



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 464 OF 2012

DEFINED PROPERTY MANAGEMENT LTD.....1ST PLAINTIFF

DIANA KARAN ACHIENG T/A 2ND PLAINTIFF

AKOSOMBO DESIGNNS ...

SAMMY NGAO T/A MASAI SHOP.....3RD PLAINTIFF

EVERDELICS SPRINGS LTD.....4TH PLAINTIFF

PAUL THUMBI KUBAI & ISIAH MWANIKI..... 5TH PLAINTIFF

T/A MOTOR SCOPE

DOMINIC KIMANI KARANJA.....6TH PLAINTIFF

TUSSY OKWARO T/A WALA AFRICA.....7TH PLAINTIFF

ASMARA FOODS LTD8TH PLAINTIFF

ESTHER TEBULIWA NYINDO9TH PLAINTIFF

T/A LENSETECH INTERIOR DESIGN

JOSEPH KENANDA MAKARIOS.....10TH PLAINTIFF

ELEGANT OCCASSIONS LTD11TH PLAINTIFF

ATIRNO ONYONYI12TH PLAINTIFF

VERSUS

HASSAN SAID OMAR1ST DEFENDANT

RULING

The plaintiffs application dated 31st July 2012 and the 2nd Defendants application dated 24th September 2012 are the subject of this ruling.

The plaintiffs Notice of Motion expressed to be brought under orders 39, 40 and 51 of the Civil Procedure Rules and sections 1A 1B, 3A and 63 of the Civil Procedure Act, Cap 21 Laws of Kenya inter alia seeks the following orders:-

1. An order restraining the defendants and/or their agents and/or servants and/or anybody claiming through or under them from letting or leasing, selling, charging, constructing, transferring, alienating and/or otherwise dealing with the suit property namely **L.R.NO.2/206 Kilimani**, Nairobi pending the hearing and determination of this application and the suit.
2. That the 2nd defendant do deposit Kshs.50,762,575.00 in court pending the hearing and determination of this suit.
3. That the court do issue orders compelling the 2nd Defendant to within 7 days deposit in court,
 - (i) Copy of memorandum and articles of association.
 - (ii) Copies of filed annual returns from the date of incorporation to date.
 - (iii) Copies of PIN and VAT certificates.
 - (iv) List of current shareholders and directors.
 - (v) That upon closure of pleadings in the instant suit the same be heard concurrently with **HCCC ELC NO. 259 of 2012**.

The plaintiffs application is premised on the grounds that appear on the body of the application and on the affidavit sworn in support of the application by one **Agnes Wanjiku Kibue**, a principal officer of the 1st plaintiff and who stated she had the authority of the other plaintiffs to plead on their behalf.

The 2nd Defendant's Notice of Motion is brought under Order 3 rule 2, Order 4 Rule 1(3), (4) and (6) and Order 51 of the Civil Procedure Rules 2010.

The 2nd Defendant seeks orders that:-

1. The plaint dated 31st July 2012 be struck out as it relates to 1st, 4th, 8th and 11th Plaintiffs.
2. The 2nd Defendant be awarded costs of the application and of the suit.

The 2nd Defendant's application is grounded on the grounds that appear on the face of the application and on the affidavit sworn in support by one **Eddy Peter Kimemia**, a director of the 2nd Defendant. The 2nd Defendant basis its application on the following grounds set out on the face of the application.

- (i) The verifying affidavit has been sworn and filed in breach of order 4 rule 1 (3) which provides that where there are several plaintiffs one of them with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.
- (ii) The suit has been filed in breach of mandatory requirement of Order 4 Rule 1 (4)

which states that where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company authorized under the seal of the company to do so.

(iii) The authority and capacity of the 1st, 4th, 8th and 11th Plaintiffs to sue in their own names goes to the jurisdiction of the court and that a company can only sue in its name with the sanction of its board of directors or under a resolution of the company.

