



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 129 OF 2014

ZULMAC INSURANCE BROKERS LTD.....APPELLANT/APPLICANT

VERSUS

FELDA KARAFI MAKUNGU.....RESPONDENT

(Appeal arising from the decision of Hon R. Rading - Resident Magistrate in Kakamega CM Civil Case No. 328 of 2014)

RULING

1. The application under consideration is the Notice of Motion dated 05/11/2014 which seeks the following orders:-

(a) That this application be certified extremely urgent and its service be dispensed with in the first instance.

(b) That the honourable court be pleased to issue temporary and/or interim orders of stay of execution of the orders made on 9/10/2014 by Hon. W. Rading Resident Magistrate in Kakamega CM CC No. 328 of 2014 pending the hearing of this application inter parties.

(c) That the honourable court be pleased to issue orders of stay of execution and/or proceedings in Kakamega CMCC No. 328 of 2014 pending the hearing and determination of the appeal herein.

(d) That the costs of this application be in the cause.

2. It is supported by the Affidavits of the Applicant sworn on 05/11/2014 and 26/11/2014 respectively.

3. It is opposed by the Respondent who filed her Replying Affidavit sworn on 12/11/2014.

4. The application was canvassed by way of oral submissions where both parties tendered submissions in support of their respective positions. I will however not reproduce the said submissions in this ruling but will definitely lend them reference.

5. In an application for stay of execution pending appeal, an Applicant ought to satisfy the Court that it has complied with the requirements of Order 42 Rule 6 of the Civil Procedure Rules. These requirements are as follows: -

(a) That the Applicant stands to suffer substantial loss if no orders are granted,

(b) That the Applicant is not guilty of inordinate delay.

(c) That the Applicant has furnished security which may be called upon by the Court for the due performance of any such orders of the court.

I will deal with each of the independently in light of the application at hand.

6. **On the issue of substantial loss**, it is not in dispute that the Applicant entered into an Agreement to Lease with the Respondent in respect to the Respondent's premises on 01/05/2005 for a period of 4 years. The period ended in May 2009. Upon the affluxion of time thereof the Applicant did not vacate the premises and neither did it renew the said Agreement. Instead the Applicant continued staying in the premises as a tenant just as before. The Applicant's said stay was however characterized with very erratic and uncoordinated mode of paying rent. There is ample evidence on record to that effect. Needless to say, a sustained breach of the term requiring the payment of rent can effectively bring such an occupation to an end. In order to reduce the relationship with the Applicant into writing, the Respondent prepared and forwarded a Tenancy Agreement dated 01/08/2014 to the Applicant. The Applicant did not execute the said Agreement until much later and long after the Respondent had entered into another Tenancy Agreement with a third party over the said premises. However the Applicant was still in occupation of the premises and the Respondent needed to hand over the premises to the third party who had even paid rent in advance for a period of two years. To that end, the Respondent on 16/08/2014 sent Auctioneers who evicted the Applicant from the premises. The Applicant however managed to return into the premises and proceeded to the Chief Magistrate's Court and instituted Kakamega CMCC No. 238 of 2014 for injunctive orders and other remedies. The application was eventually dismissed and the Applicant given 30 days to voluntarily vacate the premises or to face an eviction.

7. That decision prompted the filing of this appeal and subsequently the application under consideration. I have carefully perused the application made in the lower Court, the resultant decision and the application before me.

8. Under the Agreement to Lease, the premises in issue was to be used for purposes of a shop only and any other use was to be sanctioned to by the Respondent or her contracted Agents in writing. The Applicant carries on the business of provision of insurance brokerage services. May we pose here and ask ourselves this question: **Was the relationship between the Applicant and the Respondent in anyway protected by the law?**

The preamble to the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301** of the Laws of Kenya, (hereinafter referred to as "**the Act**") states as follows:-

"An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto."

Section 2 of the Act defines a "**shop**" to mean:-

"Premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth."

Looking at the clause on '**demise**' in the Agreement to Lease and from the above definition of a shop, it is without any doubt that the Applicant was and remains in occupation of a shop.

But does that occupation of a shop entitle the Applicant the protection of the Act?

Section 2 provides the following an "**controlled tenancy**": -

“controlled tenancy” means a tenancy of a shop, hotel, a catering establishment-

(a) which has not been rendered into writing; or

(b) which has been reduced into writing and which-

(i) is for a period not exceeding five years; or

(ii)

(iii)

9. It is therefore a fact that the tenancy created by the Agreement for Lease for 4 years resulted into a controlled tenancy. Consequently, the resultant tenancy which to date has not been reduced into writing is a controlled tenancy in law. In other words the relationship between the parties herein squarely falls under the Act.

10. Section 4 of the Act provides for termination of and the alteration of terms and conditions in controlled tenancies. Section 4(1) and (2) of the Act provides as follows: -

“4(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provision of this Act.

(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

11. **Section 6** of the Act requires the receiving party of the notice if he does not agree to comply with the tenancy notice aforesaid and before the date upon which such notice is to take effect refer the matter to a Tribunal whereupon the said notice shall be of no effect until and subject to the determination of the reference to the Tribunal. One of the grounds upon which a landlord may seek the termination of a tenancy is provided under section 7(1) (b) of the Act as follows: -

“(b) that the tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due and payable;”

12. **But how did the Respondent attempt to terminate the tenancy with the Applicant?** From the record it is revealed that when the Respondent entered into a Tenancy Agreement with a third party she sent in Auctioneers who threw the Applicant out of the premises but the Applicant managed to return into the premises and rushed to Court for injunctive orders.

Having established that the Applicant enjoyed a controlled tenancy then such tenancy could only be terminated as per the Act provides. But that was not the case as the Respondent wanted an immediate and abrupt termination of the tenancy and yielding of vacant possession of the premises.

13. The Applicant had carried out its business in the premises for around 9 years and by the Respondent bringing that business to an abrupt and immediate halt despite being contrary to law would definitely have an adverse effect on the Applicant’s goodwill on the business. That goodwill stood to be wasted or lost alongside the business being exposed to suits arising out of possible breach of contracts with its clients given the nature of business the Applicant is engaged in, the provision of insurance brokerage services. To this extent, the Applicant would suffer substantial loss.

14. **On the issue of delay**, the record reveals that the appeal was filed within time and the application

under consideration filed within 30 days of the ruling appealed against. Taking into account the process of filing an appeal including advising the client and receipt of instructions thereto, the said period cannot be termed as delay which is inordinate. However, had the Applicant taken more provocative step, it could have filed the application much earlier.

15. **On the issue of security**, the Applicant has not offered any but states that it is willing to abide by any condition that this Court may impose being prerequisite to the grant of the orders. The Applicant is a tenant who has not been keen to honour its obligations towards rental payments on one hand and on the other hand the Respondent is suffering loss whereas her property is being utilized. I wish to say here that it is not sufficient for a party to only so allege its willingness to abide by the Orders of the Court but an Applicant must go further and offer such security, the sufficiency thereof being another issue altogether.

16. From the above analysis, this Court therefore makes the following final Orders: -

(a) There be a stay of execution and/or proceedings in Kakamega CMCC No. 328 of 2014 pending the hearing and determination of this appeal.

(b) The Applicant shall pay all the rent arrears upto February 2015 in full to the Respondent herein within the next 15 days of the date hereof and shall continue paying the rent as and when the same falls due and in default thereof the stay orders granted in (a) above shall stand discharged and the Notice of Motion dated 05/11/2014 deemed dismissed with costs.

(c) The Applicant shall file the Record of Appeal within 30 days of the date hereof and list the appeal for directions within 60 days of the date hereof.

(d) Costs of the application shall be in the main appeal.

DATED AND SIGNED AT KAKAMEGA THIS 17TH DAY OF FEBRUARY 2015.

A. C. MRIMA

JUDGE

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 19TH DAY OF FEBRUARY 2015.

RUTH N. SITATI

JUDGE