



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 323 of 2012

MSUMENO LIMITED PLAINTIFF

VERSUS

1. NESCLAY LIMITED

2. ELAM NGASE LUMWAJI

(T/A DOMICILE SERVICES) DEFENDANTS

RULING

1. The Plaintiff was the 1st Defendant's tenant in certain business premises within Nairobi. Whether it was a controlled tenancy under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, or whether there was a written lease that took the tenancy out of the ambit of the said Act, is in contention.

2. The Plaintiff has pleaded at paragraph 7 of its plaint dated 28th June 2011 that on 29th May 2012 it was illegally evicted from the premises by the 2nd Defendant in purported distress for rent upon instructions of the 1st Defendant. The Plaintiff therefor filed the present suit on 29th June 2012 claiming the main relief of an order that the Defendants do restore it into the premises, and also that the Defendants do return to it the distained goods.

3. Together with the plaint the Plaintiff filed **notice of motion dated 28th June 2012** seeking a temporary mandatory injunction for it to be restored into the premises and its distained goods returned to it. That application is the subject of this ruling. It is supported by the affidavit of one **Frederick Alambo** who has described himself as a director of the Plaintiff. The said affidavit is a rehash of all the averments contained in the plaint. There are annexed to the affidavit some documents, including some correspondence between the Plaintiff and the 1st Defendant, which give a history of the dispute between them.

4. The Plaintiff's case, briefly stated, is that it was the 1st Defendant's tenant in the premises from 1987 paying a monthly rent of KShs 5,000/; that in the year 2007 the 1st Defendant attempted to unilaterally increase the monthly rent from KShs 5,000/00 to various other stated sums up to KShs 40,000/00; that the 1st Defendant also refused to accept from the Plaintiff the old rent of KShs 5,000/00 per month; and that the Plaintiff then complained to the **Business Premises Rent Tribunal** which upheld its complaint.

5. The Defendants have opposed the application by two replying affidavits. The 1st affidavit is sworn by one **Eric Nesbit**, a director of the 1st Defendant. The second one is sworn by the 2nd Defendant. The main case of the Defendants is that the Plaintiff was in huge arrears of rent and that the 1st Defendant was entitled to distress for rent. The Plaintiff filed a further affidavit in response.

6. The law pertaining to mandatory injunctions is well settled. In **Volume 24 of Halsbury's Laws of England, 4th Edition, para. 948** it is stated as follows:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff...a mandatory injunction will be granted on an interlocutory application.”

7. In the English case of **Locaball International Finance Ltd -vs- Agroexport and Others (1986) All ER 901** at page 901 it was stated:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases, either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction.”

8. Whatever special circumstances there may have been in this case, the same were negated by the Plaintiff's delay in coming to court. After being **evicted on 29th May 2012** it **did not come to court until 29th June 2012**, a month later. I have anxiously read through the supporting affidavit and the further affidavit filed on 20th July 2012 in response to the replying affidavits. There is no attempt at all to explain why it took the Plaintiff one month to come to court in such a matter.

9. The purpose of a mandatory injunction is to restore the applicant as soon as possible to his position prior to the respondent's action complained of or giving rise to the action. It says a lot of an applicant who delays coming to court for a whole month and offers no explanation at all for the delay.

10. I am not satisfied in present case that there are special circumstances or that the case is so clear as to warrant the mandatory injunction sought. The application is dismissed with costs to the Defendants. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS

23RD DAY OF JANUARY 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2013