(iv) The suit has drawn is bad in law and an abuse of the court process as the plaintiffs have not exhibited the required authority.

(v) The plaint herein has been filed in breach of order 3 rule 2 which refer to the list of documents to accompany a suit.

2nd Defendant's Application

As the 2nd Defendant's application is in the nature of what can be construed as a preliminary objection as relates to the competency of the suit by the 1st, 4th, 8th and 11th Defendants I propose to deal with it first. The Respondents did not file any response to this application but Mr. **Athony H. Khamati** who appears for all the plaintiffs save for the 11th Plaintiff filed written submissions dated 20th November 2013 dealing with issues of law in regard to the application.

Counsel for the 2nd Defendant has aptly set out the issues for determination in this application as follows:-

(a) Whether a principal officer can commence proceedings on behalf of a company without its authority under seal?

(b) Whether the authority and capacity of the 1st, 4th, 8th and 11th plaintiffs to sue in their own names goes to the jurisdiction of the court?.

(c) Whether a plaint filed in breach of order 4 rule 1 (4) of the Civil Procedure Rules 2010 is properly before the court?

(d) Who is liable for costs of the suit?

Order 4 Rule 1 (3) and (4) provide as follows:-

4.1(3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

4. 1(4) where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officers of the company duly authorized under the seal of the company to do so.

The above provisions are clear that where there are several plaintiffs, the plaintiffs may expressly in writing authorize one of their number to swear the verifying affidavit. In the case of corporations the law recognizes their Separate legal capacity and thus requires that a corporation must authorize the institution of a suit in its name through the affixing of its corporate seal to such authority. A corporation can only authorize an act through a board resolution or a shareholders resolution taken at a duly convened meeting. The affixing of the corporate seal to any document by a company denotes that such document is duly sanctioned by the company and hence binding on the company. The requirement under Order 4 Rule 1(4) for the authority to be under seal is so that the company owns the suit and is bound by its outcome. The verifying affidavits by the stated principal officers of the 1st, 4th, 8th and 11th Defendants have not exhibited authorities from the respective companies under seal sanctioning the bringing of the suit and authorizing them to swear the verifying affidavits. In my view the same are not in conformity with Order 4 Rule 1(4) of the Civil Procedure Rules and that renders the verifying affidavits defective.

There is ample authority that where the verifying affidavit is found to be defective the same is for striking out. In the cases of **Bugerere Growers Ltd –vs- Sebaduka & Another (1970) EA 147, Akaba Investments Ltd –vs- Kenroid Limited (2006) e KLR, Mountain View Transporters Limited & Another –vs- Alcon Holdings Ltd & Another HCCC NO. 385 of 2004 (unreported) and A.J. Limited & Another –vs- Catering Levy Trustees & 3 others (2005) eKLR** where the court’s have found the suits to have been filed without appropriate authority have either proceeded to strike out the suits and/or the verifying affidavits.

Hon Justice F. Azangalala (as he then was) in the case of **Akaba Investments Limited –vs- Kenrod Limited** (supra) while holding the verifying affidavit to be defective struck the same out but allowed the plaintiff to file a compliant verifying affidavit and to serve the same within a period of time. Order 4 Rule 1(6) would appear to give the court the discretion to strike out or not to strike out. It is worded thus:-

“The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with subrule (2) (3) (4) and (5) of this rule”.

The plaintiffs in their filed submissions argue that under section 181 of the companies Act, the acts of one director can be ratified by a subsequent resolution of the company. The section provides thus:-

“The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification”.

With respect I do not consider that this provision would have any relevance to the matters in issue. As I understand it, section 181 relates to acts of directors or managers whose appointment and/or qualifications are subsequently found to be defective. Their acts for the period they served as such are the ones shielded from challenge. Their acts of course have to have been lawful to be protected under section 181 of the Act. In the instant suit what is in issue is the authority given to commence the suit. The same was not in conformity with the law and that even if ratification was possible, the same is incapable of being ratified.

