



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 400 OF 2017

IDEAL LOCATIONS LIMITED.....PLAINTIFF

VERSUS

NAKUMATT HOLDINGS LIMITED.....1ST DEFENDANT

ATUL SHAH.....2ND DEFENDANT

RULING

1. For my consideration is the Notice of Motion dated 23rd May 2018 by the defendants and the Notice of Motion dated 23rd July 2018 by the Plaintiff.

Defendants' application dated 23rd May 2018

2. The application is brought under Sections 1A, 1B, 3A, 63(e) of the Civil Procedure Act, Order 40, Rules 2, 3 and 4; Order 20 Rule 2; Order 51 Rule 1 of the Civil Procedure Rules and Sections 558, 559, 560 and 561 of the Insolvency Act, 2015 and is seeking the following orders:

1. That this matter be certified urgent and service thereof be dispensed with in the first instance;

2. That pending inter parties hearing of this application; 0

a) An order do issue suspending/halting the computation and/or effluxion of time in respect of the thirty-30-day period orders by the Honourable Court on 17/05/18 requiring the defendants to pay rental arrears to the Plaintiff within the stated period.

b) An order of Injunction do issue restraining the Plaintiff, whether by herself, her agents, servants, her from dealing with the suit property, situated in the building known as "City Mall, Nyali", erected on Land Reference No.14407 and 16088, SECTION 1, MAINLAND NORTH, MOMBASA MUNICIPALITY (CR 42055 AND CR 46400), in any way, manner or form, adverse to the 1st Defendant's interests in peaceful and Derivative use and occupation thereof, or at all;

3. That the OCS, Bamburi Police Station Mombasa do supervise the execution of this order, provide security and ensure no public disturbance ensues, and perpetually maintain law and order throughout and after the execution of this order, or

4. That the interim orders subject of prayers/orders No. 2 and 3 hereinabove do persist until the hearing and determination of this application;

5. That an order do issue requiring the taking of accounts as between the parties herein, with due regard being made to the administration orders issued on 22/01/2018 in Nairobi High Court Insolvency Cause No.10 Of 2017; Re: Nakumatt Holdings Limited (Under Administration), and all orders/process consequent/subsequent to said order, any/all payments made thereafter as well as orders of this Honourable court given on both 21/3/18 and 17/5/2018;

6. That an order do issue to the effect that upon the conclusion of the exercise subject of prayer/order No.5 hereinabove, the Applicants be granted thirty 9300 days within which to pay any agreed arrears, less any amounts in respect of this period to be used up on the course of the exercise of taking accounts.

7. That further, an order do issue requiring the plaintiff to reinstate the suit premises to as good as a condition as they were

in prior to the eviction exercise conducted on 7/3/2018, with such reinstatement works to be concluded within sixty (60) days of such order, and thereafter the defendant do pay full agreed arrears, if any, less any amounts in respect of the period to be used up in the course of the reinstatement works and/or that there should be no rent payable for the suit premises until such time as the reinstatement works subject hereof are duly concluded.

8. That costs of this application be provided for.

3. The application is based on the grounds thereon and supported by the affidavits of Peter Obondo Kahi and Atul Shah. The main grounds as claimed by the defendants are that on 17th May, 2018, the court gave orders requiring the defendants to pay all rent arrears within 30 days upon which the 1st Defendant could be reinstated into the suit premises. The defendants argue that all outstanding rent arrears prior to the Administration order given on 22/1/18 are subject of the said Administration and are only payable upon due approval of the Administrator's schedule of payment, and therefore only rent payments in respect of the months falling after the Administration order are legally payable. It is the defendants' contention that 30 days period given by the court on 17th May 2018 be suspended/halted pending the computation of the exact amount of arrears payable.

4. The application has been opposed by the plaintiff vide grounds of opposition dated 23rd May 2018 in which they contend *inter alia*, that there is no need for an order of taking of accounts as the rent payable has never been in dispute and that the orders issued in Insolvency Cause No. 10 of 2017 have no legal consequences in this case. That the orders sought in the application amount to an appeal against the ruling of this court delivered on 5th March 2018 and 17th May 2018.

