



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO .299 OF 2015

MARTIN MWANGI GICHUKI..... PLAINTIFF

VERSUS

GLADINGA (K) LIMITED..... DEFENDANT

RULING

1. By Notice of Motion application dated 31st October 2016, and brought under Section 1A & 3A of the Civil Procedure Act, Order 8 Rule 5 and Order 51 Rule 3 of the Civil Procedure Rules, the defendant is seeking the following orders:

a) Spent

b) The applicant is granted leave to amend its defence to include a counter-claim as shown on the draft amended statement of defence and counter-claim;

c) In the interim, the injunction issued on 13th April 2016 is discharged on account of the plaintiff's blatant abuse of Court injunction by continued failure to pay reasonable mesne profits at the rate of Kshs.50,000 per month, yet he continues to wrongfully occupy the defendant's premises for profit; he is presently in arrears of mesne profits of Kshs.150,000 and rent deposit of kshs.300,000.00 totaling to kshs.450,000.00 and the defendant cannot do anything to either recover possession or levy distress, given that the plaintiff has no attachable goods;

d) Abandoned.

e) The plaintiff is ordered to vacate the premises forthwith for breach of the alleged contract, upon which it obtained this Court's injunction in the first place; in line with the termination, notice issued and served in April 2016, which took place on 31/7/2016;

f) Spent

g) Costs of this application are provided for

2. The motion is predicated on nine grounds on the face of the application namely:

a) *This Court granted an injunction in favour of the plaintiff in April 2016 on grounds that there was a valid lease in his favour;*

b) *The plaintiff has failed to pay rent or mesne profits "agreed" in the lease, yet he continues to enjoy an injunction which under rules of Court has lapsed;*

c) *It is an abuse of Court process to obtain an injunction to prevent an eviction from a business premises, but fail to honour the very foundation of the lease and the injunction;*

d) *The plaintiff has of April 2016 was in arrears of mesne profits for four (4) months amounting to Kshs.200,000.00 made up as follows:*

Particulars

i. 4 months deposit due on 1/1/2015 when the tenant took possession.....300,000

ii. January – April 2016 at Kshs.50,000.00 per month.....200,000

iii. Balance of deposit and mesne profits due.....500,000

e) The plaintiff has made six remittances on

4/5/2016Kshs.50,000)

6/5/2016Kshs.50,000);

11/5/2016Kshs.50,000

16/8/2016.....Kshs.100,000

7/9/2016Kshs.100,000

27/9/2016Kshs.50,000 ,

to cover rebated rent or mesne profits for January to august 2016 at Kshs.50,000 per month.

f) The defendant gave a notice on 21.4.2016 notifying the plaintiff of the default and intimating that the tenancy would be terminated effective 31/7/2016 on account of default in payment of rent/mesne profits. By the time the notice took effect the plaintiff was in arrears;

g) That in the circumstances, it is only fair to apply to amend the statement of defence to include the new cause of action which has accrued to the defendant and to facilitate the hearing of the prayers in the application;

h) That the plaintiff cannot have his cake and eat it,

i) The plaintiff's conduct is intended to financially emasculate the defendant which is both inequitable, in bad faith and a basis for discharge of the equitable injunction granted earlier.

3. The application was also supported by an affidavit sworn by Miracle Core Kidemu on 4th November 2016 in which she deposes that the plaintiff obtained an injunction on 13th April 2016 and has not paid rent on time or at all for the premises he occupies and is in arrears of Kshs.450,000 as shown in the proposed amended statement of defence and counter-claim. She deposes that in April 2016, the defendant company resolved to serve a notice terminating the plaintiff's tenancy with effect from 31st July 2016 and the notice was duly served on the plaintiff and his advocates. She further deposes that given the nature of activities into which the plaintiff has put the demised premises, there is need to amend the defence to include a counter-claim. According to the defendant, the plaintiff is abusing the Court process by default on his obligations merely because he is aware that there is an injunction in place, and the defendant cannot attach or levy distress as the plaintiff has no attachable property in the demised premises. It is the defendant's contention that the plaintiff cannot hide behind the injunction so as not to perform his tenancy obligations.