The plaintiffs further argue that the requisite authority had been appropriately obtained but was inadvertently not filed with the verifying affidavit but was subsequently filed as per the court record on 1st October 2012 and thus the defect was cured. The plaintiffs place reliance on Article 159 of the constitution and sections 1A, 1B and 3A of the Civil Procedure Act to implore the court not to place undue reliance on technicalities but rather to do substantive Justice and sustain the suit to enable the same to be heard on merit.

Article 159 2(d) of the Constitution provides:

159(2) in exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

- (a) -----
- (b) -----
- (c) -----
- (d) **Justice shall be administered without undue regard to procedural technicalities.**

The courts are therefore enjoined under the constitution to endeavour to administrator substantive justice without undue regard to technicalities. Sections 1A and 1B of the Civil Procedure Act and section 19 of the Environment and Land Court Act echo the spirit of Article 159 2 (d) of the Constitution and provides the basis for the court to be alert in its application and interpretation of the law to avert miscarriage of justice by overreliance on procedural technicalities.

Section 1A Civil Procedure Act provides:

1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act.

(2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1).

Section 1B Civil Procedure Act provides

1B(1) for the purposes of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims-

- (a) The just determination of the proceedings,
- (b) The efficient disposal of the business of the court,
- (c) The efficient use of the available judicial and administrative resources,
- (d) The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties, and
- (e) The use of suitable technology.

While it is apparent that the principal officers of the 1st, 4th, 8th and 11th Defendants filed verifying affidavits that were not supported by resolutions of the companies they represent duly sealed there is evidence that the sealed resolutions were subsequently filed in court on 1st October 2012. My reading and understanding of Order 4 Rule 1(4) is that the officer of the corporation who swear a verifying affidavit in support of a plaint must be authorized by the company to do so under seal. If such authority is not exhibited the verifying affidavit is defective but does not necessarily render the suit incompetent. The requirement of the authority to be under seal is so that the company is said to have sanctioned the suit. I do not suppose that where a verifying affidavit omits to exhibit a duly sealed authority perhaps inadvertently and/or through an oversight that would render the plaint incompetent. I, like **Anzangalala J**, in the case of **Akaba Investments Limited –vs- Kenroid Limited (supra)** hold the view that the defective verifying affidavit can be remedied by filing of a fresh verifying affidavit annexing the duly sealed authority. Indeed Order 4 Rule 1(6) is not in mandatory terms and in my view allows the court a discretion to allow the parties to make amendments.

In the present matter I am of the firm view that the ends of justice would militate against the striking out of the 1st, 4th, 8th and 11th Plaintiffs plaint. The respective companies have subsequent to the filing of the verifying affidavits filed duly sealed authorizations for the stated officers to file the verifying affidavits. To strike out the plaints would be an affront to article 159 2(d) of the constitution and sections 1A and 1B of the Civil Procedure Act as it would of necessity mean the affected plaintiffs file fresh suits which would not only entail delay but would be at additional cost. That would not be facilitating the overriding objective as envisaged under sections 1A and 1B of the Civil Procedure Act.

In the premises I decline to grant the orders sought by the 2nd Defendant in its Notice of Motion dated 24th September 2012. However as it is unclear whether the authorizations under seal filed in court on 1st October 2012 were served on the 2nd Defendant I direct that the 1st, 4th, 8th and 11th plaintiffs file and serve fresh verifying affidavits exhibiting the sealed authorizations within 10 days of this ruling.

The plaintiffs Notice of Motion dated 31st July 2012.

