



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.396 OF 2017

REMTONE HOLDING COMPNAY LTD.....PLAINTIFF

VERSUS

MASHUKUR ENTERPRISES LTD &

ANOTHER.....DEFENDANTS

RULING

(Application to enforce an order of injunction; applicant through a ruling on an application for injunction granted possession of the suit premises pending hearing and conclusion of the matter; respondent failing to give vacant possession; application seeking orders of enforcement; argument by respondent that the order ought not to have been given in the first place; the said argument misplaced as that is an argument on appeal or review; respondent not denying that it has not complied with the court order; court orders must be obeyed; application allowed)

1. The application before me is that dated 11 December 2017 filed by the plaintiff. The application principally seeks orders to have Messrs Tango Auctioneers, remove the persons in occupation of the suit property with the assistance of the OCS Nakuru Central Police Station. The application is opposed, and before I go to the gist of it, I think it is prudent that I give a little background on this suit.

2. This suit was commenced by way of plaint on 16 October 2017 and it relates to ownership of the land parcel Nakuru Municipality/ Block 4/127 which is a leasehold title initially issued for a period of 99 years from 1 December 1912. The plaintiff, purchased this property from the previous registered proprietor, one Harmeet Kaur, on 25 July 2002, and as she was in the process of working on the transfer of the same, the lease expired. A fresh lease was not issued to Harmeet Kaur or to the plaintiff, but was instead issued to Mashukur Enterprises Limited, the 1st defendant, on 3 October 2017, and which lease provides that it is issued for a period of 99 years from 1 January 1998. Prior to the registration of the 1st defendant as proprietor, the suit property was in the hands of the plaintiff and she had placed tenants in it. Upon registration of the 1st defendant as proprietor, the 1st defendant took possession and placed her own tenants and/or took over the tenants in place, and the plaintiff was denied access to the suit property. It is the action of the 1st defendant of taking over the suit property which made the plaintiff learn that a lease has been issued to the 1st defendant, thus prompting the filing of this suit. In the suit, the plaintiff has sought orders of permanent injunction to restrain the 1st defendant from the suit land, an order directing cancellation of the title of the 1st defendant, costs and interest.

3. Together with the plaint, the plaintiff sought orders of injunction to bar the 1st defendant/respondent from the suit premises pending hearing and determination of this suit. I heard the application, and

delivered a ruling 27 November 2017. I made the following orders pending the hearing and determination of the suit :-

(i) That the 1st respondent and/or its servants/agents or any person purporting to act under its direction, is hereby barred from accessing, entering, being upon, placing any tenants, or in any other way, interfere with the plaintiff's quiet possession and occupation of the land parcel Nakuru Municipality Block 4/127.

(ii) That for the avoidance of doubt, the person entitled to place tenants on the suit premises is the plaintiff and the plaintiff is not bound to keep the tenants placed in the suit premises by the 1st respondent, nor charge the rent charged by the 1st respondent, or indeed keep any tenants on the suit premises.

(iii) That the 1st respondent and/or its servants/agents, or any person purporting to act under its direction, is hereby restrained from, charging, selling, leasing, or in any other way enter into any dealings and/or transactions in respect of the land parcel Nakuru Municipality Block 4/127.

(iv) That the costs of this application shall be costs in the cause.

4. Through this application, the plaintiff has averred that the 1st defendant has refused to comply with the above orders and has denied the plaintiff access to the property through persons who have taken possession of the suit premises. The plaintiff has thus asked that the persons in occupation of the suit premises be removed so that the orders issued on 27 November 2017 can be given effect.

5. The 1st defendant has opposed the application through Grounds of Opposition filed on 18 January 2018. The following grounds have been cited :-

(i) That the application is misconceived, incurably defective, incompetent, frivolous, vexatious and therefore an abuse of the process of this Honourable Court.

(ii) That the prayer for eviction sought by the plaintiff is not borne of the parent pleadings and hence incapable of being granted.

(iii) That the orders granted/issued on the 30th November 2017 are restrictive/restraining in nature and cannot be interpreted to give mandatory effect.

(iv) That orders sought are drastic and are capable of disposing off the suit without giving the parties adequate opportunity to ventilate their case, and for the court to make a proper inquiry. Such orders can only be granted in very clear circumstances and in rare of the rarest cases.

6. I think I also need to mention that the 1st defendant on 15 January 2018, filed an application seeking to review my orders of 27 November 2017.

7. I took in the submissions of Mr. Gatonye for the plaintiff/applicant and Mr. Ogola for the 1st defendant/respondent and I have considered the same in arriving at my decision.

8. What is before me is nothing more than an application seeking the enforcement of the orders issued by this court on 27 November 2017 which orders I have already set out above. The respondent has not filed any affidavit to controvert the averments of the plaintiff that the respondent has through the persons in possession of the suit premises, frustrated the plaintiff from effecting the court order, which order directed that the suit premises be in the hands and control of the plaintiff until the suit is disposed off. In his submissions, Mr. Ogola appeared to attack the orders made, and indeed referred me to various authorities, but in my view, that attack is misplaced, as what is before me is not an appeal or an application for review of the said orders. That must await a different forum or time. As matters stand there is no stay order which blocks the implementation of the orders issued on 27 November 2017.

9. It is trite that court orders must be obeyed. It is apparent to me that the 1st defendant is not bent on ensuring compliance with the said orders. I have no reason to decline the prayers sought in this application as they only seek enforcement of what this court has already ordered. That being the case, I do not hesitate to issue orders that will ensure compliance with the orders already made. I also do not see why the applicant needs to shoulder costs of enforcement of a court order, which she would not otherwise have been burdened with, had the respondent complied. I am unable to allow a recalcitrant party to get away with disobedience of a court order and any costs and/or expenses that the applicant will incur in effecting these orders will have to be shouldered by the respondent before I can hear the respondent on its application dated 15 January 2017 or indeed any other application. The 1st defendant has not denied not being in disobedience of the orders of 27 November 2017, and I am not bound to hear that application unless and until the 1st defendant first complies with the order of 27 November 2017. Before being heard, the 1st defendant must first satisfy me that it has handed over possession of the suit premises to the plaintiff as ordered on 27 November 2017, and if the plaintiff will incur any costs to remove any persons on the suit premises placed by the 1st defendant, the 1st defendant must, before it is heard on its application for review, first satisfy me that it has fully paid such costs to the plaintiff.

10. I now make the following orders :-

(i) That Messrs Tango Auctioneers with the assistance of the OCS Nakuru Central Police Station are hereby ordered to give full effect to the orders of 27 November 2017.

(ii) That Messrs Tango Auctioneers with the assistance of the OCS Nakuru Central Police Station are hereby authorized to remove all persons whom the plaintiff has not authorized to be in occupation of the premises comprised in the land parcel Nakuru Municipality/ Block 4/127 and ensure that possession is immediately given to the plaintiff.

(iii) That the above orders to be executed forthwith and any costs incurred be passed over to the 1st defendant to pay and the 1st defendant must make good any such costs before being heard on its application for review dated 15 January 2017 or any other application.

(iv) The plaintiff shall have the costs of this application.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 30TH day of January 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Mr. Gatonye instructed by M/s Mirugi Kariuki & Company Advocates for the plaintiff/applicant.

Mr. Ogola instructed by M/s Gordon Ogola & Kipkoech Advocates for the 1st defendant/respondent.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU