



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CIVIL SUIT NO. 30 OF 2016

(CONSOLIDATED WITH ELDORET E & L CASE NO. 389 OF 2015)

HOTEL HORIZON LIMITED.....PLAINTIFF

VERSUS

MOI TEACHING AND REFERRAL HOSPITAL

STAFF PENSION SCHEME.....DEFENDANT

RULING

Hotel Horizon Ltd (*The plaintiff's in Environment And Land Court Of Kenya At Eldoret E & L Civil Suit No. 30 Of 2016*) is a limited liability company established under the Companies Act Cap. 486, Laws of Kenya whilst Moi Teaching And Referral Hospital Staff Pension Scheme (**hereinafter referred to as the defendant**) is also a limited liability company registered under the Companies Act Cap 486 laws of Kenya and the registered proprietor of the parcel of land known as Eldoret/Municipality/Block 4/332 measuring 0.0462 hectares and on which it has caused to be erected an eight storey building consisting of a hotel block basement parking, ground floor, restaurant, mezzanine floor, bar, 60 suite accommodation rooms and other developments.

By dint of a lease agreement dated 6.8.2013, **the defendant** leased the whole premises to a company called Syke Enterprises Limited (*hereinafter referred to as the plaintiff's Eldoret E & L Case No. 389 Of 2015*) at a monthly rent of Kshs.1,000,000.00 (One million) effective from 1st July, 2013 which was to be paid over a period of twenty (20) months in arrears. At all material times to this suit, Kennedy Shikuku trading as Eshikhoni Auctioneers was acting in his capacity as an agent and/or servant of the defendant in the course of his gainful employment.

It is alleged that on the 2nd February, 2016, Kennedy Shikuku trading as Eshikhoni Auctioneers together with its agent trespassed into the plaintiff's place of business and seized furniture and fittings which are the plaintiff's tools of trade in the purported execution of distress for rent as ordered by the court in Eldoret E & L Case No. 389 of 2015 in which the plaintiff is not a party and that at all material times to this suit, the 2nd defendant was acting as an employee, agent and/or servant of the 1st defendant purportedly in execution of distress for rent attached and proceeded to advertise for sale goods belonging to the plaintiff namely; 15 mattresses = 2 mattresses locked in one, three burner gas cooker, Microwave 12 glass tables, one small cupboard, two burner cooker ,chips cutter, all utensils, computer and printer not working, company fridges, one tea urn, four plastic stools, three office chairs, empty crates of soda with bottles, small weighing scale, four gas cylinders 35 kg with the intention to sell the furniture by public auction on the 15th January, 2016. The plaintiff avers that the

process of seeking to exercise distress for rent is improper for the reasons that no privity of contract exist between the plaintiff and the 1st defendant and that no valid court order or decree was ever served by the defendants as required by law. Moreover that the seizure breaches the provisions of the Auctioneers Act and Distress for Rent Act. Lastly that no exercise of exhaustion of alternative remedies has been carried out prior to resorting to seizure of the furniture and fittings.

The plaintiff ultimately seeks a declaration that the acts of the defendants in execution for distress for rent are unlawful coupled with a perpetual injunction seeking to restrain the defendants whether by itself, its servants and/or agents from selling or transferring the seized furniture and fittings as per paragraph 8 of the plaint and a declaration that the acts of the defendants in execution for distress for rent are unlawful coupled with a perpetual injunction seeking to restrain the defendants whether by themselves, their servants and/or agents from selling or transferring the seized furniture and fittings.

Hotel Horizon Ltd (*The plaintiff's in Environment And Land Court Of Kenya At Eldoret E & L Civil Suit No. 30 Of 2016*), in the application dated 11.2.2016 filed with the plaint on 12.2.2016 prays for an order of mandatory injunction against the defendant compelling the defendants, their agents, servants, employee and any other person claiming under them to release the attached goods to the applicant pending the hearing and determination of the suit.

