



Case Number:	Civil Case 824 of 2006
Date Delivered:	15 May 2007
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	John Luka Osiemo
Citation:	DUBOW JELLE IBRAHIM v GRACE WANJIKU KABUI & ANOTHER [2007] eKLR
Advocates:	-
Case Summary:	<p>[Ruling] Civil Practice and Procedure –affidavit-application for the court to order attendance of deponent for cross examination- application by the plaintiff on the ground that the 1st defendant had no proprietary right in the suit property- where the issue was for court to determine the rent payable and also whether the plaintiff should be allowed to continue occupying the suit premises without paying rent –where there was an affidavit sworn by 1st defendant which was not disputed-purpose of an affidavit- where facts are not disputed there is no need to call the deponent for cross examination –where the issue raised was purely a point of law-whether the plaintiff could be allowed to raise issues in that respect at that stage having not filed a replying affidavit to oppose the facts deponed in the 1st defendant’s affidavit-Order 18 Rule 2 (1), Order 39 rule 4 and Order 50 rule 16 of the Civil Procedure Rules</p>
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-

History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

DUBOW JELLE IBRAHIM.....PLAINTIFF

VERSUS

GRACE WANJIKU KABUI.....1ST DEFENDANT

MACHARIA KABUI (Sued as the administrators

of the estate of MR. KABUI KIGERA).....2ND DEFENDANT

RULING

The deceased Kabui Kigera was the registered proprietor of the suit property known as LR NO.36/11/1 Eastleigh Section II Nairobi. The Defendant's Grace Wanjiku Kabui and Macharia Kabui, widow and son respectively were appointed as joint administrators of the estate of the deceased.

By a Lease Agreement dated 16th January 2004 Grace Kabui and Macharia Kabui leased the suit property LR NO. 36/7/409 to the Plaintiff Dubow Jelle Ibrahim for 5 years and 6 months commencing from 1st November 2003 and the rent payable in the following terms:

(a) For the first two years commencing from 1st November 2003 to 31st October 2005 the monthly rent payable was Shs.300,000/=.

(b) For the second two years commencing from 1st November 2005 to 31st October 2007 the monthly rent payable was Sh.345,000/=.

(c) For the remainder of the said term commencing 1st November 2007 to 30th April 2009 the monthly rent payable was Shs.396,750/=.

The lease was renewable for a further similar term on application by the tenant and the landlord reserved the liberty to reject such an application without giving any reason whatsoever. But the lease could only be terminated in the event of default. The 1st Defendant also assured the Plaintiff that in the event of the sale of the property he could be given the first option to buy.

But to his surprise the Plaintiff learned that the Defendants had on 14th September 2005 entered into a Sale Agreement with third parties for the sale of the property for Shs.45 million. He avers that the Defendants have been constantly harassing him and have severally sent strangers to collect rent and all hell bent to evict him from the suit premises.

The Plaintiff brought this suit seeking orders for a permanent injunction restraining the Defendants jointly and severally, by themselves, their agents, servants and/or employees from interfering with or in any way disturbing the Plaintiff's peaceful and quiet possession and occupation of the suit property until the expiry of the lease dated 16th January 2004 over the said property; A declaration that the Sale Agreement dated 14th September 2005 for the sale of the suit property was null and void ab initio on the basis that the 1st and 2nd Defendants had no legal capacity to the sell the suit property and pass good title and order of revocation and/or cancellation of any transfer of the suit property registered in favour of any party on the basis of the Sale Agreement dated 14th September 2005 among others.

Simultaneously with the plaint he brought a Chamber Summons under Certificate of Urgency seeking orders 1 to 12 as stated on the body of the Chamber Summons dated 27th July 2006.

The applicant appeared before the Duty Judge on 28th July 2006 who certified the application urgent and granted a temporary injunction for 14 days in terms of Prayer 2 of the application dated 27th July 2006 on condition that an undertaking as to damages is filed by the Applicant by 31st July 2006 and Prayer 4 was allowed pending inter partes hearing and determination. The Judge also ordered that service be effected on the Respondent and the application to be heard inter partes on 7th August 2006.