4. There was no opposition to the application. The plaintiff's advocates were served with Notice of Motion on 9th November 2016 but did not file any response nor attend Court during the hearing of the application. In his submissions, Mr. Kabugu, counsel for the defendant reiterated the grounds on the face of the application as well as the contents of the supporting affidavit. The learned counsel submitted that the Court has wide discretion to grant the order for amendment where justice of a case requires. On prayer 3 of the motion, counsel submitted that the plaintiff who is the holder of the order of injunction is abusing the same by continuing being in possession of the defendant's property without paying rent. It was his submission that the plaintiff is using the said order to deny the defendant its rights. He further submitted that since the order was made, the plaintiff has taken no steps to set down the suit for hearing and has deliberately delayed the finalization of the matter. It was his submissions that the Court has unfettered and wide powers to grant the orders sought.

5. I have carefully considered the application herein, I will deal first with the prayer seeking the discharge of the injunction order issued by the Court on 13th April 2016. Order 40 Rule 7 of the Civil Procedure Rules provides that any order for an injunction may be discharged or varied or set aside by the Court on application made thereto by any party dissatisfied by such order. It is also settled law that an interlocutory injunction may be set aside or discharged if it has been obtained by means of misrepresentation or concealment of material facts. In the case of **REEF BUILDING SYSTEMS LTD –VS- NAIROBI CITY COUNCIL NAIROBI HCCC NO.1357 OF 2001 (UR) , Ringera, J** (as he then was) set out the circumstances under which a Court may exercise its discretion to discharge and/or set aside an order of injunction and held that the same may be discharged or set aside.

“ a) If it is shown that the order was irregularly obtained; or

b) There was a subsequent change in circumstance that it was unjust to maintain it in force or

c) Is otherwise unjust and inequitable to let the order remain.”

6. In the instant case, the Court, after granting each party an opportunity to present its case made a ruling and granted the order of injunction. The issues then as now involved the occupation of the suit premise by the plaintiff. In the previous application, the defendant impugned the alleged tenancy between the parties but in the present application it alleges that the plaintiff is not paying rent or mesne profits.

In my view, the order of injunction was issued regularly both parties having presented their respective arguments before the order was made on merit. I am equally not persuaded that the circumstances have changed to warrant the discharge or setting aside of the orders issued by the Court on the 13th April 2016. I therefore decline to discharge the same.

7. I now turn to the prayer for leave to amend. The applicant is seeking leave to amend its defence to include a counter-claim. The general power to amend pleadings is donated by section 100 of the Civil Procedure Act and is provided for under Order 8 Rule 5 which reads as follows: -

“5 (1) For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the Court may either of its own or even on the application of any party order any document to be amended in such a matter as it directs and on such terms as to costs or otherwise as are just.

(2) this rule shall not have effect in relation to a judgment or order.”

Similarly, order 8 Rule 3 (5) provides that ***“an amendment may be allowed notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”*** It is clear from the above provisions of the law that the Court has discretionary power to allow amendment of pleadings at any stage before judgment for purposes of determining the real question or issue between the parties, even if the amendment will occasion adding a new cause of action. That discretionary power must, however be exercised judiciously and not whimsically. In this application, the defendants seek to amend its defence in order to include a counter-claim for mesne profit and vacant possession. In my view the amendment will advance the cause of justice and will give the Court the opportunity to determine all the questions between the parties herein. The defendant has indicated that it has issued notice to the plaintiff to determine the tenancy and that the plaintiff is in rent arrears. It is only through the proposed amendment that those issues can adequately be ventilated.

8. According, I exercise my discretion and allow prayer 2 of the defendant's application and grant it leave of 14 days from the date of this ruling to file an amended statement of defence.

In the circumstances, the defendant's application only partially succeeds.

Costs of this application shall be in the cause.

Delivered, dated and signed at Mombasa this 29th day of June, 2017.

C. YANO

JUDGE