



**Mbugua alias Goerge Boniface Nyanja v Chaudry (Environment & Land  
Case 1107 of 2013) [2015] KEELC 846 (KLR) (4 February 2015) (Ruling)**

*George Boniface Mbugua alias Goerge Boniface Nyanja v Sharrif Chaudry [2015] eKLR*

Neutral citation: [2015] KEELC 846 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1107 OF 2013**

**P NYAMWEYA, J**

**FEBRUARY 4, 2015**

**BETWEEN**

**GEORGE BONIFACE MBUGUA ALIAS GOERGE BONIFACE  
NYANJA ..... PLAINTIFF**

**AND**

**SHARRIF CHAUDRY ..... DEFENDANT**

**RULING**

**The Plaintiff's Application**

1. The application before Court is a Chamber Summons dated 16<sup>th</sup> March 2013 brought by the Plaintiff under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules and section 3A of the *Civil Procedure Act*. The Plaintiff is seeking an interim injunction to restrain the Defendant, M/S Westminster Merchants, or the Defendant's other agents, servants, employees and or any other persons claiming through him from attaching or in any way dealing with, alienating or interfering with the Plaintiff's office furniture, computers, motor vehicles or any other properties belonging to the Plaintiff in LR No. 1/387 along Ngong' Road, Nairobi until the hearing and determination of the Defendant's application dated 17<sup>th</sup> September 2011 or further orders of the court.
2. The application referred to dated 17<sup>th</sup> September 2011 was filed by the Defendant and he sought leave therein to amend his defence and counterclaim filed on 26<sup>th</sup> July 1989. This application was dispensed with by this court by orders issued on 27<sup>th</sup> May 2014.
3. The grounds upon which the application dated 16<sup>th</sup> March 2012 is premised are detailed in the Plaintiff's affidavit sworn on 16<sup>th</sup> March 2012. The Plaintiff has stated that on 9<sup>th</sup> March 2012, his employees were served with a proclamation attaching his office furniture, motor vehicle and other goods lying in his premises known as LR No. 1/387 (hereinafter referred to as "the suit premises"),



and a copy of a proclamation dated 9<sup>th</sup> March 2012 issued by Westminster Merchants has been exhibited. The Plaintiff has averred that he was not a tenant of the Defendant who gave instructions for attachment of his properties, and further, he denied owing the Defendant the rent alleged in the Counterclaim.

4. It is the Plaintiff's averment that he bought the suit premises from one Ghulam Rasool who gave him possession in 1985 and that although he paid the full purchase price for the premises, the same has not been transferred to him due to the death of Ghulam Rasool. According to the Plaintiff, the Defendant's instructions to the auctioneers were malicious, premature and illegal since there were no court orders to that effect and the matter is still pending before the court. Lastly, the Plaintiff averred that he would suffer irreparable and irreversible loss and damage were the auctioneers to proceed with the attachment.

### **The Defendants' Response**

5. The Defendant responded to the application through grounds of opposition dated 21<sup>st</sup> March 2012 wherein it was stated that the application was fatally defective and incompetent, having been filed in misconception of the provisions of *Distress for Rent Act*. The Defendant averred that it was an abuse of the court process to seek to restrain him from seeking to distress for the rent due and owing from the Plaintiff, since he was entitled to levy under the *Distress for Rent Act*.
6. While stating that the Plaintiff had not adduced evidence to prove that he purchased the property from Ghulam Rasool and paid the entire purchase price thereof, the Defendant contended that the Plaintiff had also not proved that he was the owner of the premises and was therefore not a tenant. The Defendant contended that any orders obtained by the Plaintiff were made pursuant to false misrepresentation and concealment of a material fact by the Plaintiff that he never finalized payment of the purchase price which resulted to the rescission of the agreement, and further that the Plaintiff was informed that he would be required to pay a monthly rent of Kshs 15,000/- for every month he remained in possession.
7. The Defendant also filed a replying affidavit sworn on 23<sup>rd</sup> March 2013 where he contended that the Plaintiff entered into a sale agreement with the late Ghulam Rasool for the sale of the suit property in 1986. According to the Defendant, the Plaintiff paid the deposit but subsequently failed and/or refused to pay the outstanding balance despite being in possession of the premises. It is the Defendant's case that due to the Plaintiff's failure to pay the balance of the purchase price, the late Ghulam Rasool treated the sale agreement as having been rescinded and duly informed the Plaintiff of the same.
8. While stating that the Plaintiff who was in possession was put on notice that he was required to pay rent for the suit property at Kshs 15,000/- per month, the Defendant averred that the Plaintiff has never paid any money as demanded. Copies of correspondences exchanged between the Plaintiff and the late Ghulam Rasool were annexed as evidence, and the Defendant averred that the Plaintiff was therefore not an owner of the suit premises as alleged and was only a tenant.