When application came up for hearing on 7th August 2006 the parties agreed to take the matter out of the hearing list to enable the Respondent to put in a replying affidavit. The matter was stood over to 26th September 2006 for inter partes hearing.

The order was extracted in the following terms:

ORDER

Upon reading the application presented to this court on 27th July 2006 by the counsel for the Plaintiff under Order XXXIX Rule 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, and all other enabling provisions of the law AND UPON READING the affidavit of DUBOW JELLE IBRAHIM sworn on 27th July 2006 and the annexures thereto AND UPON HEARING counsel for the Plaintiff/Applicant.

IT IS ORDERED

1. That this application be certified urgent.
2. That an injunction be and is hereby issued restraining the Defendants jointly and severally, whether by themselves, their agents, managers, servants and/or employees from evicting, interfering, meddling, disturbing the Plaintiff's peaceful and quiet possession, and occupation of the suit premises or interfering with the same in whatsoever manner all that property known as LR NO. 36/VII/409 for 14 days on condition that an undertaking as to damages is filed by the Applicant by 31st July 2006.
3. That an injunction be and is hereby issued restraining the Defendants jointly and severally whether by themselves or their employees from compelling or forcing the Plaintiff to pay rent due to them to any other party or person other than his lawful landlords, the Defendants herein pending the inter partes hearing and determination.
4. That this application be served for interpartes hearing on 7th August 2006.

When the matter came up for hearing interpartes on 7th August 2006 the parties agreed by consent to take the matter out of the hearing list to enable the Defendant to file a replying affidavit. The application was stood over to 26th September 2006 for interpartes hearing and the court extended the interim orders.

On 26th September 2006 the matter could not proceed because it was brought to the courts attention that the suit property had been transferred to a Third Party MABACHA INVESTMENT LTD pendent lite and it was agreed by consent that Mabacha Investment now represented by Mr. Owino be joined as a 3rd Defendant. It was further agreed that the 3rd Defendant do file and serve its papers by 29th September 2006 and reply to defence so filed if any to be filed by 4th October 2006 and the matter to be heard on 18th October 2006.

Immediately thereafter Mr. Ahmednasir counsel for the applicant applied for the extension of the interim orders which application was opposed but the court overruled the objection.

On 16th November 2006 when the matter came up for hearing, Mr. Owino counsel for the 3rd Defendant applied for adjournment on the ground that the status of the suit property had changed and that the same is now registered in the name of Mabacha Investments Ltd, the 3rd Defendant and sought leave to file a further affidavit to reflect the true status of the suit property. He further submitted that the new development has changed the character of the pleadings in that the parties sought to be enjoined had ceased to be the proprietors of the suit property. Mr. Machira counsel for the 1st and 2nd Defendants concurred with Mr. Owino but Mr. Ahmednasir was opposed to it. In my ruling I allowed the application and ordered that Mr. owino do file a further affidavit as prayed and the same to be filed within 7 days from the date of the ruling with leave to the other parties to file a reply if need be.

The matter was stood over to 23rd November 2006 and Mr. Ahmednasir applied that status quo be maintained until further orders of this court and which application was granted as prayed. This triggered fierce opposition from the Defendants which led to the filing of a Notice of Motion on 22nd January 2007 seeking orders that the order made on 6th December 2006 to the effect that the status quo be maintained be discharged, vacated and/or varied and that the Amended Plaintiff dated and file in court on 18th December 2006 be struck out with costs and/or expunged from the record.

The application is based on the ground that :-

1. The Plaintiff has taken unfair advantage of the injunction of this Honourable Court first made on 28th July 2006 and on the basis of which this Honourable Court made the order of status quo on 6th December 2006 as he has refused to pay the monthly rent and he is now in arrears of rent of Shs.1,675,000/=.

2. The Amended Plaintiff dated and filed on 18th December 2006 was filed after the pleadings had been closed and no leave of the court was sought and obtained.

The application is also supported by an affidavit sworn by GRACE WANJIKU KABUI on 22nd January 2007.

The application is opposed by the Respondent who has filed the following grounds of opposition inter alia

That the application is useless in Law and in fact bad and has no basis whatsoever being frivolous and vexatious to the extreme, solely filed to annoy. The Chamber Summons dated 27th July 2006 was filed under certificate of urgency. It contained 12 prayers. When the Applicant appeared before the Duty Judge on 28th July 2006, the application was certified urgent and the Duty Judge granted prayers 2 and 4. Our main concern in this application is prayer 4 in which the applicant sought the following order.

That the Honourable Court be pleased to issue an injunction restraining the Defendants jointly and severally whether by themselves, or their agents, servants, managers or employees from compelling or forcing the Plaintiff to pay the rent due to them, to any other or person, other than his lawful landlord the defendant herein pending the hearing and final determination of the application herein. The Plaintiff extracted the orders in the following terms.:

IT IS ORDERED

- 1.
- 2.

3. That an injunction be and is hereby issued restraining the Defendants jointly and severally whether by themselves, their agents, managers, servants and/or employees from compelling or forcing the Plaintiff to pay the rent due to them, to any other party or person other than his lawful landlords, the Defendants herein pending inter partes hearing and determination of the application.

My interpretation of this order is that the Plaintiff should not be compelled or forced to pay the rent due to the Defendants to any other person but should continue to pay rent whenever due to the lawful landlords who are the Defendants.

These were the orders that were granted ex parte and were extended from time to time and they were the orders that comprised the status quo ordered by this court on 6th December 2006.

If the Plaintiff failed to pay the rent to the Defendants herein Grace Wanjiku Kabui and Macharia Kabui then he acted contrary to the order which he himself sought and was granted. The order so granted was so clear and it has no ambiguity that will require interpretation by the court. Having made such a finding I order that the Plaintiff do pay to the 1st and 2nd Defendants any rent outstanding accordingly.

Now I turn to the issue of the order sought to strike out and or expunge the Plaintiff's Amended Plaint filed in court on 18th December 2007 allegedly without leave of the court.

Initially the Plaintiff had sued the 1st and 2nd Defendants seeking injunctive orders against them. But on 26th September 2006 the court was informed of the new development which had emerged. The suit property had been transferred to a third party MABACHA INVESTMENTS LTD pendente lite who had applied to be joined as a 3rd Defendant in these proceedings.

Both parties recorded a consent order on 26th September 2006 that MABACHA INVESTMENTS LTD be joined as the 3rd Defendant and to file and serve its papers within the next three days and reply to the defence if any. On 16th November 2006, Mr. Owino counsel for the 3rd Defendant applied for adjournment and at the same time sought leave to put in his pleadings.

As a rule relief not founded on the pleadings will not be given. Cases must be decided on issues on record, and if it is desired to raise other issues they must be placed on record by amendment.

The introduction of MABACHA INVESTMENTS LTD as the 3rd Defendant obviously changed the character of the pleadings and in my ruling of 16th November 2006 I granted leave to the Plaintiff as well as the 1st and 2nd Defendants to amend their pleadings.

The amendment of the Plaint by the Plaintiff dated 16th December 2006 and filed on 18th December 2006 was with the leave of the court as shown above.

It is ordered that the Plaintiff do pay any outstanding rent to the 1st and 2nd Defendants. Costs in the cause.

Dated and delivered at Nairobi this 15th day of May, 2007.

J.L.A. OSIEMO



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](http://kenyalaw.org) under a [Creative Commons](http://creativecommons.org/licenses/by/4.0/)

[Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions.
Read our [Privacy Policy](#) | [Disclaimer](#)