFENDANT

RULING

The plaintiff filed this plaint dated 6th day of May 2008 and filed the same date. The central theme in the same is that the grievance arise from the fact that the plaintiff was unlawfully evicted as a tenant on 12th May 2007 from his business premises situate and know as Plot 1777 and or land Reference Number 1430 Homabay Township, where he ran a shoe shop and accessories, mobile telephone shop, with accessories, and mainly a bar, hotel and lodging. As a result of that unlawful closure of the premises, from 12/5/2007 to 1st February 2008, he moved to court and filed Kisumu HCCA No. 43 of 2006 delivered by the Hon. court on 30th January 2008 a period of 8 ½ months. The earnings from the said businesses earnings are set out in Paragraph 7 of the Plaint whose aggregate sums are stated in paragraph 9 of the plaint whish comes to the sums prayed for in paragraph 15 of the plaint namely in prayer (a) Ksh 4,647,750/= being the value of goods removed and thrown away from the said suit business premises, stolen and or looted as claimed in paragraph 9, Ksh 6,120,000 being amount constituting loss of business profits as set out in paragraph 8 here of. In addition, there is a plea for general damages for wrongful eviction, punitive and or exemplary damages, interest on (a) (b) (c) and (d) above at court rates, costs of the suit and any other relief that the court, deems fit to grant in the circumstances.

There is interlocutory judgement entered against the 2nd defendant on 18th day of June 2008, where as that against the 3rd defendant was entered on the 21st day of July 2008.

The first defendant filed a defence dated 4th day of June 2008 and filed on 5th June 2008. Vide paragraph 2 thereof, the 1st defendant admits that it is true the plaintiff was evicted from the premises known as Plot Number 177 in Homabay (here in after referred as the suit premises on 12/5/2007, but avers that his agents, officers and or servants were acting pursuant to a court, order, served upon them by the agents and or servants of the 2nd and 3rd defendants. The 1st defendant will rely on the said court orders, for its full tenor and effect.

- vide paragraph 4 there of, that if at all the entry into the suit premises by his agents and or officers pursuant to the said court, orders, was illegal, and or wrongful, then the same constitutes a breach of covenant for quiet enjoyment to which action will only be against the 2nd defendant , his agents and/or servants.

-Vide paragraph 5, there of, that the duty of care of the goods and properties stated in paragraph 7 of the plaint laywith 2nd and 3rd defendants, and therefore the 1st defendant is not liable for any loss and damage, that may have resulted from handling of the same.

Vide paragraph 6 there of, that in the alternative and without prejudice to the fore going, the 1st defendant denies that the plaintiff has suffered loss of business and damage to his goods as alleged and the plaintiff is put to strict proof.

- Lastly that the statutory notice under section 13 A of the government proceedings Act Cap 40 of Laws of Kenya has not been issued.

It is against the above background that the plaintiff has moved to this court, vide an application dated 16th December 2008 and filed on16th December 2008, by way of chamber summons brought under order VI rule 13 (i) (b) (d) and (2) and 16 of the CPR Section 63 (e) order XII rule 6 and 3 A of the CPA. Five prayers are sought namely:

(1) The 1st defendant/Respondents' statement of defence, filed on 5th June 2008 in this suit be struck out and interlocutory judgment on liability be entered for the plaintiff/Applicant against the 1st defendant/Respondent.

(2) In the alternative and without prejudice to prayer (1) above, judgment on admission be and is hereby entered against the 1st defendant/Respondent on liability.

(3) Upon grant of prayer (1) and Pr (2) above, this suit be listed for formal proof.

(4) Costs of this Application be borne by the 1st defendant/Respondent as well as costs in the cause.

(5) Such further or other consequential orders be made as the court may deem fit to grant in the circumstances"

The grounds in support are set out in the body of the application, grounds in the supporting affidavit, annextures , oral highlights in court and case laws. The major points are:-

(1) Applicant was the proprietor of the subject business.

(2) He obtained an order from the High Court at Kisumu in HCCCA 43 of 2006 stopping the intended eviction by the landlord.

(3) The said orders were duly served on the landlord.

