



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC NO. 128 OF 2014

REVITAL HEALTH EPZ LIMITED.....PLAINTIFF

-VERSUS-

ASHTON APPAREL EPZ LIMITED.....DEFENDANT

RULING

1. The application for determination is dated 23rd September 2014 filed by the defendant. The motion is brought under sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Order 51 rule 1 of the Civil Rules and sections 13 (7) and 19 (2) of the ELC Act of 2011. The defendant/applicant seeks the following orders :-

1. That this Honourable Court be pleased to order that the Plaintiff to give up vacant possession of the suit premises forthwith.

2. That this Honourable Court be pleased to order that the Plaintiff dated 22nd December, 2011 and the Reply of Defence to Counterclaim dated 5th March, 2012 be struck out with costs and the Counterclaim dated 31st January 2012 do proceed to Formal Proof.

3. That the costs of this Application be awarded to the Defendant.

2. The application is premised on the grounds on the face of it and the affidavit sworn by Pankay Mehta on behalf of the defendant/applicant. Mr Mehta deposes the plaintiff/respondent is in breach of Court orders issued in this matter. He deposed further that the defendant's lease with Mvita Industrial Park Ltd expired and was ordered to vacate the premises on or before 31.5.2014. The said Mvita Park Ltd has served them with a demand notice and the only reason they are still in the premises is because of the Court order. Further the plaintiff in this matter is in no hurry to set down this suit for hearing yet the defendant need this premises for occupation in the event the Court does not vary its order in HCC 132 of 2010. He urged the Court to allow the application.

3. The application is opposed by the plaintiff vide replying affidavit sworn by Director/Chairman Board of directors. In this affidavit, the deponent avers that the orders sought herein are final as they are the same orders prayed for in the counter-claim. He deposed that the pleadings disclose several triable issues and thus motion filed is mischievous. The respondent deposed

further that this suit was not set down for hearing because of the compliance with the Chief Justice practice directions that it be transferred to the ELC division. Subsequently on transfer, they list it for mention for fixing a hearing date but the Presiding Judge directed that dates be taken from the registry. This plaintiff deposes that it is ready to fix this matter for hearing once all – pretrial formalities have been complied with. The respondent confirmed that it has been remitting rent as ordered by the Court and is only unsure on the interpretations of the order on interest but it shall be willing to secure the amount of US & 4155.20 claimed by the defendant as interest.

4. The plaintiff/respondents argues that the order of the Court dated 11.4.2014 did not entitle the defendant to vacant possession in case of default. That to allow what the applicant is seeking would contravene the plaintiff's right to be heard and to a fair trial and this Court is enjoined by the Constitution to do substantive justice between the parties. He urged the Court to disallow the application and asked this Court to refer to its previous affidavits on record on payments made towards the amount due for rent to the defendant.
5. The parties argued the application by filing of written submissions. The defendant/applicant submitted that the application is grounded on the overriding objective which is to facilitate the just and expeditious resolution of this matter. In relying on section 13 (7) and 19 (2), the applicant submits this Court has power to order an interim relief particularly that of restitution equated to vacant possession. According to the applicant, the Court sitting and delivering its ruling of 11.4.2011 did not dismiss the suit because the defendant counter-claimed for mesne profits until delivery of possession. Further that the plaintiff failed to pay a sum of USD 4155.20 as interest ordered by the Court and demanded by the defendant. The applicant denied it is seeking a final relief and urged the Court to exercise its inherent powers for the ends of justice and allow the application.
6. The plaintiff/respondent submitted that the application seeks an order to compel them to give vacant possession and the plaint dated 23.12.2011 and reply to defence and counter-claim dated 5.3.12 be struck out and the defendant be permitted to proceed with formal proof on its counter-claim dated 31.1.2012. He submits that the defendant acknowledges that the only relief sought in the counter-claim is an order for vacant possession. He analysed the import of the ruling of 11.4.2014 which is in force and remains binding on both parties. The respondent also pointed out that the applicant chose not to invoke the specific provisions of Order 2 of the Civil Procedure Rules which touches on striking out of pleadings/suits. The respondent submits that unless the applicant demonstrates that this suit is scandalous or vexatious or an abuse of the process of this Court, it is not entitled to this Court's discretion to be exercised in his favour.
7. The respondent then submitted on instances when a suit can be summarily dismissed and supporting their submission with relevant case law to wit
 - **D.T. Dobie (K) Ltd vs Joseph Mbaria Muchina (1980) eKLR**
 - **Wedlock Malonsey & Others (1965) 1 W. L. R 1238**
 - **Nancy Mwangi vs Airtel Networks (K) Ltd (2014) eKLR**

As regards fixing the matter for hearing, the respondent reiterated the explanation given in the replying affidavit. He urged the Court to dismiss the application.

8. In the plaint dated 23rd December 2011, the plaintiff had sought several prayers inter alia specific performance entitling him to an option to renew its tenancy for a further period of five (5) years

and one (1) month from 1st March 2012. He also prayed for damages arising out of interruption caused by the defendant's unlawful and wrongful conduct. In the counter-claim, the defendant sought for vacant possession of the suit premises and mesne profits at the rate of USD 10,000 from 1.1.2012 until the date of delivery of vacant possession. The application seeks for the relief of vacant possession and thereafter the matter be listed for formal proof once the plaint is struck out. The reasons the applicant relied on to support his application were the overriding principles and the provisions of article 159 of the Constitution as regards to timeous and expeditious disposal of disputes. He also relied on the fact that the plaintiff had failed to pay interest and have the matter fixed for hearing as was ordered in the ruling of 11.4.2014.

9. I have analysed the issues raised in the application and the responses thereto. The applicant's prayers clearly show he is seeking for prayers to strike out the pleadings brought by the plaintiff. These are the exact words in prayer 2

“... the plaint dated 22nd December 2011 and reply to defence and defence to counter – claim dated 5th March 2012 be struck out with costs and the counter – claim do proceed to formal proof.”

The applicant must first and foremost lay a basis why he wanted the plaintiff's suit struck out. In the grounds on the face of the motion and the supporting affidavit it only pleaded the fact that the plaintiff was in breach of the ruling of the Court. The submissions did not also discuss the grounds upon which a suit can be struck out. The principles for striking out suits are set under Order 2 rule 15 of the Civil Procedure Rules and the application does not state the plaint sought to be struck out offends any of these principles.

10. Secondly, if I were to rely on the ground of breach of the ruling of 11.4.2014. The Judge dismissed the application for injunction and directed the plaintiff to set down the suit for hearing within the next 30 days. The Judge also ordered that as a condition for hearing, the plaintiff shall deposit with the defendant an amount equivalent of the rent of the last month of the lease, payable with interest at 12% per annum. In the ruling, the Judge did not add a default clause in the event the plaintiff failed to comply with the terms set out in the ruling. The defendant never appealed this ruling and he has not stated that the plaintiff is not paying rents. The present application as presented has not sought the interpretation of this ruling on the question of interest. It does seek independent prayers that I find completely not interlinked to the orders of the learned Judge in his ruling.
11. In any event, the respondent has given an explanation why the suit has not been set down for hearing. The ruling was delivered on 11th April 2014, the plaintiff fixed the matter for directions. On the 3rd July 2014, the matter was certified as ready for hearing and parties were directed to fix hearing dates from the registry. This explanation given by the respondent was not contested by the applicant. The wise and proper step the applicant ought to have done is to set the suit down for hearing instead of bringing the present application as he also had a suit in the counter-claim.
12. In summary, I find that the reasons given by the applicant do not support the grant for the prayers sought. I therefore find the notice of motion dated 23.9.2014 as without merit and dismiss it with costs to the plaintiff. I direct parties to fix this matter for hearing of the main suit.

Ruling dated and signed in Mombasa this 4th day of November 2015

A. OMOLLO

JUDGE

Ruling delivered in Mombasa this 11th day of November, 2015

O. ANGOTE

JUDGE



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