The application is based on grounds that the plaintiff has *a prima facie* case with a probability of success and that damages shall not be an adequate remedy and that the balance of convenience tilts towards granting an order of injunction. The applicant claims to have no relationship of whatsoever nature with the 1st defendant since the applicant was not party in the lease agreement entered into between Syke Enterprises Ltd and the defendant. The application is supported by the affidavit of **Dr. Jacqueline C. Korir**, a Director of the plaintiff who states that they are the proprietors of Hotel Horizon, a 2 Star Hotel in Eldoret town and that the defendant/respondent is the registered proprietor of that parcel of land known as Eldoret Municipality Block 4/332 measuring 0.0462 hectares and on which it has caused to be erected an eight storey building. That by a lease agreement dated 6th August, 2013, the defendant leased the whole of the said premises together with other fixture and fittings to a company called Syke Enterprises Limited at a monthly rent of Kshs.1,000,000.00 (One Million) effectively from 1st July, 2013, which was to be paid over a period of twenty (20) months in arrears. The plaintiff purchased furnitures and fittings to run a hotel in the premises owned by the 1st defendant from China.

That in order for the plaintiff/applicant to import furniture and fitting for its business it applied to the Ministry of East African affair, commerce and tourism for exemption from paying VAT on material and equipment. The plaintiff was peacefully operating its business as usual knowing all is well until the agents of the 2nd defendant visited their premises with instructions to distress for rent.

The plaintiff inquired from Kennedy Shikuku trading as Eshikhoni Auctioneers who informed them that there is a court case between Syke Enterprises Limited and 1st defendant over a lease agreement entered between them that is Eldoret E & L Case No. 389 of 2015. They took furniture and fittings from the plaintiff place of business in execution for distress for rent, without any court orders or warrants giving effect for the said execution. They forcefully removed furniture and fittings without following proper procedure as provided by the Distress For Rent Act And The Auctioneers Act. The items seized belongs to the plaintiff and not Syke Enterprises Limited, and there being no privity of contract between the plaintiff and the defendant, the seizure of the plaintiff's furniture was illegal. Kennedy Shikuku trading as Eshikhoni Auctioneers on the 2nd February, 2016 served the plaintiff with notification of sale which was back dated to read 26th January, 2016, showing that they received instructions on the 6th of January, 2016. The notification clearly indicated that the furniture and fittings were to be sold by advertisement. The plaintiff learnt that Kennedy Shikuku trading as Eshikhoni Auctioneers intended to sell the furniture and fitting by a public auction on the 15th February, 2016. The plaintiff believes that based on the above reasons, the he has a *prima facie* case with probability of success and that damages shall not be an adequate remedy as the furniture and fittings are plaintiff's tools of trade. Moreover the balance of convenience would tilt in favour of the plaintiff herein and that unless the court do issue stay of sale, the plaintiff shall suffer irreparable loss.

The application is opposed by the 1st defendant who has filed a replying affidavit through **Agunda Ochanda** who states that he is the Principal Officer at the defendant's Board of Trustees. He states that based on the advice of Z. K. Yego, the plaintiff does not deserve the orders sought as he has concealed material facts to the court. He has abused the court procedures and has misled the court. Further he claims that the suit herein is *res judicata*.

The defendant claims that the only known tenant is Syke Enterprises Ltd and not Horizon Hotel Ltd. The defendant claims that despite not being a tenant, he received over 40 cheques from the plaintiff in payment of rent from July, 2013 to January, 2016. He believes that the plaintiff should have filed objection proceedings. He contends that the lease agreement has always been between Syke Enterprises and the defendant for the former to run a hotel. However, Syke Enterprises Ltd was forbidden from engaging a sub-tenant. The defendant claims that the plaintiff has always been in rent arrears.

On the 29.2.2016, Hon. Justice Obaga consolidated Eldoret ELC No. 30 of 2016 and Eldoret ELC No. 389 of 2015.

In the plaint filed on 21.10.2015 by Syke Enterprises Ltd at paragraph 3 the parcel of land in dispute is the same thus Eldoret/Municipality/Block 4/332 and it is admitted by the plaintiff that he runs a hotel on the lease premises known as Hotel Horizon. In the supporting affidavit of Dr. Jacqueline C. Korir filed on 21.10.2015, she states that she is a director of Syke Enterprises Ltd and that “they” are proprietors of Hotel Horizon, a star Hotel in Eldoret town.