(4) Despite the said service of the order, annexture pool, the defendants went ahead and issued letters dated 7th May 2007 poo2, poo3 dated 10th May 2007, poo4 dated 22/10/2007, poo 4(a) dated 17/10/2007, Poo5 dated 11/03/2008 which all go to show that indeed the eviction was carried out, and the involvement of the police.

(5) That they issued a statutory notice to the first defendant annexture Poo 6, dated 12th March 2008, whose proof of receipt is annexture Poo6, dated 27th March 2008 addressed to the commissioner of police, being advised by the Deputy Solicitor General, instructing the commissioner to investigate the allegations and give a feedback to enable them respond to the claim.

On the basis of the documentation exhibited, they have demonstrated that the defendants defence is a sham and mere denial and it should be struck out.

The 1st Respondent relies on grounds of opposition dated 16th day of February 2009 and filed the same date namely:-

(1) That the 1st defendant acted pursuant to a court order, served upon them by the 2nd and 3rd defendants.

(2) That paragraph 3, 4 and 5 of the 1st defendants defence raises triable issues which ought to be determined on merit

On case law, the court, was referred to the case of JAMES. O. ONYANGO T/A WATCH DEALERS WHOLESALER VERSUS MUNICIPAL COUNCIL OF KISUMU. HABII OGADO T/A WINAM CYCLE CO. KISUMU CA 54/1996 decided by the CA on the 22nd day of November 1996. At page 2, line 8 from the bottom, the following facts are se out:-

" on 9th January 1986 a team of Municipal Councils' askaris led by Agiko Omoro and John Omwere descended without warning, upon the appellants shop, and without talking to him and in full view of the public forcibly removed the doors and completely demolished the wall portion. The Askaris threw out the appellants watches and other stock – in trade goods valued at Shs 167,069/50. These goods were left unguarded and most of them were stolen in the malice. The police refused to intervene. The appellant went to Town Hall and saw the Acting Town clerk and explained to him what had befallen his shop. The acting Town clerk disowned the action stating that the Municipal Council had not sanctioned the demolition

At page 4 , line 17 from the bottom, it is observed as follows:-

"*The sum total of the evidence adduced in court, by the appellant clearly establishes that the Municipal Council of askaris led by the senior enforcement officer, went to the appellants premises and demolished them without any lawful authority and without notice. The Municipal Council in trying to exonerate itself from liability failed to appreciate that its senior officer the Acting Town Engineer, Mr. Jakandongo who during the 15th May 1986, meeting, had expressly and unequivocably given authority to demolish the appellants' premises. The Municipal Council had unwittingly been led by the second respondent to resort to jungle law. However in its written statement of defence filed on 7th April 1986, the Municipal council denied the claim."*

The superior court, dismissed the action, because in its conclusion, the unlawful acts of the Municipal Council employees did not occasion any liability on it, because the said acts were not authorized by it.

On appeal, the CA, held that:- "*the decision to demolish the appellants' shop, was made by a senior officer of the Municipal Council in collusion with the second respondent. It acted through its' askaris, who were its servants, and gents, carrying out orders from its chief officer. The Municipal Council is therefore vicariously responsible for the torts of its employees in the course of their employment with itself. The Municipal council must therefore compensate the appellant for the consequential loss and damage"*

There is also cited MILIMANI COMMERCIAL COURT HCCC NO 410 OF 2005 HANS KENYA LTD VERSUS BUS STRUCK LIMITED, a ruling decided by Azangalala J on the 12th day of July 2006. A perusal of the same, reveals that, it is observed by the learned judge at Page 1 line 6 from the bottom that:-

"*the plaintiff avers that the defendant has admitted liability in writing and has agreed to liquidate the same by agreed instalments but has failed and or refused to comply with the admission or to pay the said instalments as agreed"*. At page 2, line 6 from the top, it is observed that the plaintiff there in, had

applied to have the defendants' defence struck out, and that judgement to be entered against the defendant for the sum claimed in the plaint together with interest and costs.