5. I have considered the application the affidavits, the grounds of opposition and the submissions made. The issue which I find falling for determination is whether an order for accounts should be issued and whether an order should issue suspending/halting the computation and effluxion of time in respect of the 30 days ordered by the court on 17th May, 2018. The application is brought pursuant to Order 20 Rule 2 of the Civil Procedure Rules among others. Order 20 Rule 2 provides as follows:

2. A defendant to an action commenced by plaintiff, and who has filed a counter-claim which includes a claim for an account or a claim which necessarily involves taking an account, on –

a. The plaintiff

b. Any other party; or

c. Any person who becomes a party by virtue of such service, may apply for an order under this rule.

6. In this suit, the defendants have not filed a counter-claim which includes a claim for an account or a claim which necessarily involves taking an account. As a matter of fact, the defendants have not filed any defence to challenge the plaintiff's claim and judgment was entered for the plaintiff on 7th March 2018. The decree of this court has not been set aside. The defendants applied for stay pending appeal and the court on 17th May, 2018 did grant them the order for stay on condition that they clear the outstanding rent arrears within 30 days from that date. In their application for stay of execution, the defendants had stated that they were prepared to abide by any conditions the court may impose. I reckon that the defendants were alive to the fact that the issue was over rent arrears. Prior to filing the present application, there has been no dispute over rent sum payable. In my view, the court can only exercise its discretion to grant an order for accounts in a situation where there was a claim pending. I agree with the plaintiff's argument that the application amounts to an appeal against the rulings of this court made on 5th March, 2018 and 17th May, 2018. According to the decree herein, the outstanding rent, service charge and promotion fund as at 1st November, 2017 was Kshs.27,812,108.52. On 21st March, 2018, the court ordered the maintenance of the status quo then prevailing pending the ruling on 17th May, 2018 but on condition that the defendants pay mesne profits equivalent to the rent payable for that period. As earlier stated in the ruling dated 17th May, 2018, the court granted the defendant the order for stay that they sought but on condition that they clear all outstanding rent arrears within 30 days. The defendants have stated that they have only paid the sum of Kshs.11,288,805.00 which according to them, they considered as the amount only payable. They have not complied fully with the orders issued by the court. Instead they have filed this present application. The issues raised now were not raised before. This amounts to an afterthought.

7. The overall impression out of the above analysis is that there is no reasonable cause why the court should exercise its discretion in favour of the defendants and grant the orders sought. In my view, the defendants are out to circumvent compliance with the orders earlier granted by the court in their favour. The court will certainly not allow such circumvention. In line with the overall objective of promoting the interests of justice as enshrined both under Section 1A of the Civil Procedure Act and Article 159 (2) (d) of the Constitution, the court must balance the interests of the respective parties.

8. The upshot is that the defendants Notice of Motion dated 23rd May, 2018 is without merit and is dismissed with costs.

PLAINTIFF'S APPLICATION DATED 12TH JULY 2018.

9. The application is brought under Section 3, 13 (7) and 14 of the Environment and Land Court Act, Section 4 (1) (a), 5 (b) and 29 of the Contempt of Court Act, 2016 and Section 1A, 1B, and 3A of the Civil Procedure Act. The Application is seeking an order permitting the Plaintiff to break into the 1st Defendant's strongroom situate within the building known as "City Mall" erected on Land Reference Number 14407 and 16088, Section 1, Mainland North Mombasa Municipality (C.R. 42055) and (C.R. 46440) and to vacate and/or empty the 1st Defendant's property, items or belongings kept in the said strong room. The Plaintiff also wants an order directing the Officer Commanding Station (OCS, Bamburi Police Station to supervise the execution of this order and provide security and ensure that no public disturbance or breach of the peace ensues and to ensure maintenance of law and order throughout and after execution of this order. In addition, the plaintiff

is seeking an order that Atul Shah, the 2nd Defendant herein and Pete Obondo Kahi, the 1st Defendant's Administrator be summoned to show cause why they should not be punished for disobeying this court's order made on 17th May, 2018.

