



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO.385 OF 2016

ZEINAB AHMED MOHAMED.....PLAINTIFF

VERSUS

FADHILI ZAHRA MOHAMED

KHADIJA ADBULRAHMAN MWINZAGU

RUKIYA MOHAMED HABIB.....DEFENDANTS

RULING

1. By a Notice of Motion application dated 7th December, 2016 and brought pursuant to the Provisions of Order 40 Rules 1 (a), 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the plaintiffs sought the following orders.

1) Spent.

2) THAT this Honourable court be pleased to grant a temporary injunction restraining the defendants/respondents either by themselves or their agents, assigns, employees and/or representatives or any person under the defendants/respondents instructions from interfering with the plaintiff's quiet and peaceful occupation of a shop situated on plot No. Mombasa/Block XXXVII/13 opposite Sawa Centre pending the hearing and determination of this application.

3) THAT this Honourable Court be pleased to grant a temporary injunction restraining the defendants/respondents either by themselves or their agents, assigns, employees and/or representatives or any person under the defendants/respondents instructions from interfering with plaintiff's applicant's quiet and peaceful occupation of a shop situated on plot No. Mombasa/Block XXXVII/13 opposite Sawa Centre pending hearing and determination of this suit.

4) THAT costs of this application be provided for.

2. The application is based on the grounds set out therein and was supported by the affidavit of Zeinab Ahmed Mohamed, the applicant sworn on 7th December, 2016. It is the plaintiff's case that she entered into a lease agreement dated 1st November, 2016 with one Alye Zahran Mohamed for the lease of a shop situate on Mombasa/Block XXXVII/13 opposite Sawa Centre for a period of 30 years and 3 months with effect from 1st December 2016 at a monthly rent of Kshs.45,000.00. The plaintiff depones that she duly paid the rent for the months of December, 2016 and a deposit and took possession of the shop to

commence operations. According to the plaintiff, on 1st December, 2016 the defendants invaded the business premises and interfered with her business operations, which action prompted the plaintiff to report the matter to the police. The plaintiff contends that she has been deprived of her legal right to peacefully utilize the business premises by the defendants' interruptions and that the same has caused her to suffer loss.

Counsel for the plaintiff filed written submissions and Mr. Gitonga in his oral submissions reiterated the grounds on the face of the application and the contents of the affidavit in support of the application. Learned counsel submitted that the defendants were not party to the agreement for lease and therefore their actions were illegal. He further submitted that the plaintiff has shown a prima facie case with a probability of success, having proved that she entered into a lease agreement with the trustee of the Wakf over the suit premises. He further submitted that the plaintiff stands to suffer irreparable harm if the orders sought are not granted because the plaintiff will be prevented from commencing her business and will thereby incur heavy losses.

According to counsel for the applicant, the balance of convenience tilts in favour of the applicant being the lessee of the suit premises.

3. The defendants opposed the application and filed a replying affidavit sworn by the 2nd defendant on 13th December, 2016. It is the defendant's contention that the lease agreement between the plaintiff and the trustee of the Wakf, Aye Zahran Mohamed who is the plaintiff's mother, was meant to deprive the Wakf of its property. Besides, the defendants, who are the beneficiaries of the Wakf were never consulted before the lease was entered into. According to the respondents, the applicant is yet to commence any business operation on the suit premises as she is still undertaking some repairs on it, and that there are no rights that have been deprived. The respondents also aver that the lease agreement was invalid and incapable of giving any right to the plaintiff. Mr. Hamza, learned counsel for the respondents submitted that the plaintiff has not satisfied the conditions for granting of an injunction. Firstly, he submitted that the lease between the plaintiff and the trustee of the Wakf is null and void for want of consent of the Wakf Commissioners as required by the provisions of section 14 of the Wakf Commissioners Act, Cap 109 Laws of Kenya. According to him, the plaintiff's case is a non-starter for the reason that the lease which is the basis of the plaintiff's suit is a nullity thereby making the entire suit a nullity. He stated that the applicant cannot approach the court for an injunction when the agreement relied on is in breach of statute.

4. I have carefully considered the application herein, the rival submissions and authorities cited by counsels for the applicant and for the respondents. The main issue that I now have to determine is whether the plaintiff has satisfied the conditions for grant of interlocutory injunctions.

5. There is no dispute that the cause of action arises out of an agreement for lease dated 1st November 2016 in which the plaintiff leased a 2 door shop on the premises on Plot No. MOMBASA/Block XXXVII/13 from one Aye Zahran Mohamed for 30 years and three months from 1st December, 2016. There is also no dispute that the said Aye Zahran Mohamed is a trustee of the Wakf of the suit properties while the defendants are beneficiaries of the said Wakf. It is also not disputed that the plaintiff is the daughter to the said trustee, Aye Zahran Mohamed.

6. The criteria for the grant of interlocutory injunction was set out in the case of **GIELLA VS- CASSMAN BROWN & CO LTD (1973) EA 358** where it was held as follows: - "...first an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable harm, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience". In the case of **MRAO LIMITED VS- FIRST AMERICAN BANK OF KENYA LTD (2003) KLR 125**, The Court of Appeal held that: -

"a prima facie case is more than all arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a

standard which is higher than an arguable case”. The court further held that “a prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”

7. The respondents believe that the applicant has not shown any prima facie case because they are the beneficiaries of the suit premises and they were not consulted by the trustee while entering into the lease agreement with the applicant, and they never consented to it. They also submitted that the lease was null and void for want of a consent from the Wakf Commissioner as required by section 14 of the Wakf Commissioners’ Act. The respondents also read mischief in the trustee’s action to lease the suit premises to her daughter, the plaintiff, for a period of over 30 years. According to the respondents, no business had commenced on the suit premises and the applicant has not come to court with clean hands.

On the other hand, the applicant maintains that she has a valid lease and that the respondents should be restrained from interfering with her quiet possession of the suit premises.

8. Looking at the facts that have emerged in this case, and the evidence adduced by way of affidavits, it emerges that the defendants are indeed beneficiaries of the suit property. The plaintiff does not dispute this position but contend that she is entitled to occupy and carry on her business on the same by virtue of the lease entered into with the trustee of the Wakf. The defendants, as beneficiaries stated that they were not consulted over the long term lease which, incidentally is between a mother and daughter. Again, matters of illegality have been alleged. I do not wish to pretend to determine the issues in an interlocutory application without full facts; that would be superficial justice. These are matters that would need proper analysis and scrutiny for their probative evidentiary value to be appreciated during a full trial.

9. As earlier stated, what came out clear is that the plaintiff has not commenced her business on the suit premises. She was carrying out renovations when she was stopped. She had however paid rent for one month and a deposit of the same amount. It is with all these facts in mind that this court makes the finding that the plaintiff has not established a prima facie case with a probability of success.

On whether or not the applicant can be compensated by way of damages, I take the view that the inconvenience or loss that may result if the orders prayed for are declined can be quantified in damages and consequently I find that the applicant has not satisfied this test also.

As for the balance of convenience, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. Considering the facts of this case in totality, I find that the balance of convenience tilts in favour of the respondents who are the beneficiaries of the suit premises.

10. Consequently, I find that the Notice of Motion dated 7th December 2016 has no merit. The same is accordingly dismissed with costs to the defendants.

Delivered, dated and signed at Mombasa this 30th day of March 2017

C. YANO

JUDGE