



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 17 OF 2011

TENDERWOOD INDUSTRIES LTD.....PLAINTIFF

VERSUS

RISPA KERUBO ONSASE.....1ST DEFENDANT

MUNICIPAL COUNCIL OF KISII.....2ND DEFENDANT

RULING

1. The plaintiff herein Tenderwood Industries Limited were tenants of the 1st defendant from sometime in 2002 in respect of **LR No. Kisii Municipality/Block II/27** (hereinafter also known as “**suit premises**”). The 1st defendant was a lessee of the suit property from the 2nd defendant. During the subsistence of the tenancy with the 1st defendant, the plaintiff built a perimeter wall and some permanent structures on the suit property which it is alleged was without the approval of the 2nd defendant. This prompted the 2nd defendant to issue the letter dated 27th January 2011 directing the 1st defendant to demolish the said perimeter wall and permanent structures within (14 days) of the date of the letter or else the 2nd defendant would demolish the said structures at the 1st defendant’s cost. The 1st defendant drew attention of the contents of this letter to the plaintiff vide the 1st defendant’s advocates letter dated 1st February 2011.

2. The plaintiff’s reaction was to file the present proceedings and by a Notice of Motion dated 7th February 2011 filed simultaneously with the plaint of even date sought interim orders of injunction restraining the respondents from demolishing or damaging the permanent structure on the suit property. **Sitati J.** granted an interim order of injunction as per the order issued by this court on 9th February 2011.

3. However before the application was heard inter partes, the plaintiff filed a Notice of Motion application dated 22nd February 2011 seeking orders for the 1st and 2nd defendants to be held to be in contempt of court for disobeying the court order issued on 9th February 2011. In the same application the plaintiff also sought an order of mandatory injunction directed against the 1st defendant to reinstate/restore the plaintiff into the suit property. In a ruling dated 28th June 2011 both defendants were found guilty of contempt of the court order issued on 9th February 2011 and sentenced to pay a fine of kshs. 100,000 and kshs. 300,000 respectively. The court did not grant the mandatory order of injunction sought in the application.

4. Noting that the court did not order the defendants to purge their contempt by having the plaintiff reinstated and/or the premises restored to its state before the contemptuous acts, the plaintiff opted to

withdraw its application dated 7th February 2011 and in its place filed a fresh application dated 29th November 2011 which is the subject of this ruling. The withdrawal of the application dated 7th February 2011 was contested by the defendants and the court record shows there were several instances when the parties sought direction on the withdrawal with the defendants arguing the application was the genesis of the contempt proceedings which had resulted in the conviction and sentencing of the defendants against which conviction and sentence the 1st defendant had appealed. The plaintiff for their part argued that the application dated 7th February 2011 sought an injunction restraining the defendants from demolishing the wall and the permanent structures the plaintiff had constructed on the suit premises and since the defendants had demolished the structures albeit in disobedience of the interim order of injunction granted on 9th February, 2011 it would have been superfluous to proceed with the application since what it sought to restrain had occurred.

5. The plaintiff further argued that it had become necessary to file a fresh application seeking mandatory injunctive orders requiring the defendants to reinstate the plaintiff in the premises and to unconditionally restore and/or put the plaintiff in possession of motor vehicle registration no. KBH 757C which was barricaded in the suit premises by the defendants.

6. As relates to the plaintiff's application dated 7th February 2011 the plaintiffs in my view had every right to withdraw the same under the provisions of Order 25 of the Civil Procedure Rules. The application had not been heard inter partes and the plaintiff having elected to withdraw it by filing a formal notice of withdrawal as they did, the court could not bar them from exercising their right to withdraw save and except that the defendants would have been entitled to move the court to be awarded the costs of the withdrawn application. The court record does not show that any order was made by the court for the defendants to be paid costs of the withdrawn application although the 1st defendant filed a bill of costs dated 10th April 2012 on 24th April 2012.