The plaintiffs premised their application on the ground that they were unlawfully evicted from the suit premises and their properties/valuables stolen by the defendants agents and/or hirelings and that there was

a risk of receiving no recompense at the end of this litigation. The plaintiffs averred that they had lost their sources of livelihood and stood to suffer irreparably. The plaintiff averred further that the suit would be rendered nugatory and further stated the issues in this suit and **HC ELC NO. 259 of 2012** are substantially the same and that the alleged the eviction order was infact obtained in the said suit. The plaintiffs in a detailed affidavit sworn by **Agnes Wanjiku Kibue** on 31st July 2012 sets out the facts and background of the matter. The plaintiffs claim to have been tenants of the 1st Defendant in the premises described as **L.R.NO.2/206** Nairobi but the obtaining scenario leading to the filing of the present suit is captured under paragraphs 12-22 of the deponents affidavit.

Paragraphs 12-15 are set out hereunder for ease of reference:-

12. That on the 18th day of May 2012, in the afternoon thugs/hooligans while claiming to be executing orders of this Honourable court obtained on 15th May 2012 in **HCCC NO. 259 of 2012** with murderous and/or assumed and/or pretentious and/or criminal madness, descended on the premises without notice or decorum of any kind and armed with all sorts of crude weapons i.e pangas, simis, sledge hammers, knives etc and while others were armed with pistols committed the following acts:-

(a) violently attacked and chased away the guards providing security in the premises.

(b) raided the individual office/shop/hotel units and in the process brought down all doors/security doors and took them away.

(c) damaged all windows

(d)entered all the individual units and took away all that could be easily carried and destroyed that which could not be readily taken away.

(e) detained the subtenants and their workers and while committing acts of terror violently robbed them of their phones and money.

13. That I am informed by the other plaintiffs which information I believe to be true, that while this mayhem was going on and agonizing terror being visited on the plaintiffs and malicious damage to property being undertaken and generally wanton lawlessness being displayed, the OCS –Kilimani Police Station and his officers were in attendance and when the other occupants pleaded for his intervention at least to enable the tenants peacefully exit the premises with whatever they could salvage, the OCS categorically declined to intervene and maintained that a lawful eviction order was being implemented.

14. That when I arrived I and some of the occupants demanded that the person who appeared to be in charge to show us the eviction order that they were executing he produced and gave to us the High Court order given on 15th May 2012 by **Mr. Justice Kimondo** in **HCCC NO. 259 of 2012**. Copy and marked “**AWK6**”.

15. That after perusal of the said order it became apparent to us that, that court order which the man in charge of the eviction gave us did not constitute an eviction order whatsoever and we promptly pointed this to him but in a very dismissive and rather arrogant manner he maintained that the order indeed was an eviction order.

Arising from the actions of the 2nd Defendant the plaintiff allege they suffered loss of Kshs.50,762,575/00 in addition to losing their daily incomes. The plaintiffs state they were unable to obtain any records of the 2nd Defendant at the companies Registry and the plaintiffs are apprehensive the 2nd Defendant company may be obscure and hence the prayer for the deposit of the sum suffered as loss to stand as security in the event the plaintiffs are successful in the suit.

The 2nd Defendant filed grounds of opposition dated 1st October 2012 and a replying affidavit sworn by **Eddy Peter Kimemia** on the same date. The 2nd Defendant avers that the plaintiffs are not entitled to the

orders sought in the Notice of Motion and specifically denies the claim of loss in the sum of Kshs.50,762,575/- by the plaintiffs and asserts the plaintiffs cannot be entitled to have the amount deposited as security. The 2nd Defendant further states that there is no justification for the claim that the 2nd Defendant's records are unavailable at the Registrar of Companies to justify the 2nd Defendant to be compelled to avail any information on the 2nd Defendant as sought by the plaintiffs. The 2nd Defendant further faults the verifying affidavits by the plaintiffs which the court has dealt with while considering the application by the 2nd Defendant above.

