



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

ELC CIVIL CASE NO. 352 OF 2015

O. BAYUSUF & SONS LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

AUNASHAMSI HAULIERS LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The application dated 21st December 2015 seeks the following orders :

1. Spent

2. That the defendant be compelled by way of a mandatory injunction to remove its motor vehicles and equipments from the suit property that is Plot Number LR 2622/V/MN and to allow the plaintiff free ingress and egress, use and operation of the suit property pending determination of this suit.

3. That the defendant whether by themselves, their servants, agents or employees be restrained by way of an injunction from parking motor vehicles, developing, constructing, or in any way interfering with or wasting the plaintiff's suit property that is Plot Number LR 2622/V/MN pending the hearing and determination of this suit.

4. That such other orders as the Court may deem expedient.

5. That the cost of this application be costs in the cause.

2. The application is supported by the grounds on the face of it *inter alia* that the defendant has no proprietary rights over the suit property. That the plaintiff is the beneficial owner of the suit property for a valuable consideration. That the defendants' actions are made in bad faith solely at harassing and frustrating the plaintiff.

3. In the affidavit in support of the motion deposed to by Mr Hasan Bayusuf, the plaintiff states that it is in the process of purchasing the suit property and has paid a deposit of Kshs 7,000,000= . That prior to the signing of the agreement, they inspected the suit property and confirmed it was vacant. Further that clause 14 of their sale agreement permits them to take immediate possession of the unoccupied part. Mr Hassan deposes that if the orders are not granted, the applicant will suffer irreparable loss.

4. The application is opposed by the defendant/Respondent. In a replying affidavit sworn by Muhamad Said, he deposed that the application is defective since there is no company resolution authorising the

plaintiff to file the current proceedings. Secondly that there is no proper authority to sue and swear an affidavit. Mr Muhamad also deposed that the Respondent leased this property for a period of five years from June 2007 from Marguarite Mckenzie (hereinafter referred to as Ms Mckenzie) and which lease was extended from time to time as per copy of the lease he annexed as 'MS – I'.

5. Mr Muhamad continued that on March 2015 at the instance of the head lessor they agreed that they take over the head lease by way of purchase and subsequently a sale agreement dated 28th April 2015 was drawn. He annexed a copy thereof. He then deposed that upon execution of the sale agreement, Ms Hakika transporters laid a claim to a portion of the sold land and they had to negotiate the price.

6. The Respondent deposed that being threatened with eviction he filed in Court on 16th December 2015 ELC Case No 344 of 2015. On account of the facts he has set out herein, he deposed that the contents of Mr Bayusuf's affidavit is incorrect since they have been in possession since 2007. He deposed further that the applicant has come to Court with unclean hands. Lastly that the applicant has not demonstrated special circumstances to warrant the granting of mandatory injunctive orders.

7. Both advocates filed rival submissions. The applicant admitted the suit was filed without a company resolution authorising the same. He however submitted that the suit should not be struck out on the basis of procedural oversight and relied on the provisions of article 48 of the constitution. He compared this to the decision of Majanja J. in **KBS & Another vs Minister of transport & 2 others (2012) eKLR** as regards non-compliance with section 13A of the Government Proceedings Act and urged the Court to look beyond the dry meaning of Order 4 Rule 6 of the Civil Procedure Rules.

8. The applicant submitted further that this Court has discretion to reject striking out proceedings and quoted Olao J in **Tapasiya Bharan Ltd vs Samuel K. Kariuki & 2 others (2015) eKLR** where the Court said the word "may" used means the Court has discretion to strike out the suit but it is not mandatory. That the Courts have taken the route that it is in the interest of justice to strike out the defective affidavit and direct a proper affidavit to be filed.

9. The applicant also submitted whether the injunctive orders issued on 17th December 2015 can be enforced against the plaintiff. I will not give summaries on this limb of this submission because those orders have since been discharged when that application was dismissed. The applicant then submitted that they have met the principles for granting mandatory injunction. It is their submission that since the defendants have no proprietary interest in the property L.R 2622/V/MN, it is their case that as purchasers they are entitled to enjoy quiet possession. He quoted the case of **Kenya Breweries Ltd vs Okeyo (2002) eKLR** which case laid grounds for granting mandatory injunctions. He urged the Court to allow the orders sought.

10. The Respondent on his part submitted that it leased the suit premises which lease expired on 5th July 2012. They continued in occupation with Ms Mckenzie receiving rents. That on 28th April 2015, they entered into a sale agreement with Ms Mckenzie and they paid a deposit of Kshs Seven (7) Million as the purchase price. Further he submitted that clause 14 of the plaintiff's agreement provided that the plaintiff was aware of the Respondent's presence on the land as a tenant. That if the sale agreement between defendant and Ms Mckenzie is unenforceable then the Respondent became a controlled tenant.

11. On the orders sought, he submitted on why the plaintiff did not enjoin Ms Mckenzie in this suit. That the orders of mandatory injunction cannot be granted because this Court has to deal with the issue of ;

i. Whether the sale agreement between the defendant and Ms Mckenzie is enforceable.

ii. Whether there was a sale agreement between the plaintiff and Ms Mckenzie and if it is enforceable.

iii. Whether Ms Mckenzie has any proprietary rights capable of being transferred to the plaintiff.

