



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 985 OF 2014

CANCER INVESTMENTS LTD.....PLAINTIFF

VERSUS

SAYANI INVESTMENTS LTD.....1ST DEFENDANT

PATRICT NG'ANG'A MBURU.....2ND DEFENDANT

RULING

Coming up before me for determination is the 1st Defendant/Applicant's Notice of Motion dated 11th July 2014 seeking the following:

1. An order authorizing the 1st Defendant and its agents access to enter upon the property commonly known as Old Nation Centre House situated on L.R. No. 209/1214/1142 Nairobi (hereinafter referred to as the "suit property") in the possession of the Plaintiff and its agents and / or sub-tenants on Sundays and or at night during weekdays or such other time as the honorable court may order for purposes of carrying out non-destructive structural tests on the said building.
2. The order for injunction made by the honourable court on 29th May 2007 restraining the 1st Defendant from proclaiming, distraining, removing, carrying away and or interfering with the Plaintiff's goods and property in any way whatsoever in the suit property on the ground and 1st floor until the hearing of the application dated 25th May 2007 and that orders made on 6th June 2007 extending the order of 29th May 2007 until the hearing and determination of the Application dated 25th May 2007 be discharged, varied or set aside.
3. Those costs of this Application be met by the Plaintiff/Respondent in any event.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of John Mutisya, the Buildings Supervisor of the 1st Defendant/Applicant, sworn on 11th July 2014 in which he averred that the 1st Defendant/Applicant is the registered owner of the suit property and the building erected thereon commonly known as Old Nation Centre House. He further averred that the 1st Defendant leased out to the Plaintiff the suit property and without the consent of the 1st Defendant, the Plaintiff proceeded to sub-let the building to third parties. He added that the dispute between the 1st Defendant and the Plaintiff relating to the tenancy is the subject matter of this suit. He added that with the

intention of carrying out non-destructive structural tests on the building so as to ensure the soundness of the building and safety of any occupants and visitors to the building, the 1st Defendant obtained a permit from the Nairobi County Government to carry out the structural tests, confirming that 60% of the tests have already been conducted by its agent Engineering Controls Ltd. He further averred that the said Engineering Controls Ltd had been unable to complete the tests because of hostilities and interruptions from the Plaintiff and its agents and sub-tenants. He added that despite numerous requests to the Plaintiff to allow the 1st Defendant and its agents access to the building on Sundays and or at night, the Plaintiff and its agents and or sub-tenants have unreasonably refused. He stated further that the 1st Defendant/Applicant has incurred huge losses as a result of the Plaintiff's actions and it is therefore pertinent that this court does intervene and make orders allowing the 1st Defendant and its agents access to the building for the purposes of completing the exercise. In addition to the foregoing, Mr. Mutisya averred that pursuant to a Notice of Motion dated 25th May 2007, this court made an order in favour of the Plaintiff on 29th May 2007 granting a temporary order of injunction restraining the 1st Defendant from proclaiming, distraining, removing, carrying away and or interfering with the Plaintiff's goods and property in any way whatsoever in the suit property on the ground and 1st floor until the hearing of the said application on 6th June 2007. He further added that on 6th June 2007, the court extended the order of 29th May 2007 until the hearing and determination of the Notice of Motion dated 25th May 2007 which to date has never been heard and determined. This means that the injunctive orders remain in force to date. He further averred that those orders of injunction were premised on the ground that the Plaintiff was paying and would continue to pay rent for the suit property to the 1st Defendant. He averred that since the making of those orders, the Plaintiff has neglected, refused and or declined to pay rent to the 1st Defendant and is currently hugely indebted to the 1st Defendant in a sum exceeding Kshs. 68,231,586.67 in rent arrears. He added that the Plaintiff is using those orders as a shield against the 1st Defendant's attempts to legally recover the said rent arrears stating that it is only fair and in the interest of justice that the orders of 29th May 2007 and 6th June 2007 be discharged, varied and or set aside.