The 2nd Defendant contends that it is the registered owner of the suit property and therefore entitled to use the same legally in any manner it pleases. The 2nd Defendant states that the plaintiffs are strangers and trespassers to the suit property. The 2nd Defendant however denies the plaintiffs were forcefully and violently evicted from the suit property as alleged but avers in case there was any demolitions and/or violent robbery it was not effectuated by the 2nd Defendant and/or by its agents. The 2nd Defendant acknowledges the existence of **HCCC NO. 259 of 2012** and claims that some allegations in the present suit have been dispensed with in that suit and avers the plaintiffs application discloses no reasonable cause of action and that it is scandalous, frivolous and vexatious and is otherwise an abuse of the process of the court and prays for its dismissal.

The parties filed written submissions to ventilate their respective cases. The plaintiffs filed their written submissions on 28th February 2014 and the 2nd Defendant filed its submissions on 28th April 2014. The parties reiterate the facts of the case as set out in their respective affidavits. After reviewing and considering the pleadings and the submissions of the parties the issues that stand to be determined is firstly whether on the basis of the material and information presented before the court the plaintiffs have satisfied the conditions for grant of an interlocutory injunction to warrant the grant of an injunction. Secondly, whether the 2nd Defendant ought to be required to place a deposit as security for loss suffered by the plaintiffs, and thirdly, whether the present suit ought to be heard concurrently with **HC.ELC NO. 259 OF 2012**.

Claim for injunction.

In the plaint filed by the plaintiffs, the plaintiffs claim against the 2nd Defendant is firstly, for an injunction restraining the 2nd Defendant from offering for sale, selling, charging, transferring, leasing, constructing, alienating and/or otherwise dealing with the suit property namely **L.R.NO.2/206 Kilimani, Nairobi** until the claims by the plaintiffs are adjudicated upon, determined and conclusively settled or **until the 2nd Defendant deposits into court money the equivalent of the plaintiffs total claim.** (emphasis mine). Secondly the plaintiffs pray for special damages, general damages together with exemplary and/or punitive damages and costs of the suit. It is in my view patently clear from the pleadings of the plaintiffs that indeed their claim is for damages. The plaintiffs thus acknowledge damages would be an adequate remedy. The plaintiffs though they claim to have been tenants on the suit premises do not claim ownership. From the pleadings the plaintiffs admit not to be in possession having been forcefully evicted.

Both the plaintiffs and the 2nd Defendant acknowledge the pendency of **HC ELC 259 of 2012** where the 2nd Defendant is the plaintiff. This court has had occasion to deal with an application at the instance of the 1st Defendant herein in the said suit where it transpired that

- (i) The suit property **L.R.NO. 2/206 Kilimani** had been converted and is presently known as Title Number **Nairobi/Block 17/318**.
- (ii) The converted title number **Nairobi/Block 17/318** was sold and transferred by the 2nd Defendant to Sohail Development Ltd who were issued with a certificate of lease on 5th April 2013.

On 8th August 2014 this court delivered a ruling on the application by the 1st Defendant herein in **HC ELC NO. 259 2012** and directed that:-

(a) That the 1st defendant as the personal legal representative of the deceased “said Mohammed” be enjoined as a party to the suit in place of the deceased.

(b) That a temporary injunction be issued restraining the 2nd Defendant (Sohail Development Ltd) from trespassing encroaching constructing, transferring or in any other manner interfering with the property known as **L.R NO. 2/206** (original number 2/88/1) Kilimani, converted and now know as **Nairobi/Block 17/318** pending the hearing of the suit.

From the foregoing it is clear that the 2nd Defendant is presently not the registered owner of the suit property and further the property **L.R.NO.2/206 Kilimani** no longer exists the same having been converted from registration under the Government Lands Act to registration under the Registered Land Act (both Acts now repealed). Thus the injunction sought by the plaintiffs in the circumstances is incapable of being granted as the same cannot be enforced. The court cannot act in vain and cannot grant an order that is not capable of being implemented.