7. The above is the background against which the plaintiff's application dated 29th November 2011 is to be considered. The application dated 7th February 2011 yielded the interim order granted on 9th February 2011 in regard to which the defendants were successfully cited for disobedience and punished. The application dated 29th November 2011 consequently is a separate and independent application and has to be evaluated and considered as such. By the application the plaintiff seeks inter alia the following substantive orders:

1. The honourable court be pleased to grant an order of temporary injunction restraining the defendants/respondents, jointly and/or severally either by their servants and/or employees from terminating the tenancy between the plaintiff/applicant and the 1st defendant/respondent and/or interfering with the plaintiffs/applicants occupation and possession of the suit property whatsoever and/or howsoever pending the hearing and determination of the instant suit.

2. The honourable court be pleased to grant an order of mandatory injunction directed unto the 1st defendant/respondents to unconditionally reinstate, restore and/or put back the plaintiff/applicant into possession of the demised premises situate on LR No. Kisii Municipality/Block II/27, forthwith and/or without further delay, whatsoever and/or howsoever.

3. Pending the hearing and determination of the instant application, the honourable court be pleased to order and/or direct the 1st defendant/respondent herein to unconditionally restore and/or put the plaintiff/applicant in possession of motor vehicle registration number KBH 757C, currently concealed and/or barricaded in the suit premises.

8. The application was supported by the supporting affidavit sworn by John Speke Mongare, the managing director of the plaintiff company. It is deposed that the plaintiff company had been a tenant of the 1st defendant in the suit premises whereat the plaintiff had been carrying on business. The 1st

defendant on or about 20th December 2010 issued notice to the plaintiff to yield and deliver vacant possession of the suit premises. The plaintiff responded to the notice indicating they would not honour the same. The plaintiff further deposes that the 1st defendant instigated the 2nd defendant to issue a notice for the demolition of the perimeter wall fence that the plaintiff had erected around the premises which the 2nd defendant issued on 27th January 2011 and communicated to the plaintiff on 1st February 2011.

9. The plaintiff filed the Notice of Motion dated 7th February 2011 seeking an order of temporary injunction which was heard ex parte and an interim order of injunction granted as earlier indicated. As the injunction was not complied with the defendants were cited and punished for contempt consequent to the application by the plaintiff dated 22nd February, 2011.

10. The plaintiff further avers that the 1st defendant has fenced the premises using barbed wire and that the plaintiff's motor vehicle KBH 757C has been blocked inside and the plaintiff has been denied access to and use of the motor vehicle. The plaintiff reiterates that although the 1st defendant served a notice to terminate the tenancy the plaintiff made a reference to the tribunal and the tenancy relationship still subsists. The plaintiff in the premises argues that the orders of mandatory injunction sought are merited and ought to be granted by the court.

11. The 1st defendant filed grounds of opposition dated 21st December 2011 and a replying affidavit in opposition to the plaintiff's application dated 29th November 2011. The 1st defendant states the lease she had with the plaintiff expired on or about the 1st April 2008 and was not renewed and that the plaintiff continued as a protected tenant under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya and that the 1st defendant served the plaintiff with an appropriate notice to terminate the tenancy to which the plaintiff made a reference to the tribunal for determination.

12. The 1st defendant further avers that the plaintiff erected permanent structures including the erection of a perimeter wall without the approval of the 2nd defendant which the 2nd defendant caused to be demolished for failure to comply with statutory requirements. The 1st defendant states that in order to secure her property she fenced the same using barbed wire and asserts that the plaintiff's motor vehicle is being held as lien for unpaid rent arrears owing by the plaintiff to the 1st defendant.

13. The 1st defendant contends that this court lacks the jurisdiction to deal with the plaintiff's application since the plaintiff had made a similar application seeking a similar mandatory injunction which was not granted by the court. The 1st defendant further states that the plaintiff has not demonstrated there are any special circumstances that would warrant the grant of mandatory injunction at an interlocutory stage of the proceedings. The 1st defendant further asserts the plaintiff has not approached the court with clean hands and neither has the plaintiff made full disclosure of all material facts.

