



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 264 OF 2018

MVITA BOTTLERS LTD.....PLAINTIFF

VERSUS

SUNCANVAS LIMITED

CARGO MOVERS LIMITED

MOHAMED TAHAIR SHEIKH SAID.....DEFENDANTS

RULING

1. The plaintiff/applicant filed a notice of motion dated 2nd November, 2018 seeking the following orders that:-

1. Spent

2. There be a temporary injunction pending the hearing and determination of this application restraining the 1st and 3rd Defendants from collecting rent from the 2nd defendant, purportedly on behalf of the plaintiff for the 2nd defendant's use and occupation of Title No./Mombasa/Block1/270.

3. Pending the hearing and determination of the present application, the mesue profits due to the plaintiff for the 2nd defendant's occupation of Title No. Mombasa/Block1/270 be deposited in an escrow account held in the joint names of the parties or their advocates or in such other account as the court may order.

4. There be interlocutory mandatory injunction pending the hearing and determination of the suit, compelling the 1st, 2nd and 3rd Defendants, their employees, agents and servants to forthwith remove at their own costs all their fixtures and fittings, trucks, and any other items unlawfully brought by them onto Title No. Mombasa/Block 1/270 and to grant the plaintiff vacant possession of Title No. Mombasa/Block 1/270.

5. In default of compliance with order 4 above, the plaintiff be at liberty, without need to apply, to evict the 1st, 2nd and 3rd Defendants through the court bailiff and the Officer Commanding Central Police Station, Mombasa to provide security during the eviction.

6. The costs of eviction application be awarded to the plaintiff against the defendants jointly and severally.

2. The application is premised on the grounds on the face of it and supported by the affidavit of Nurein Sheikh Said sworn on 2nd November, 2018.

3. The applicant had filed a suit against the defendants jointly and severally in which they sought the following reliefs:

1) There be a permanent injunction restraining the 1st and 3rd defendants from collecting rent from the 2nd defendant purportedly on behalf of the plaintiff for the 2nd defendant's use and occupation of Title No. Mombasa/ Block 1/270.

2) The 1st and 2nd defendants be ordered to pay to the plaintiff mesue profits calculated at the monthly rent for the suit property from September, 2018 till the date of giving vacant possession.

3) Interest on the mesue profits in (2) above at commercial rates of 14% per annum from the date of filing suit till payment in full.

4) There be a mandatory injunction compelling the 1st, 2nd and 3rd defendants, their employees, agents and servants to forthwith remove at their own costs all their fixtures and any other items unlawfully brought by them onto Tittle No. Mombasa/Block1/ 270 and to grant the plaintiff vacant possession of Title No. Mombasa/Block 1/270.

5) In default of compliance with Order 4 above, the plaintiff be at liberty, without need to apply, to evict the 1st, 2nd and 3rd defendants through the court bailiff and the Officer Commanding Central Police Station Mombasa to provide security during the eviction.

6) The costs of the suit be awarded to the plaintiff against the defendants jointly and severally.

4. The Respondents who were duly served with summons to enter appearance as well as the application never entered appearance or reply to the application.

5. The applicant contends that it is the registered owner of Title No. Mombasa/ Block 1/270. That it had gratuitously allowed Mohamed Tahir Sheikh Said, the 3rd defendant to occupy the suit property for purposes of carrying on the business of the various companies under the TSS Group of companies where the plaintiff is one of the companies in the Group. It is the applicant's contention that the 3rd defendant abused the plaintiff's gratuitous accommodation by converting the office space and warehouse on the suit property and using it to carry on the business of Suncanvas Limited, the 1st defendant, which is a company owned by and used to further the private individual interests of the 3rd defendant. The applicant states that it had never authorized the 1st defendant to occupy the suit property for any purpose. The applicant further states that the 3rd defendant further abused the gratuitous permission by letting out or purporting to let out part of the suit property to the 2nd defendant who now occupy the 2nd floor of the house constructed on the suit property.

6. The applicant contends that when its agent, Nairobi Homes (Mombasa) Ltd went to show the office space and warehouse on the suit property to a prospective tenant, it learnt that the 3rd defendant had unlawfully converted his occupation of the suit property in the manner described above. The applicant states that it immediately issued a demand letter dated 18th September, 2018 requiring the defendants to give vacant possession of the suit property but defendants refused to comply, and instead threatened to harm the plaintiff's director. The plaintiff avers that it is losing revenue running into millions of shillings monthly since it cannot let out the suit property which it rightfully owns.

7. I have considered the application, the affidavit in support and annexures thereto as well as the submissions made out and the authorities cited. The principles upon which an interlocutory injunction may be granted are now well settled. One has to establish a prima facie case with a probability of success and an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. If in doubt, the court will decide the matter on a balance of convenience. See **Giella –v- Cassman Brown & Co. Ltd.** [1973] EA 358.

8. It is not in dispute that the applicant is the registered proprietor of the suit property. It is the applicant's contention that the respondents have arbitrarily and unlawfully deprived it of the use and enjoyment of its property contrary to Article 40 of the Constitution. The applicant contends that it has issued demand notice requiring vacant possession but the defendants have refused to comply. The defendants occupation is without the applicant's permission.

9. I have perused the documents on record. The certificate of lease for title No. Mombasa/Block 1/270 is in the name of the applicant. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavit, it is clear that the applicant has established a prima facie case with a probability of success against the defendants. In my view, the applicant has shown its right over the suit property being the registered proprietors. As regards irreparable damage, I take the view that the damage the applicant will be subjected to if the defendants actions are not stopped will be enormous that cannot be quantified in damages. The balance of convenience, if I had doubt, would tilt in favour of the applicant which is the registered owner. The defendants interests, if any, is not known at the moment as they have not responded to the application and the suit.

10. The applicant besides seeking an order of temporary injunctions is also seeking a mandatory injunction compelling the defendants to remove at their own costs all their fixtures and fittings, trucks and any other items unlawfully brought by them onto the suit premises and to grant the applicant vacant possession thereof.

11. The principles for grant of mandatory injunction were well set out in the case of **Locabail International Finance Ltd -v- Agro Export & Another** [1986] 1 ALL ER 901 where it was stated as follows:-

“A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”.

12. In the case of **Super Power Cash and Carry Ltd -vs- Nairobi City Council and 2 Others** (unreported) the Court of Appeal stated as follows:-

“This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has

taken because he can pay for it.”

13. Applying the above principles, I find that a mandatory injunction can be granted at interlocutory stage in the circumstance. The 3rd defendant has taken the law into his hands and purported to let out the applicant's property to the 1st and 2nd defendants and is unlawfully collecting rent from them. The defendants have also taken the law into their own hands and chased away the applicant's director and threatened him, and continue to occupy the premises which lawfully belongs to the applicant. The defendants are prima facie trespassers who should not be allowed to retain a position of advantage which they have gained through unlawful means. I am therefore satisfied that the prayer for mandatory injunction can be granted.

14. The upshot of this is that the applicant's notice of motion dated 2nd November, 2018 is allowed in their entirety. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 14th day of January, 2019.

C.K. YANO

JUDGE

In the presence of:

Omondi holding for Kongere for the plaintiff

No appearance for the defendant

Court Assistant-Yumna