In the present case I am not satisfied that even if the plaintiffs had demonstrated a prima facie case that I would in the circumstances of the case grant an injunction. The conditions for grant of an injunction are well settled since the determination of the leading case on the subject **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358**. The applicant has to demonstrate firstly that he has a prima facie case with a probability of success, secondly, the applicant has to demonstrate and show that he stands to suffer damages/harm that cannot be compensated by an award of damages. Thirdly, if the court is in any doubt in regard to the first two conditions the court can determine the application on a balance of convenience.

In the instant case it is clear to me that the plaintiffs claim is for damages. The deposit that the plaintiffs seek is a computation of their losses and I am of the view that the consequent losses/damages can be quantified in the event the plaintiffs are successful at the trial. As an applicant needs to prove the first two conditions to be entitled to an injunction and the plaintiffs in my view cannot satisfy the second condition that they would suffer irreparable damage that cannot be compensated by an award of damages I find and hold that they cannot be entitled to an injunction.

Claim for security deposit

On the issue whether or not the 2nd Defendant should be ordered to deposit Kshs.50,762,575/- I would observe that the plaintiffs have laid no basis to seek or be entitled to such an order. The plaintiffs it does appear have founded this claim on Order 39 of the Civil Procedure Rules. This Order broadly deals with arrest and attachment before judgment. Order 39 Rule 1 deals with situations where the defendant with intent to delay the plaintiff or to avoid court process or to obstruct or delay the execution of any decree that may be passed against him-

- (i) Has absconded or left the local limits of the jurisdiction of the court
- (ii) Is about to abscond.
- (iii) Has disposed of or removed from the local limits of the jurisdiction of the court his property or
- (iv) That is about to leave Kenya under circumstances that may lead to the plaintiff being obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

In the above situations if the court is satisfied by affidavit it may issue a warrant to arrest the Defendant to

appear before the court to show cause why he should not be ordered to furnish security or deposit money into court to stand as security.

Order 39 rule 5 (1) provides for instances when the court may order for provision of security.

5.(1) Where at any stage of a suit the court is satisfied by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him-

(a) is about to dispose of the whole or any part of his property

(b) is about to remove the whole or any part of his property from the local limits of jurisdiction of the court.

The court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order-----

In my view a party seeking security under the provisions of Order 39 has the duty and obligation to prove and establish intent to delay, obstruct and/or avoid the due process of the court in the execution of a decree that is likely to be passed against the party they seek security.

In the present case the plaintiffs have merely alleged they suffered loss of some Kshs.50,000,000/- plus which they are yet to prove at the trial. The plaintiffs in my view have not demonstrated any intent on the part of the 2nd Defendant to delay and/or obstruct the process of execution of a decree that may be entered or passed against it. It is noteworthy that the plaintiffs application was filed simultaneously with the plaint which places a high burden upon them to prove that the 2nd Defendant had the intention to delay and/or obstruct any decree they may obtain against it.

Question of consolidation of the suits

On the third issue whether or not this suit should be concurrently tried with **HC ELC NO. 259 of 2012** my view is that although the two suits relate and touch on the same subject matter being **L.R.NO.2/206** now title number **Nairobi/Block 17/318** the issues are distinct and not related. In the instant suit the claim is basically for damages arising from what the plaintiffs claim was unlawful eviction and damage to property. In **HC ELC NO. 259 of 2012** although both Defendants herein are parties there are other parties and the main issues revolve on who is the owner of the suit property. I do not consider that the two suits can be conveniently tried together. The evidence that will require to be led in both cases is clearly different and there would be no basis to have the two cases tried together and I decline to order that they be heard concurrently.

The upshot is that the plaintiffs application dated 31st July 2012 is hereby dismissed. As the 2nd Defendant's application dated 24th September 2012 was equally unsuccessful I order that each party will meet their own costs for the applications.

Ruling dated signed and delivered this 6thday of.....February.....2015

J.M. MUTUNGI

JUDGE

In the presence of:

.....for the Plaintiffs

.....for the Defendants