14. The 2nd defendant filed grounds of objection to the plaintiff's application on 16th January 2012 as hereunder;-

1. **This court lacks jurisdiction to hear this application.**
2. **The applicant has come to court with unclean hands.**
3. **The applicant has not made full disclosure to the court.**
4. **The application does not satisfy the basic principles laid down in the case of Giella –vs- Cassman Brown & Company Ltd [1973] EA 358 to warrant the grant of injunction.**

The parties filed written submissions and made reference to authorities in support of their positions. I have reviewed the pleadings and the submissions by the parties and the issue for determination is firstly,

whether the instant application is *res judicata* by reason of the previous contempt application determined by the court and secondly whether on the material placed before the court and having regard to the circumstances of this case the plaintiff has satisfied the conditions upon which a mandatory injunction could be granted.

15. The defendants have argued that the plaintiff having sought a mandatory order of injunction in the application for contempt against them dated 22nd February 2011 and the same having not been granted, the same order cannot be sought in the instant application as the issue is *res judicata*. In the earlier application the plaintiff sought the following order:-

“pending the hearing and determination of the instant application, the honourable court be pleased to grant an order of mandatory injunction directed unto the 1st defendant to reinstate and/or restore the plaintiff into the suit premises.”

16. The judge who heard the application did not grant the order at the ex parte stage before the hearing of the application interpartes as sought. Having not been granted pending the hearing of the application interpartes the matter in my view remained alive during the course of the hearing of that application. There was nothing to prevent the plaintiff from inviting the judge to consider the granting of the order restoring the plaintiff back to the premises. The judge also if she found it appropriate would have ordered the defendants to purge the contempt which would have meant ordering the defendants to restore the premises to the condition before the contemptuous acts and to restore the plaintiff to the premises as the plaintiff had been shoved out and/or evicted. **Hon. Lady Justice Sitati** did not see it fit to require that the defendants purge the contempt and was content to punish them by imposition of a fine after she found them to have disobeyed a court order and therefore in contempt.

17. Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya provides:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently heard and finally decided by such court.”

Lady Justice Aburili had occasion to consider the application of the doctrine of *res judicata* in somewhat similar circumstances as in the present matter in the case of **Rose Njeri Munoru & 13 Others –vs- Hannah Mwhaki Muturi & 4 Others [2016] eKLR**. In the case the plaintiffs having been unsuccessful in an application they had filed before a subordinate court opted to file a fresh suit in the High Court and reintroduced a similar application as the one the lower court had dismissed. **Lady Justice Aburili** in holding the application before the High Court was *res judicata* stated that the explanatory notes 1-6 set out under section 7 of the Act explain the *res judicata* doctrine/rule. She cited with approval the holding of **Wingram V.C** in the case of **Henderson –vs- Henderson [1843] 67 ER 313** where the court stated thus:-

“...where a given matter becomes the subject of litigation and adjudication by, a court of competent jurisdiction the court requires the parties to a litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the subject of litigation in respect of matter which might have been brought onward, as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applied, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time...”

18. The plaintiff had in the application dated 22nd February 2011 specifically prayed for a mandatory order of injunction to be restored back to the premises. This prayer was not granted and is therefore

deemed to have been dismissed. The plaintiff had the opportunity to urge the court to order the defendants to purge the contempt by reinstating the plaintiff back to the premises. My view is that the plaintiff spurred the chance to have the court pronounce itself on the issue whether or not the plaintiff ought to have been reinstated and restored back to the premises. It is my position therefore that this court cannot properly entertain the instant application in regard to the prayer for a mandatory order for restoration to the premises. I hold the view that that aspect of the application is *res judicata* the issue having been directly and substantially in issue in the previous application.

