



REPUBLIC OF KENYA

IN THE Environment And Land Court Of Kenya

At Nakuru

ELC NO.103 OF 2017

APOSTLE NJUGUNA WAWERU

GEORGE MWITI M'IBUTU

FRANK KARANJA THIRU (Suing as the officials of

Living Water Ministry Kenya).....**PLANTIFF**

VERSUS

PAUL KARIUKI MWANGI.....1ST DEFENDANT

COUNTY SECRETARY.....2ND DEFENDANT

COUNTY GOVERNMENT OF NAKURU.....3RD DEFENDANT

RULING

(Application seeking orders to have the respondent deposit accumulated rent for the duration of the suit; parties having a landlord tenant relationship and then entering into a sale agreement; respondent making a deposit then defaulting on the balance; respondent occupying the premises while not paying rent and not paying the balance of the purchase price; not justiciable for the respondent to continue occupying premises without paying the balance and without paying rent; abuse of court process to hide behind court proceedings without making good its promises; respondent ordered to either deposit the balance of the purchase price or accrued rent).

1. The application before me is that dated 13 October 2017 filed by the 1st defendant. The said application is said to be brought pursuant to the provisions of Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, and Order 50 Rule 1 of the Civil Procedure Rules. The principal order sought is to have the plaintiff/respondent, deposit an alleged accrued rent of Kshs. 1, 190,000/= pending the hearing and determination of this suit, and in default, the applicant be granted leave to levy distress. It is said that the said rent is accruing at the rate of Kshs. 17,500/= per month. It is claimed by the applicant that the respondent has frustrated efforts to recover the rent by hiding behind this suit.

2. The application is opposed, and before I go to the gist of the objection, I think it is proper that I give a little background on this case.

3. This case was commenced by way of a plaint which was filed on 4 June 2015. The three plaintiffs have

commenced this suit on behalf of Living Water Ministry Kenya and have sued the applicant as first defendant, with the County Secretary and County Government of Nakuru, as 2nd and 3rd defendants respectively. In their plaint, the plaintiffs pleaded that they have been occupiers of the suit land from the year 2005, but on 22 May 2015, the applicant affixed on the wall of the premises, a letter from the 2nd defendant giving notice of restoration of the building to its original state as per the approved building plans. It is contended that no communication from the defendants or any inspection of the premises has ever been done and that it has done merited modifications and developments on the premises. They pleaded that they have in fact entered into a sale agreement with the applicant and paid a consideration of Kshs. 600,000/= but the applicant appears to have changed his interest to sell and on 5 November 2014, issued a demand notice for vacant possession. The plaintiffs believe that the notice from the County Government is based on an unfounded complaint of the 1st defendant and that in any event the notice was too short to be complied with. In the suit, they have asked for orders of a permanent injunction restraining the defendants from interfering with their peaceful occupation of the building in the suit premises and costs of the suit.

4. On 2 August 2017, the 1st defendant filed a statement of defence and counterclaim. He has denied granting the plaintiff consent to conduct any modifications on the suit property and has pleaded that the plaintiffs' organization is tenant at a monthly rent of Kshs. 17,500/=. He has acknowledged that on 21 January 2012, he entered into an agreement to sell the suit property to the plaintiff's organization at a consideration of Kshs. 4,500,000/=: payable in 9 months, but the plaintiffs only paid Kshs. 600,000/= and defaulted on the balance of Kshs. 3,900,000/=. He has pleaded that rent was suspended from 10 February 2012 on the assumption that the plaintiffs will pay the balance of the purchase price and assume ownership. He has pleaded that he is entitled to rent from 10 February 2012 and that the deposit of Kshs. 600,000/= be treated as deposit for rent. In the counterclaim, the 1st defendant has sought judgment for rent from 10 February 2012 at the rate of Kshs. 17,500/= till the date of judgment, general damages for breach of sale and orders of eviction against the plaintiff.

5. In the supporting affidavit to this application, the applicant has repeated the above averments in the plaint. He has sought that the deposit of Kshs. 600,000/= should be treated as rent and the respondent be ordered to deposit in court the accumulated rent of Kshs. 1,190,000/= and any further accruing rent.