The Application is contested. The Plaintiff/Respondent filed a Replying Affidavit sworn on 28th July 2014 by Mukhtar Parker, a Director of the Plaintiff, in which he averred that the dispute over the alleged rent arrears is the subject matter of another court case being Civil Appeal No. 100 of 2012 which is yet to be heard and determined. He averred that the institution of Civil Appeal No. 100 of 2012 was consequent upon the ruling of the Business Premises Rent Tribunal which ordered the Plaintiff/Respondent to vacate and hand over vacant possession of the suit property to the 1st Defendant on 1st August 2012. He added that there are in place temporary orders in that appeal case staying the order made by the Business Premises Rent Tribunal pending the hearing and determination of that appeal. He also added that the stay of execution was granted subject to the Plaintiff/Respondent depositing in a joint interest earning account the sum of Kshs. 500,000/- within 90 days, which the Plaintiff complied with. In any event, he denied that the Plaintiff/Respondent owes the 1st Defendant the sum of Kshs. 68,231,586.67 in rent arrears insisting that the Plaintiff/Respondent has been paying rent monthly to the 1st Defendant/Applicant without fail. He further averred that the Plaintiff/Respondent was not aware of the 1st Defendant/Applicant's intentions regarding the testing of the building as it had not been informed or consulted by the 1st Defendant. He added that when unknown people visited the suit property with intentions of carrying out tests in the building, the Plaintiff/Respondent instructed its advocates to write to the 1st Defendant's advocates to enquire the scope of work it proposed to undertake to enable the Plaintiff/Respondent make necessary arrangements with its tenants and also seeking an assurance that the suit property would be restored to its original state after the exercise. He stated further that the 1st Defendant/Applicant did not write to the Plaintiff/Respondent in response pointing out that the Plaintiff/Respondent would not unreasonably refuse to grant access to the agents if it is furnished with the information and assurances it had sought from the 1st Defendant/Applicant. He asserted that the temporary orders made by this court on 29th May 2007 and on 6th June 2007 are meant to maintain the status quo of the suit property until this suit is heard and determined and requested the court not to discharge, vary or set them aside. The Plaintiff/Respondent also filed a Notice of Preliminary Objection dated 22nd July 2014 and Grounds of Opposition dated 22nd July 2014 in which they raised similar matters as those contained in their Replying Affidavit.

Both the 1st Defendant/Applicant and the Plaintiff/Respondent filed their written submissions.

The issues arising for my determination are two, one being whether to order that the 1st Defendant/Applicant be granted access to the suit property by the Plaintiff/Respondent in order to complete the carrying out of non-destructive structural tests on the building on the suit property. The second issue is whether to order the discharge, varying or setting aside of the orders of injunction issued in this court by Osiemo, J. on 29th May 2007 and 6th June 2007 to pave way for the 1st Defendant/Applicant to levy distress for rent arrears allegedly standing at the sum of Kshs. 68,231,586.67.

On the issue of the 1st Defendant/Applicant and its agent being allowed access to the suit property to conduct non-destructive structural tests, I do not find much resistance from the Plaintiff/Respondent which explained that they were not given any information on the same by the 1st Defendant/Applicant pointing out that had they been informed of the same, they would not have denied the 1st Defendant/Applicant access to the building. On that count, I find no difficulty in allowing prayer no. 1 of this Application.

When it comes to the issue of discharging, varying or setting aside the orders of this court issued on 29th May 2007 and 6th June 2007 to pave way for the 1st Defendant/Applicant to levy distress for rental arrears allegedly amounting to Kshs. 68,231,586.67, the Plaintiff/Respondent has resisted the same stating that the issue of rent arrears between them was ventilated in the Business Premises Rent Tribunal Case No. 309 of 2011 whose decision was that the Plaintiff/Respondent do vacate and hand over vacant possession of the suit property to the 1st Defendant/Applicant on 1st August 2012. The Plaintiff/Respondent stated that they appealed against that decision in Civil Appeal No. 100 of 2012 which is yet to be heard and determined. The Plaintiff pointed out that an order of stay of execution was issued in their favour in that appeal. The 1st Defendant/Applicant has not made any reply to these assertions by the Plaintiff/Respondent. The situation is obviously not a straightforward one considering the existence of the decision by the Business Premises Rent Tribunal in Case No. 309 of 2011 and the appeal therefrom being Civil Appeal No. 100 of 2012. Care must be taken to ensure that issues that have been determined are not litigated upon a second time in this present suit. For now, I am reluctant to discharge, vary or set aside the orders issued by this court on 29th May 2007 and on 6th June 2007 which are meant to maintain the status quo of the suit property until this suit is heard and determined. I would instead urge the 1st Defendant to take the necessary steps to ensure that this suit is heard and determined within the shortest period of time to conclude the long standing dispute between them and the Plaintiff.

In the circumstances, this Application is hereby dismissed. Costs shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 2ND

DAY OF OCTOBER 2015.

MARY M. GITUMBI

JUDGE