12. He concluded that the plaintiff had not made out a case to warrant the orders sought as the same would also determine the entire action through an injunction.

13. I have considered the pleadings as filed and the submissions rendered. The applicant took it upon itself and explained circumstances under which mandatory orders of injunction can be granted. It also submitted that despite failure to file company resolution, this Court still has discretionary powers to save the suit by giving orders directing the appropriate authority to be filed. He quoted several High Court cases which are persuasive on this Court to support his submissions. I will therefore begin with the issue of whether this suit should be struck out for failing to comply with the provisions of Order 4 rule 1 (4).

14. Order 4 rule 1 (4) requires the officer duly authorized to swear a verifying affidavit under the seal of the company. The word used is “*shall*”. Rule 1 (6) says the Court may of its own motion or on application of **defendant/plaintiff order to be struck out any plaint which does not comply with sub rules (2), (4) and (5)**. The verifying affidavit accompanying the plaint and the affidavit in support of the application were both not under company seal of the plaintiff. Neither did the plaintiff file a company resolution authorising the filing of this suit.

15. In the case of **Tapasiya** supra quoted by the Applicant, the High Court proceeded to strike out the defective affidavit and ordered that a proper affidavit be filed within 15 days of the order. The Applicant also relied on the provisions of article 159 (2) (d) of the Constitution that states that justice shall be administered without undue regard to procedural technicalities. Would this omission be treated as a procedural technicality? I do not agree as requiring company resolution to be filed together with the plaint or counter-claim is a statutory requirement under section of the Companies Act. There is a reason the legislators included it in statute. It is therefore improper to pass it off as a procedural technicality.

16. Secondly the rules are meant to serve a purpose. Non-compliance with certain provisions particularly those worded those in mandatory terms cannot be assumed to be a procedural technicality. The consequence of non-compliance of this specific rule is given under Order 4 rule 1 (6) i.e the Court may order to be struck out. The Court is given a discretion in meting out the penalty. In the circumstance should the suit be struck out? The plaintiff has submitted that the error can be rectified. In the case of **D. T. Dobie Kenya Ltd vs Muchina (1982) KLR 1**, the Court of Appeal held that striking out should only be allowed where the error or omission cannot be cured even by amendment.

17. In this instance, there is a possibility the error can be cured by amendment i.e leave of this Court allowing the Applicant to file company resolution and a proper verifying affidavit in support of the claim. Therefore I make a finding, that the verifying affidavit and supporting affidavit both filed on 22nd December 2015 are incompetent and is hereby struck out. I will exercise however my discretion and direct the Applicant to file a verifying affidavit in compliance with Order 4 rule 1 (4) within 14 days of this date.

18. On the merit of the application, first it is supported by a defective affidavit therefore it has no legs to stand on. However assuming that a proper affidavit was to be filed by leave of this Court, is there merit for the orders sought? The defendant submitted that he became a controlled tenant once his lease expired and at the time the Applicant was entering into the sale agreement he acknowledged his presence on the land in clause 14 of their agreement with Ms Mckenzie. Secondly the defendant is also claiming purchaser’s interest and lastly that if the orders sought are granted, this suit would have been determined by interlocutory injunction denying the defendant a chance to a hearing.

19. Taking the first issue of tenancy of the plaintiff, clause 14 of the Applicant’s sale agreement admitted that there was a tenant on the premises. The Applicant was to use his own means to obtain vacant possession but the vendor was to deliver vacant possession of the area not under the lease/tenancy. The agreement was entered into on 25th November 2015 one month to the filing of this suit. Probably the Applicant opted to use this Court as a means to obtain vacant possession.

20. Once the Applicant admitted he was aware of a tenant on the premises, it was misleading to describe

the defendant as a trespasser. No indication is given if there was notice served on this tenant to inform him of the sale that was taking place between the Applicant & Ms Mckenzie and to ask him to vacate before this suit was filed. Secondly the defendant also claimed purchaser's interest. In regard to the agreement annexed by the defendant I have ruled in ELC 344 of 2015 that the Respondent was not a party to this agreement therefore I find no basis for this argument and will not go into the contents of the said agreement.

21. The last issue is whether if the orders granted will determine the suit by a way of an interlocutory application. In the plaint, the applicant has sought for delivery of vacant possession failing which the defendant be forcibly removed. Similar orders are sought in the present application. I agree that if the orders herein are granted there will be nothing to go for trial. However in clear cases the Court would still grant such orders.

22. Is this a clear case? I would answer yes & because no the plaintiff's own pleadings and document. The agreement dated 25th November 2015 annexed as 'HBI' shows a deposit of Kshs 7,000,000 was paid. The balance was to be paid within 90 days of the date of the agreement. The completion date was also indicated as 90 days from date of execution (clause 7 and 8). The Vendor did not swear any affidavit to say she had received the balance so that the title could be presumed to have passed to the Applicant. The Applicant herself deposed that she is in the process of purchasing the land. On this account the answer is no. Probably if the sale was completed then it would a clear case to warrant the grant of the mandatory order of injunction as applied/sought at the time this application was made.

23. For the reasons that the affidavit in support of the application is defective and for the reason of want of completion of sale, I reach a finding find the application is defective, premature and abuse of the Court process. I proceed to dismiss it with costs to the Defendant.

Signed and dated at Mombasa this 31st October 2016.

A. OMOLLO

JUDGE