



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 32 OF 2011

JOHN RUKENYA KABUGUA.....PLAINTIFF

VERSUS

- 1. DANIEL GITUKU MUINDO (T/A SANNEX AUCTIONEERS)**
- 2. REV DR ELLIUD W WABUKALA**
- 3. REV CANNON ROSEMARY M MBOGO**
- 4. JOHN MUHOHO**
- 5. DR WILLIAM O OGARA**
- 6. THE ANGLICAN CHURCH OF KENYA(ACK).....DEFENDANTS**

R U L I N G

1. The Plaintiff's suit against the Defendants is that he is a month-to-month tenant of the 6th Defendant in the suit business and residential premises. He has pleaded that his tenancies arose after he continued to occupy the premises upon expiry of his employer's tenancies over the same premises. His occupation of the premises was by virtue of his employment. His employer was one ***Ital Shoes (K) Limited***. He was employed by it as a manager. The Plaintiff has further pleaded that his tenancies are protected under the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301**.
2. The Plaintiff's complaint is that upon instructions of the 2nd - 6th Defendants the 1st Defendant levied illegal distress against him for alleged arrears of rent that were not due. His further case is that further distress has been threatened. He has sought in his plaint dated 31st January 2011 various declarations in respect of his tenancies and the distress for rent. He has also sought an appropriate injunction to restrain the Defendants from levying further distress against him, and also general damages.
3. The Defendants filed a joint statement of defence dated 28th February 2011. The 2nd - 6th Defendants' capacity to be sued is denied. The Defendants have also pleaded that the Plaintiff is not the 6th Defendant's tenant at all, the tenant having been the Plaintiff's employer; it is therefore that tenant who held over the premises after the leases expired. The Defendants further aver that the tenant was in huge arrears of rent in purported payment of which it had issued cheques that were dishonoured by its bankers; that the distress complained of was levied against the tenant and not against the Plaintiff; and that the tenant is still in arrears of rent.
4. Together with the plaint, the Plaintiff filed **chamber summons dated 31st January 2011**. He seeks two main orders as follows –
 - i. **That the Defendants by themselves their servants or agents be restrained from howsoever levying distress upon or selling Plaintiff's properties, or evicting the Plaintiff from the residential and office accommodation at Bishop Waqo Flats, and/or**

howsoever terminating the Plaintiff's tenancy thereof or interfering with Plaintiff's possession or use of his office and residential accommodation in Bishop Waqo Flats within Nairobi, or altering terms of the Plaintiff's tenancy to the detriment of the Plaintiff until hearing and determination of this suit.

- ii. **That the Defendants do render a fair and accurate account of moneys received or receivable from the Plaintiff on sale of Plaintiff's properties by the Defendants.**

The application is brought under **Order 40, Rules 1 and 2** of the **Civil Procedure Rules, 2010** (the **Rules**).

5. The grounds for the application as well as the supporting affidavit sworn by the Plaintiff are more or less a reproduction of the Plaintiff's case as pleaded in the plaint.
6. The Defendants have opposed the application by **grounds of opposition dated 25th February 2011** and also by **replying affidavit filed on 2nd March 2011**. The affidavit is sworn by one **George Muhoho Kimani**, the finance director of the 6th Defendant. Grounds of opposition emerging from both documents include –
 - i. That the 6th Defendant is non-suited.
 - ii. That the Plaintiff is not the 6th Defendant's tenant.
 - iii. That the landlord of the premises is **Church Commissioners Properties (K) Limited** and not the 6th Defendant.
- iv. That the alleged tenancies of the Plaintiff cannot be protected tenancies under Cap 301.
- v. That the Plaintiff has not satisfied the requirements for grant of injunctive reliefs.
- vi. That the Plaintiff has not met the conditions imposed by the court when he was granted interim relief as no rent has been paid for many months, and he is therefore undeserving of the equitable relief sought.
7. The application was canvassed by way of written submissions. The Plaintiff's submissions were filed on 4th April 2011 while the Defendants' were filed on 12th May 2011. I have considered those submissions together with the cases cited.
8. The law with regard to temporary injunctions is well established. The Plaintiff must establish –
 - i. That he has a *prima facie* case with probability of success.
 - ii. That he stands to suffer irreparable loss unless the order sought is granted, irreparable being loss that cannot be made good by way of damages.
 - iii. If the court is unable to decide the application upon the two grounds above, then it would decide it on a balance of convenience.

Prima facie case

9. The Plaintiff's occupation of the premises leased out by his employer was by virtue of his employment; it was not independent of his employment as he was not the tenant thereof. So, he could not have held over the premises of which he was not the tenant. Only the tenant could have held over in occupation. There is no evidence before the court that upon determination of the tenancies of **Ital Shoes (K) Limited**, by effluxion of time that the said tenant gave vacant possession of the premises to the landlord. The Plaintiff's continued occupation of the premises therefore could only be an act of holding over by his employer who was the tenant.
10. Secondly, the tenancy agreement exhibited by the Plaintiff himself shows that the landlord was **Church Commissioners (K) Limited**, and not the 6th Defendant. It does appear therefore that the 6th Defendant is non-suited. As for the 2nd – 5th Defendants, since they are sued as alleged

members of the “governing council or committee of the 6th Defendant”, they would also appear to be non-suited.

11. Thirdly, it does appear from the material now before the court that the tenant, ***Ital Shoes (K) Limited***, was in considerable arrears of rent. The Defendants’ stand is that the distress for rent complained of by the Plaintiff was in fact levied against the tenant. The Plaintiff has not placed before the court any evidence that the distrained goods belonged personally to him and not to his employer, Ital Shoes (K) Limited.
12. In all these circumstances, I am not satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success.

Irreparable loss

13. Any distress for rent would involve attachment of moveable properties whose value can be easily quantified. In the event of sale of such movables, compensation for the same, if it became necessary, would be easily met by an award of damages. I am of course alive to the elements of annoyance, harassment, disruption and distress that is normally attendant on distress for rent. Where a tenant is deserving of protection from such, the court would not hesitate to accord such protection.
14. In the present case however, I have observed, *prima facie*, that the Plaintiff was not the tenant and therefore he could not have held over in occupation. I have also observed, again *prima facie*, that the tenant, who is the Plaintiff’s employer, is in considerable arrears of rent. I must also observe that the conditions imposed by the court while granting interim relief appear not to have been met. Those conditions were continued payment of rent as and when it fell due. The Plaintiff, not being the tenant, might feel not obliged to pay the rent!
15. In these circumstances, I am not satisfied that the Plaintiff stands to suffer irreparable loss unless temporary injunction is granted.
16. In the event the chamber summons dated 31st January 2011 is without merit. The same is hereby dismissed with costs to the Defendants. Any interim orders in place are hereby vacated. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF AUGUST 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 29TH DAY OF AUGUST 2013