10. The application is based on the grounds on the face of it and supported by the affidavit of Mohamed Talsam Mohamed Salim sworn on 12th July, 2018. It is the plaintiff's case that the 1st Defendants declined to pay the outstanding rent within 30 days as ordered by the court on 17th May, 2017 and the plaintiff handed over the premises to a new tenant who has not taken full possession and occupation thereof because the 1st defendant has adamantly declined to vacate its strong room situate within the suit premises. That the 1st defendant's refusal to vacate the strong room is deliberate and utter violation and contempt of the court made on 17th May 2017.

11. The application has been opposed by the defendants vide statement in opposition dated 24th July 2018. It is the defendants contention that the application is ill-conceived, misinformed and tainted with mala fides for the reasons that:

1. That the application is belated, ill-conceived, misinformed and tainted with mala fides for the reasons that: -

i. It seeks orders that are untenable in the circumstances of this case;

ii. It is vexatious and does not meet the threshold requirements for grant of the orders sought;

iii. It is bad in law and an abuse of court process in light of the Rules of Practice and Procedure;

iv. It bears grounds not supported by any facts as deponed to in the Supporting Affidavit;

v. It is fatally defective;

vi. It is non-cognizant of the substantive development of Kenya jurisprudence through promulgation of the Constitution of Kenya, 2010, particularly Article 159 (2) (d) thereof as read with Sections 1A, 1B, 3A Civil Procedure Act, Cap 21, Laws of Kenya, Sections 558, 559, 560 and 561, Insolvency Act, 2015, Laws of Kenya and as viewed against the backdrop of the Rule of Law and Rules of Natural Justice;

2. That the Application is therefore grossly incompetent, fatally defective, frivolous, vexatious, wholly unmerited and ought to be struck out ab initio for being an abuse of the court process;

3. That it is therefore only in the interests of justice that the Plaintiff's said Application be dismissed with costs to the defendants.

12. I have considered the application the affidavit, statement in opposition and the submissions made. The issue which I find for determination is whether the plaintiff has met the prerequisites for grant of the orders sought.

13. The orders of the court made on 17th May 2018 were clear. The 1st Defendants was to be reinstated into the suit premises upon payment of the outstanding rent arrears within 30 days and thereafter pay the rent whenever it falls due. There was also a default clause to the effect that failure by the defendants to pay the rent arrears, the plaintiff was at liberty to allow the new tenant take up occupation of the suit premises. The plaintiff has stated that the defendants did not pay the outstanding rent within 30 days of the ruling and the plaintiff has consequently and subsequently handed over the suit premises to the new tenant who has however not been in a position to take full possession and occupation thereof because the 1st defendant has declined to vacate its strong room situate within the suit premises. In his submissions, Mr. Ngonze advocate for the defendants submitted inter alia that the defendants are no longer in control of the suit premises having been evicted and are no longer in occupation or possession. The defendants have however not controverted, the plaintiff's contention that they have not vacated from the strong room. In the premises, it is my finding that they should have given vacant possession of the entire suit premises, including the strong room, if they failed to comply with clause (a) and (b) of the order made by the court on 17th May 2018. If the defendants vacated partly and are still in occupation of the strong room, then the plaintiff's application is merited.

14. Upon hearing the two applications herein and arising from all the above reasons, the final orders of this court are as follows:

a. The Notice of Motion dated 23rd May, 2018 is dismissed with costs.

b. The Notice of Motion dated 12th July 2018 is allowed in terms of prayers (2) and (3) thereof to the extent that the defendants are to vacate from the strong room within seven (7) days of this order in default of which the plaintiff is permitted to break into it under the supervision of the OCS, Bamburi Police Station and any items therein to be kept at the said police station pending collection by the defendants.

c. Costs of the application dated 12th July 2018 are awarded to the plaintiff.

15. Having granted the Plaintiff order to break in, in my view it is not necessary at this stage to issue summons as requested in prayer (4) of the application.

16. It is so ordered.

Delivered, signed and dated at Mombasa this 24th September, 2018.

C. YANO

JUDGE