### **The Submissions**

9. The application was canvassed by way of written submissions, and the Plaintiff in submissions dated 11<sup>th</sup> June 2012 argued that the attachment was premature and unlawful since it was based on an anticipated ruling allowing the Defendant's application for amendment of the defence where the Defendant had prayed for a counterclaim for rent amounting to Kshs 25, 020,000/-. Counsel for the Plaintiff argued that the Defendant purported to have a right to levy distress before his application for amendment had been heard and determined.



10. It was submitted that the Plaintiff's claim against the Defendant was for specific performance. Counsel contended that the Plaintiff entered the suit premises and remained thereon for the last 26 years and further, that there had never been a demand for the Plaintiff to pay rent to the Defendant. The Plaintiff's counsel further argued that any claim for alleged rent was time barred under section 8 of the Limitation of Action Act.
11. While submitting that the Defendant was not entitled to levy distress under the *Distress for Rent Act*, Counsel contended that the Plaintiff did not enter the suit premises as a tenant but as a purchaser. It is the Plaintiff's submission that the issues raised would have to canvassed in a full hearing and further, that it was wrong for the Defendant to assume that he was a tenant before the hearing and determination of the suit. The Plaintiff argued that the threatened attachment of his goods was unlawful and premature, and the court was urged to restrain the Defendant from attaching his goods until the hearing and determination of this suit.
12. The Defendant's Counsel reiterated the facts of his case in his submissions dated 17<sup>th</sup> July 2012. He contended that the Plaintiff was a tenant at will and was occupying the suit premises with the consent of the owner. Counsel made reference to the case of Hagee (London) Ltd vs. A.B Erikson and Larson (a firm) and 7 Others (1975) 3 All ER 234 and argued that a tenant at will can be contractual or may arise by operation of the law.
13. Counsel for the Defendant submitted that since the Plaintiff breached the sale agreement which was rescinded, he continued occupying the suit premises as the negotiations were underway and further, that he was required to pay rent for the suit property at Kshs 15,000/- per month in order for him to enjoy possession. Reliance was placed on the case of Javad vs. Mohamed Aqil, (1991) 1 All ER 243 for the proposition that entry into possession while negotiations proceed is one of the circumstances in which a tenancy at will may exist.
14. The Defendant argued that after rescission of the sale agreement and subsequent communication to the Plaintiff to pay rent through a letter dated 28<sup>th</sup> January 1986, the Plaintiff became a tenant of the late Ghulam Rasool. The court was also referred to the case of Wheeler vs. Mercer, (1956) 3 All ER 631 where the court stated that a purchaser who had been let into possession before completion without any special stipulation was at law a tenant at will.
15. Counsel made reference to the treatise Halsbury's Laws of England, Vol 13 at page 107 for the definition of the term distress, and submitted that the Defendant had established that the Plaintiff was a tenant and not a purchaser. It was submitted that since the Plaintiff was in arrears, the Defendant's right to levy for distress was automatic without the need for a legal process.
16. In respect to the Plaintiff's averment that the right to levy distress was time barred under the *Limitation of Actions Act*, Counsel for the Defendant submitted that the Defendant gave instructions for the distress against rent which was due as at the time of the instructions and not before. The Defendant argued that the Plaintiff was in arrears as at the time of giving instructions, and there was no claim that there had been a lapse of six years when the rent arrears became due.
17. According to the Defendant, that amount due and outstanding as at the date of the instructions was Kshs 25,220,000/- from 1986-2011 and therefore, that the distress was not time barred. Reference was made to section 3(1) of the *Distress for Rent Act* and the Defendant submitted that he had a right to levy distress for rent since the Plaintiff was in arrears.
18. In further submission, the Defendant submitted that no court will grant relief to a party who is in default to derive advantage from his own wrong and reliance was placed on the cases of Meyers vs. Casey (1913) 17 CLR 90 and Alghussein Establishment vs. Elton College (1991) 1 All ER 20. The Defendant



argued that the Plaintiff misled the court to believe that he was the owner of the suit premises having paid the full purchase price. It was further submitted that the Plaintiff failed to inform the court that he was in breach of the sale agreement, and that the late Ghulam Rasool had asked him to pay rent in order to continue being in possession.