19. Although I have held that the plaintiff in the instant application would be disentitled to a mandatory injunction as the prayer is *res judicata*, I am equally not persuaded that the plaintiff would have been entitled to an order of mandatory injunction sought even if the application would have been considered on its merit. The principles for granting mandatory injunction are fairly well settled and it is a requirement that an applicant must apart from satisfying the conditions for grant of a normal temporary injunction also demonstrate there exists some special circumstances that make a mandatory order desirable for ends of justice to be met. The case must also be one where the facts are plain and obvious such that it would be unjust to refuse to grant a mandatory order. The principle to be applied is well articulated in Vol. 24 Halsbury Laws of England, 4th Edition para 948 thus:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

20. Similarly in the English case of **Locabail International Finance Ltd –vs- Agro Export & Anor [1986] ALL ER 901** the Court of Appeal held:

“A mandatory injunction ought not to be granted in an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedial or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than was required for a prohibitory injunction.”

In the case of **Shariff Abdi Hassan –vs- Nadhif Jama Adan [Civil Appeal No. 121 of 2005] 2006 eKLR** the Court of Appeal quoting *Locabil* (supra) further observed:-

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to the property.”

21. In the present case, after having considered both the plaintiff's and the 1st and 2nd defendants' affidavit evidence, the plaintiff has not in my opinion established a prima facie case to entitle them to get a mandatory injunction. I say so because there are allegations by the 1st defendant that she has given the plaintiff a notice to terminate the tenancy and that the plaintiff has been in rent arrears and in addition there are allegations the plaintiff breached the terms of the lease agreement with the 1st defendant when they constructed a permanent perimeter wall and permanent structures on the suit property without the requisite approvals by the 2nd defendants who as per Section 33 of the Physical Planning Act Cap 286 Laws of Kenya are mandated to give approvals before any developments are undertaken within their area

of jurisdiction. The plaintiff was required to first seek permission from the local authority for development permission to undertake the developments and/or alterations. The plaintiff did not annex any development permission in their affidavit to evidence that such permission was ever sought and/or granted. These are contested issues between the plaintiff and the defendants and it cannot be said the case for the plaintiff is plain and obvious in the face of these disputed facts.

22. Given the foregoing scenario my holding is that the plaintiff would not be entitled to an order of mandatory injunction as sought and I decline to grant the same. Consequent to my said holding, it follows that an order of temporary injunction as prayed under prayer (5) of the Notice of Motion cannot issue. The court cannot restrain that which has already occurred as the court will not give orders which are incapable of being implemented. The plaintiff in the instant case admits it has been ejected out of the suit premises and that explains why an order to be restored in the premises was prayed for. At the trial if it turns out the plaintiff's tenancy was unlawfully terminated, damages would be an adequate remedy.

23. There is the matter of the plaintiff's motor vehicle KBH 757C which the plaintiff states was barricaded in the suit premises once the 1st defendant fenced off the premises and placed guards over the property. The 1st defendant does not deny this fact but states the vehicle is being held as lien for unpaid rent arrears. From the record the motor vehicle must have been detained in February 2011 (over 5 years ago) and it is not clear in what state the vehicle is today. I do not suppose the 1st defendant had a valid reason to impound the motor vehicle even if the plaintiff had accrued rent arrears. The 1st defendant has not demonstrated there was a valid levy of distress and that the motor vehicle was such property as would be amenable to levy of distress. The 1st defendant has not shown there had been any demand for any rent in arrears from the plaintiff before the plaintiff's vehicle was impounded. To the extent that the 1st defendant has not shown she had any lawful cause to retain the plaintiff's motor vehicle my view is that the detaining of the plaintiff's motor vehicle was unlawful and I accordingly direct that the same be unconditionally released to the plaintiff if still being held by the 1st defendant.

24. In the result therefore, save for my order as above directing the release of motor vehicle KBH 757C to the plaintiff, I disallow the plaintiff's application. As the parties have each been partially successful, I make no order for costs and my direction is that each party will bear their own costs of the application.

25. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 13th day of May, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

.....for the plaintiff

.....for the 1st and 2nd defendants

J. M. MUTUNGI

JUDGE