The application was based on the primary grounds that "*the defence filed may prejudice, embarrass or delay the fair trial of the action, that it is otherwise an abuse of the process of the court, that the defendant, is fully and justly indebted to the plaintiff in the said sum and that the defence is a sham.*"

At page 3 line 1, the learned Judge went on to note that no replying affidavit was filed in opposition to that application, the defence did not attend court, to oppose the same, scrutiny of the deponements, and annextures, among them, the defendants own letter to the plaintiff, revealed that as at the time the plaintiff moved to the court, the defendant was truly indebted to him in the sum of Ksh 6,790,610.35 which the defendant had promised to settle by instalments but had failed to do so. At page 4 of the said ruling, the court, took the defendants letter as an admission of the indebtedness and the defence filed by them could therefore be described as embarrassing, prejudicial and would give same to delay the fair trial of the action. In the learned judges' view, although striking out a pleading is a drastic remedy, to be exercised only in plain and obvious cases, the case before His lordship, was a proper one for striking out, went ahead to strike out the defence and entered judgement as prayed for the plaintiff.

Due consideration has been made by this court, of the Rival arguments presented herein, in the light of the provisions of the law cited as well as case law cited, herein with approval as well as case law on the subject that this court, has judicial notice of and on that account the court therefore moves to make the following findings on the same:-

(1)That there is jurisdiction to strike out a defence and entry of judgement in favour of the plaintiff.

(2) This remedy of striking out of a pleading, and shutting out of a litigant from the seat of justice, is drastic and the court, is enjoined to exercise it only in plain and obvious cases and where the defence put forward is a sham and one that is likely to embarrass, prejudice and or delay the fair disposal of the case or in the alternative, there is plain admission of the indebtedness by the defence. This admission could be in the pleading itself or some other document.

The applicant herein has sought to strike out the defence firstly, because, it is a sham and raises no triable issues and in the alternative, that there is a clear admission of the wrongful acts that gave rise to the cause of action.

The salient features of the defence have been set out herein and the court, is of the opinion that a construction of the same reveals that the defendant has put forward three arguments.

(i) That the plaint raises no reasonable cause of action.

(ii)That indeed the plaintiff was evicted from the suit premises on the dates complained of but the defendant and its servants and or agents did so on the basis of a lawful court order.

(iii) That the statutory notice pursuant to section 13 of the government proceedings Act had not been issued as required by law.

The plaintiffs responses to them is a reliance on the admission that the eviction was indeed carried out by the defendants as mentioned in the plaint. Exhibition of the correspondences emanating from the defence confirming that indeed the eviction took place and then there went a head to apologize for the same, exhibition of a copy of the statutory notice of the intention to sue, a copy of an acknowledgement of the same and request for particulars from the department concerned, and their failure to put in a replying affidavit to controvert the deponements in the plaintiff applicants' grounds in the body of the application, the grounds in the supporting affidavit and annextures.

Due consideration has been made of the above and in this courts' opinion the defence can only survive the axe if there is no cause of action against it. In this courts' judicial opinion, cause of action has been

stated in judicial decisions both by the court of appeal and as dutifully followed by the superior courts, that a cause of action means nothing but existence of a genuine complaint against the defendant (see the case of D.T DOBIE (K) LTD VERSUS MUCHINA (1983) KLR 1) In this courts opinion, on the deponement and annextures presented herein, there is a genuine complaint as there is proof that the eviction took place. The only explanation or defence put forward was that the eviction was on the basis of court order. It is noted by this court, that the case number and the date the orders on the strength of which, the eviction was carried out was not exhibited, to controvert those exhibited by the plaintiff that indeed an appeal had been filed against the tribunals, orders which orders were ordered stayed.

As for the lack of issuance of the statutory notice the documents annexed by the plaintiff reveal that the same was issued and acknowledged.

In the premises, there is no defence put forward by the defendant to counter the plaintiff's claims. It can be termed a clear sham whose retention on the record for purposes of trial will only operate to delay, prejudice, and embarrass the trial herein. It is a proper candidate for striking out and it is accordingly struck out. Having been struck out, there is no need to make a finding on the alternative prayer of entry of judgement on admission. The plaintiff is at liberty to list the case for formal proof.

(2) The plaintiff/applicant will also have costs of the application.

Dated, Read and delivered at Nairobi this 8th day of May 2009.

R.N.NAMBUYE

JUDGE