19. It is the Defendant's submission that having misled the court, the Plaintiff was not entitled to the orders for restraint that were obtained ex parte. Counsel submitted that in ex parte applications, the applicant must give full disclosure of all facts known to him at the time of making the application failure to which the orders are lifted ex debito justitiae
20. While submitting that the Plaintiff had not satisfied the conditions for the grant of an interlocutory injunction, the Defendant argued that no prima facie case had been established since the Plaintiff had failed to prove that he was the owner of the suit property. It was submitted that since an action for distress was an action for the recovery of rent due, it was a monetary claim for which damages was an adequate remedy. Lastly, it was submitted that the balance of convenience was not in favour of the Plaintiff who was in breach and tried to lay claim against the other party in the contract.

### **The Issues and Determination**

21. I have read and carefully considered the pleadings filed and submissions made by the parties herein. The question to be determined is whether the Plaintiff has met the threshold for the grant of temporary orders of injunction that he seeks.
22. I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in *Giella vs Cassman Brown & Co Ltd, (1973) EA 358* as to the grant of a temporary injunction. These are that the applicant must establish a prima facie case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.
23. The first question I must therefore answer is whether the Plaintiff has established a prima facie case. A prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR* as follows:

“ 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.”
24. The Plaintiff in the Amended Plaint filed herein on 19<sup>th</sup> August 2014 and dated 14<sup>th</sup> August 2014 is seeking orders that the Defendant transfers to it the suit premises. The Plaintiff claims that he is a purchaser for value and owner of the suit premises, having paid Kshs 2,016,295/= for the said property and having taken possession in 1985. He alleges that the Defendant instructed M/s Westminister Merchants Auctioneers to proclaim his goods yet there was no rent due and owing since he is not a tenant.
25. This claim has been highly contested by the Defendant who argued that the Plaintiff was not a purchaser since the agreement for sale of the suit property between the Plaintiff and Ghulum Rasool (deceased) was rescinded owing to the Plaintiff's failure to pay the balance of the purchase price. The Defendant contended that since the Plaintiff who was a tenant was in arrears, he had a right to levy distress for rent under section 3(1) of the *Distress for Rent Act*.



26. The Defendant exhibited a letter dated 31st January 1986 notifying the Plaintiff to complete the sale within 21 days of the notice, failure to which the sale agreement would be rescinded and further, requiring the Plaintiff to pay rent at Kshs 15,000/- per month from 1st January 1986. The Defendant also annexed a copy of a letter dated 12th February, 1986 where a demand for rent of Kshs 30,000/- for the month of January and February 1986 was made.
27. A perusal of the list and bundle of the Plaintiff's documents dated 14<sup>th</sup> August 2014 and filed in Court on 19<sup>th</sup> August 2014 together with his Amended Plaint however show that there were still negotiations and subsequent correspondence on completion of the contract between the Plaintiff's Advocates and the Advocates for Ghulam Rasool through to 1987. In particular in some of the correspondence there is confirmation by the then advocate of the vendor, M.A Khan Advocate that payments had been received from the then advocates for the Plaintiff, Njoroge & Musyoka Advocates. The said correspondence also points to full payment having been made by the Plaintiff, and that the only issue outstanding was the transfer of the suit property to the Plaintiff.
28. In the premises I find that the Plaintiff has a beneficial interest in the suit property and has established a prima facie case with probability of success.
29. As regards the requirement for an applicant to show that he will suffer irreparable damage, in the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR, the Court of Appeal stated as follows in this regard:-

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

30. It is my view that given that the Plaintiff has been in occupation of the suit premises since 1985, and having brought evidence showing his payment of the purchase price, and also given the colossal sum being claimed as rent by the Defendant, the Plaintiff would suffer irreparable harm that cannot be adequately compensated by way of damages in the event that the injunction orders are not granted. This is especially so in light of the facts that the Defendant have not pleaded that they are ready and willing to compensate the Plaintiff in damages. In addition the issues of the ownership of the suit premises and whether any rent was payable and/or due from the Plaintiff are in contention, and it would be premature to distress for any rent at this stage as no right of the Defendant to such rent has crystallised.
31. The Plaintiff's Chamber Summons dated 16<sup>th</sup> March 2013 is therefore allowed for the foregoing reasons, and I accordingly order as follows:
  1. The Defendant, M/S Westminster Merchants, and/ or the Defendant's other agents, servants, employees and or any other persons claiming through him be and hereby restrained from attaching or in any way dealing with, alienating or interfering with the Plaintiff's office furniture, computers, motor vehicles or any other properties belonging to the Plaintiff in LR



No. 1/387 along Ngong' Road, Nairobi, until the hearing and determination of the suit herein and/or further orders of the court.

2. The Costs of the Plaintiff's Chamber Summons dated 16<sup>th</sup> March 2013 shall be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2015.**

**P. NYAMWEYA**

**JUDGE**