6. The plaintiffs have opposed the application through the replying affidavit of Apostle Njuguna Waweru. He has deposed inter alia that the primary prayer in the application is an issue pending determination before court and allowing the same at this interlocutory stage is tantamount to deciding the case. He has not disputed that the applicant is the owner of the suit premises but has pointed at the sale agreement of 21 January 2012. He has contended that the 1st defendant orally, impliedly or by conduct, agreed that the balance would be paid upon a valuation being done by both parties. He has stated that a valuation of the property was carried out by Prime Valuers, who on 2 July 2013, valued the premises at Kshs. 3,700,000/= and that the 1st defendant has refused to carry out his own valuation. He has averred that they wish to amend the plaint to seek inter alia prayers of specific performance, or in the alternative, refund of the deposit so far paid, costs of developments valued at Kshs. 1,260,000/= and general damages for breach of contract. He has also stated that there are status quo orders in place.

7. I have considered the application and the rival arguments of Mr. Ngure for the applicant and Mrs. Mukira for the respondents. The application before me is premised on the provisions of Section 3A of the Civil Procedure Act, which provides as follows :-

3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

8. Section 3A above is expansive enough to cover any situation where one party feels that it is necessary for the court to use its inherent powers to make orders that meet the ends of justice or which prevent another party from abusing the process of court.

9. In this application, it is the feeling of the 1st defendant that it will be in the interests of justice that the respondents be ordered to deposit accrued rent which he quantifies at Kshs. 1,190,000/= and also for the respondents to continue depositing the sum of Kshs. 17,500/= which is said to accrue every month. The issues herein revolve around a sale agreement which the parties entered into on 21 January 2012. I have looked at the sale agreement which is a simple handwritten sale agreement. I observe that the plaintiffs agreed to purchase from the applicant the suit land for a consideration of Kshs. 4,500,000/=, and from the same, I deduce that the parties agreed to settle the sale within 9 months. The respondents agreed to pay the sum of Kshs. 500,000/= on 1 February 2012 and on 10 February 2012, the applicant wrote to his agent informing the agent not to collect rent from the respondents as he has an ongoing agreement with them.

10. So far, the parties are in agreement that a total sum of Kshs. 600,000/= has been paid as deposit for purchase of the property. I have not seen any evidence of payment of the balance of the purchase price and there is no question that the 9 month period for the performance of the agreement has lapsed. Without deciding the point, which can only be decided after a hearing of the main suit, it does appear, prima facie, that the applicant is entitled to consider the sale agreement as repudiated by the respondents. The respondents have however continued occupying the premises and are not paying rent. In its reply, the respondent organization has pointed at an order of status quo. In my view, the respondent organization is abusing the status quo so as not to pay rent and not to perform its part of the bargain. I do not see how the ends of justice are going to be met if the respondent organization continues to occupy the suit premises when not paying rent and not performing its part of the bargain in so far as the sale agreement is concerned. I do not think any party ought to use ongoing court proceedings to steal a march or gain an undue advantage on the opposite party which is what I believe the respondent organization is doing. The applicant has already ceded possession of the suit premises but is neither getting rent not being paid the balance of the purchase price.

11. I am of the view that the ends of justice will be met if either the respondent organization deposits the balance of the purchase price, or deposits what is accrued rent, pending the hearing and determination of this case. If the respondent organization can do neither, then it is only fair that it vacates the suit premises and hands it over to the applicant, and it can conduct its case while outside the suit premises. Their case for specific performance or general damages is not defeated by them not being in the premises, but it is clear to me, that the continued occupation by the respondent organization, while not paying rent and not paying the balance of the purchase price, is an injustice upon the applicant.

12. I therefore make the following orders :-

(i) That pending the hearing and determination of this suit, the plaintiffs/respondents, to deposit in court the balance of the purchase price, being the sum of Kshs. 3,900,000/= within 60 days from today, or in the alternative, the plaintiffs/respondents to deposit accrued rent to be calculated from January 2012 at the rate of Kshs. 17,500/= per month to date less the sum of Kshs. 600,000/=, within 60 days from today, and further deposit in court every month the sum of Kshs. 17,500/= for the duration of this suit.

(ii) That in default of the above, the plaintiffs/respondents to forthwith vacate the suit premises within 60 days and conduct their case while outside the premises.

(iii) That the 1st defendant/applicant shall have the costs of this application.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 24th day of January 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Biko holding brief for Mr Rubua Nguni for the 1st defendant/applicant.

Mr. Caleb Langat holding brief for Mrs. Elizabeth Mukira for the plaintiffs/respondents.

No appearance on the part of the 2nd and 3rd defendants.

Court Assistant :Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU