



REPUBLIC OF KENYA

IN THE HIGH OF KENY AT MERU

ELC NO. 162 OF 2013

ELIZABETH MWARI MAINGI.....PLAINTIFF

VERSUS

LUCY KANYUA MUTUNGI.....DEFENDANT

RULING

This ruling concerns an application filed by the plaintiff and dated 24th June, 2013 and a Preliminary Objection filed by the defendant dated 5th July, 2013. The plaintiff's application seeks orders:

1. **That** this application be certified urgent and this Honourable be pleased to hear the same ex-parte in the first instance.
2. **That** this Honourable be pleased to issue an order of injunction to restrain the Defendant, her servants, workmen, licensees, agents or any other persons acting on her own behalf or on behalf of the defendant from howsoever trespassing, entering, encroaching, remaining in, taking over, dispossessing, alienating, reclaiming, and or harassing the plaintiff or interfering with her peaceful entitlement and possession of the shop Number B facing Njuri Ncheke Street in L. R. NO. Meru Municipality Block 11/96 pending the hearing of this Application interpartes.
3. **That** pending the hearing of this application interpartes, this Honourable be pleased to order the subject premises being the shop Number B facing Njuri Ncheke Street in **L.R. NO. MERU MUNICIPALITY BLOCK 11/96** be closed.
4. **That** this Honourable be pleased to issue an Order of injunction to restrain the Defendant, her servants, workmen, licensees, agents or any other persons acting on her own behalf or on behalf of the defendant from howsoever trespassing, entering, encroaching, remaining in, taking over, dispossessing. Alienating, reclaiming, and or harassing the plaintiff or interfering with her peaceful entitlement and possession of the shop number B facing Njuri Ncheke Street in **L.R. NO. MERU MUNICIPALITY BLOCK 11/96** pending the hearing of this suit.
5. That pending the hearing of this suit, this Honourable be pleased to order the subject premises being the shop Number B facing Njuri Ncheke Street in **L.R. NO. MERU MUNICIPALITY BLOCK 11/96** be closed.
6. **That** this Honourable be pleased to issue an Order of eviction as against the defendant from the shop Number B facing Njuri Ncheke Street in **L.R. NO. MUNICIPALITY BLOCK 11/96**.
7. **That** the OCS – Meru Police station does assist in enforcement of any orders issued herein.
8. **That** the costs of this application be borne by the Defendant.

Before the plaintiff's application could be heard, the Defendant/Respondent raised a Preliminary Objection dated 5th July, 2013. The objection was in the following terms:

1. The Court has no jurisdiction to entertain the same since this is a landlord and tenant issue

- conened (sic) under Cap 301 Laws of Kenya.
2. That the plaintiff has not signed the supporting and verification affidavits and instead have been signed by a 3rd party (stranger) illegally/irregularly.
 3. The application seeks final order (prayer 6) which against (sic) Civil Procedure Act Cap 21 Laws of Kenya.
 4. The plaintiff is not the owner of the suit premises.
 5. There is implied extension of lease thus this application is an abuse of Court process thus prays for this application to be dismissed with costs.

The defendant had filed grounds of opposition dated 5th July, 2013.

By consent, the parties elected to dispose of both applications concurrently.

In his submissions, Mr. Kirimi, on behalf of the plaintiff/applicant stated that the lease agreement of 5 years and 3 months between the plaintiff and the defendant was to expire on 31.5.2013. On 14.1.2013, the plaintiff informed the defendant that the lease would not be renewed. On 7.2.2013, through the firm of Carlpeters Mbaabu & Co, Advocates, the defendant informed the plaintiff that she was not willing to vacate the suit premises. She however, offered autonomously to raise the monthly rent she paid from Kshs.9,000/= to Kshs. 18,000 per month. This offer was declined. On 7.5.2013, the same advocate wrote to the defendant's advocate pleading with the plaintiff to be allowed to stay in the suit premises for sometime as she looked for alternative premises. Again this request was denied and the defendant was informed that the plaintiff would take vacant possession upon expiry of the lease agreement on 31st May, 2013. A reminder dated 25th May, 2013 was sent to the defendant. In this correspondence, the defendant was informed that after 31.5.2013 she would be deemed a trespasser on the plaintiff's premises. The letter by the plaintiff's advocate also warned the defendant not to contrive to obtain a controlled tenant status. It said: "Our client is not interested in any rent from your client after 31st May, 2013 and any attempts to pay any after 31st May, 2013 will not be entertained. Infact our client is verily aware of your client's ill and mis-advised intentions to acquire a protected tenant status and shall not allow that to happen."

Aware that the plaintiff was not willing to renew the lease agreement the defendant rushed to the Business Premises Tribunal. The plaintiff on 20.6.2013 purported to pay to the defendant's bank account an amount of Kshs.18,000/= as rent. According to the plaintiff, this was meant to perpetuate an illegal stay and to abuse the judicial process by attempting to contrive a controlled tenancy. The plaintiff submitted that she had come to this Court to guard against the intended abuse of the judicial process.

Mr. Kirimi, for the plaintiff then addressed the Court concerning the preliminary objection raised by Mr. Ogoti, the defendant's advocate. Regarding the signing of the verifying affidavit by one Patricia Ithau, the plaintiff, submitted that the plaintiff's daughter had authority to do so and in any case there were authorities to the effect that this would not be fatal to this application or to the suit. In any case, according to the plaintiff, the defendant had broken into the premises when the plaintiff was away in India for medical treatment, and the expediency of the situation forced the plaintiff's daughter to take the action she took. It was pointed out that after coming from India, the plaintiff had corrected the position by filing a supplementary affidavit, which had by consent of the parties, been admitted with this Court's leave.

Regarding summary prayers, the plaintiff pointed out that Rule 36 of the Civil Procedure rules embraced the granting of summary prayers. On the question of who owned the suit premises, it was pointed out that a copy of the Certificate of Lease for the suit premises showing the plaintiff was the registered owner of the suit premises had been annexed to the plaintiff's supplementary affidavit.

The plaintiff then submitted that the Preliminary Objection did not raise pure points of law and for that reason should be dismissed.

Mr. Ogoti for the defendant stated that he was relying on the grounds of opposition and on the Preliminary Objection he had filed in Court. He argued that the pronouncement of the termination of the defendant's tenancy was improper and this fact led to the filing of case No.34 of 2013 in the Business

Premises Tribunal by the defendant. As the tribunal is a competent Court created by statute, this suit was incompetent for being subjudice. According to Mr. Ogoti, this Court had no jurisdiction.

Mr. Ogoti further submitted that as the supporting and verifying documents had originally been signed by a stranger, they were incompetent and should be struck out. He also argued that the signatory had been appointed irregularly. He also stated that there were indications that the suit property belonged to one Stephen Nkubitu Maingi and wondered how the plaintiff, not being the owner of the suit premises came in. He further took issue with the prayers for injunction and eviction, which to him were contradictory and which he felt could not be granted before the main suit was heard and determined. He also opined that since the defendant had paid the July, 2013 rent into the plaintiff's bank account, the plaintiff could not have her cake and at the same time eat it.

Mr. Ogoti prayed that his Preliminary Objection be upheld and that the entire suit be struck out with costs.

In reply Mr. Kirimi for the plaintiff reiterated that the defendant's occupation of the suit premises was illegal. He also pointed out that the BPT was filed after expiration of the lease agreement to perpetuate mischief. He prayed that his application be allowed.

I will first of all deal with the Preliminary Objection. This is because if it is upheld this application will stand dismissed. Regarding the 1st ground which is that this Court has no jurisdiction as the subject matter is an issue concerning a Landlord and a Tenant under the Landlord and Tenant (Hotels and Catering Establishments Act), Cap 301, it is necessary to establish whether a Landlord/Tenant relationship subsisted as was envisaged by the Act. This would necessitate calling of evidence. As was stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd V Westend Distributors Ltd (1960) EA 696**: "a preliminary objection can only be raised in a pure point of law, which is argued on the assumption that all the facts pleaded by the other party are correct. It cannot be raised if any fact has to be ascertained, or if which is sought is the exercise of a judicial discretion." In this case the plaintiff claims that there is no controlled tenancy while the defendant argues otherwise.

Regarding the 2nd ground of opposition, I do not wish to dwell on it more than is necessary. This is because, by consent, the parties agreed to have the defect cured through the admission of the ameliorating affidavit of the plaintiff which she swore after her return from India. In any case, the omission would not have been fatal and the plaintiff would have been allowed to cure it.

Regarding ground 3 that the application seeks a final order contrary to the Civil Procedure Rules, I do not find it necessary to take a lot of time on it for two reasons. One, I have found that the Preliminary Objection does not raise a pure point of law in ground one. Two, in proper circumstances, courts have issued mandatory injunctions and summary orders.

Ground 4 unequivocally states that the plaintiff is not the owner of the suit premises. This is not a ground predicated upon a pure point of law. Ownership would need to be proved. I, however, find that the plaintiff has proffered uncontroverted evidence, in the form of a copy of the lease of the suit premises, showing that it is registered in her name.

Regarding ground 5 to the effect that there was an implied extension of the original lease, this is not a pure point of law as the parties would need to tender evidence to prove or disprove their respective assertions.

As the Preliminary Objection does not raise pure points of law, it stands dismissed.

In ground number 7 of his grounds of opposition the defendant has opposed this application on the ground that this Court lacks jurisdiction as the defendant has already filed a suit in the Business Premises Tribunal. It is necessary to deal with this issue first. As Nyarangi, JJA, said in "The MV Lillian S", "Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A

Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

In this matter the plaintiff argues that the relationship between the parties is not a controlled one under Cap 301 whereas the defendant argues otherwise. To decide on these diametrically opposed positions, I find that this Court has jurisdiction.

I delineate the fundamental issues for determination to be the following.

1. Is the relationship between the plaintiff and the defendant a controlled tenancy governed under the Landlord and Tenant (Hotels, Shops and Catering Establishments Act or not?
2. Is the plaintiff entitled to an order of eviction as prayed in the application.

Both parties do not dispute that they had entered into a lease agreement for a term of 5 years and 3 months which expired on 31.5.2013. The defendant has not controverted the plaintiff's averment that the defendant moved out of the premises after the expiry of the lease, handed over vacant possession to the plaintiff as a result of which the plaintiff put in her farm inputs and machinery in the shop and locked it on 6th June, 2013. On 14th June, 2013, the plaintiff left for India. On 15th June, 2013, the defendant broke the locks and doors of the premises and thereafter returned her stock to the suit premises and started operating her business in the premises. A report regarding the defendant's alleged action of breaking into the suit premises and damaging the plaintiff's property was lodged with the police. This version tendered by the plaintiff was not controverted. It was merely submitted for the defendant that she was in possession and that it would be inhuman not to allow her to continue staying in the suit premises.

A plethora of cases has decided this question. The Business Premises Tribunal is a creature of the statute. It can only operate within the ambit circumscribed by statute. In this case, there was a lease of 5 years and 3 months. This fact is not disputed by the defendant. The lease expired and the parties did not enter into another lease agreement. It is not for Courts to foist contractual obligations on parties. In this case, the defendant had the full benefit of the term contained in the lease agreement. To re-emphasize this position, I quote Law, J A in **Bachelors Bakery Ltd V Westlands Security Ltd (Civil Appeal No.2 of 1978)** as follows: “The appellant had the full benefit of the term which it freely negotiated and I agree with the Learned Judge that it was bound to give up possession on expiry of the lease.”

I find that the relationship subsisting between the plaintiff and the defendant is not one of a controlled tenancy. The defendant cannot be allowed to contrive a controlled tenancy by forcefully occupying the suit premises. I find that this is not a matter for the Business Premises Tribunal.

Considering all the circumstances of this application including the existence of a lease whose term was 5 years and 3 months and the egregious manner in which the defendant broke into and moved into the suit premises in a bid to contrive a position of a controlled tenancy, I find that this is a proper case for me to grant the summary order sought in prayer 6 of the plaintiff's application which in my view subsumes the other prayers. I therefore, order as follows:

1. An order of eviction is hereby granted as against the defendant to be evicted from Shop number B facing Njuri Ncheke Street in **L.R. NO. MERU MUNICIPALITY BLOCK 11/96**.
2. The OCS, Meru Police Station to assist in enforcement of the order of eviction granted above.

Dated and Signed this 12th day of August 2013 at Meru

P. M. NJOROGE

JUDGE

Delivered in open Court at Meru on the 14th day of February 2014 in the presence of:

Cc Daniel/Mwonjaru

Nyenyire h/b Kirimi for Respondent

Ogoti for Appellant – Absent

P. M. NJORGE

JUDGE