I have carefully considered the pleadings, the application dated 11.2.2016 and do find that on *prima facie* basis that Hotel Horizon Ltd and Horizon and Hotel Horizon is one and the same entity. Moreover, as admitted by the Director of Syke Enterprises Ltd who is also a Director of Hotel Horizon Ltd, the former company operates the Hotel business known as Horizon Hotel (Ltd) on the suit premises. The applicant is not honest when he states that he has no relationship with the first defendant and yet he operates a hotel business on the 1st defendant's premises in the name of Horizon Hotel. If indeed the applicant was independent from Syke Enterprises, he should have produced a sub-tenancy lease with Syke Enterprises. Needless to say that the lease agreement between Syke Enterprises and the 1st defendant outlawed sub-tenancy, I do agree with the 1st defendant that the plaintiff has concealed material facts in this matter to mislead this court so that it can make a misinformed decision.

in *Mrao Limited vs First American Bank of Kenya [2003] KLR 125* it was 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...”

This court continues to hold the foregoing view that, the applicant for interlocutory injunction must not only show that he has an arguable case but must also prove that a legal right has been infringed or is about to be infringed on by the defendant and that he has come to court in good faith and the application is not an abuse of court process.

Injunction is a discretionary remedy which can only be granted when a party lays bare all the facts and acts in good faith. Unfortunately, for the plaintiff, he is guilty of *melafides*. He has not disclosed the contract between herself and Syke enterprises ltd or its Articles of Association and Memorandum of Association to enable the court make its determination in respect of the relationship between Syke Enterprises and Hotel Horizon Ltd. Ultimately, the application dated 11.2.2016 is dismissed with costs.

On the application dated 26.2.2016 made by the defendant, the court finds that there is evidence that some of the items that were proclaimed and attached have already been sold however, the auctioneer is still holding some items hence the ruling in the application dated 21 October 2015 is overtaken by events as the Syke Enterprises Ltd and Horizon Hotel Ltd have already vacated the premises and therefore, there is no likelihood of the 1st defendant claiming for rent or interfering with the plaintiff's Hotel business.

Costs of the application will be in the suit.

I have considered the application for amendment of the defence and counterclaim and submission of parties and do find that the Syke Enterprises has not demonstrated any prejudice he is likely to suffer if amendment is allowed. The general power to amend pleadings is donated by section 100 of the *Civil Procedure Act* which is the substantive law and its handmaiden Order 8 Rule 5 of the Civil Procedure Rules.

That Rule reads as follows:

“5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order.”

The above provision of the law expressly provides that the court has discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue which has been raised by parties. That discretionary power is exercised so as to do justice to the case. However, the said discretion must be exercised judiciously and not whimsically as correctly submitted by Mr Gacheru counsel for the defendant.

In Bullen Leak and Jacobs Precedents of Pleadings, 12th Edition page 127 titled “amendment with leave-time to amend” it is stated that the power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise.”

In *Institute For Social Accountability & Another v Parliament of Kenya & 3 others* [2014] eKLR, Lenaola, Mumbi and Majanja J while determining whether to allow the petitioner to amend their consolidated petitions the court observed that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

Conversely, I do agree with Mr. Yego that the plaintiff will be allowed to file a reply to amended defence and counterclaim.

I do not see any basis for the defendants in the counterclaim to provide security for any decree that may be passed against the defendants jointly and or severally had the suit claimed. Prayers for the freezing of the plaintiff's bank accounts and those for directors are not granted as no basis has been laid for the grant of the same.

I do further decline to grant warrants of arrest as prayed by the applicant as I have not seen the court order made on 12.1.2016.

On the issue of surrender of items already proclaimed, I have seen the auctioneers note indicating that some of the items proclaimed and attached have been sold. The allegation by the plaintiff that the goods

were attached and sold has not been controverted. However, in the interest of justice, I do order that there be no further sale of the property until the suit is heard and determined. Those will be the orders of the court.

DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF MAY, 2016.

ANTONY OMBWAYO

JUDGE