



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 1004 OF 1997

MUTEMA UUKI WINES & SPIRITS

DISTRIBUTORS LTD.....PLAINTIFF

VERSUS

R & K INVESTMENTS COMPANY LTD LTD.....DEFENDANT

CONSOLIDATED WITH

CIVIL CASE NO. 203 OF 1999

MUTEMA UUKI WINES & SPIRITS

DISTRIBUTORS LTD.....PLAINTIFF

VERSUS

**1. P & K INVESTMENTS COMPANY LTD
2. JOSEPH M GIKONYO**

(t/a GARAM INVESTMENTS)DEFENDANTS

RULING

1. These two suits were consolidated to be heard together by an order entered on 7th March 2001 (Kasanga Mulwa, J) in HCCC No. 1004 of 1997. Before the order of consolidation was made hearing of No. 1004 of 1997 had commenced before the learned Judge, and one witness for the Plaintiff had testified in part. Kasanga Mulwa, J subsequently directed on 21st June 2001 that the case(s) be heard **de novo** before another Judge as he was unable to continue with the trial.
2. Long before the consolidation, the Plaintiff had on 25th April 1997 obtained *ex parte* (Aluoch, J) an order that the parties do maintain the *status quo* until further orders of the Court. Similarly in HCCC No 203 of 1999 in a considered ruling delivered on 18th June 1999 the Court (Etyang', J) granted the Plaintiff temporary injunction pending hearing and determination of the suit to restrain the Defendants from levying distress for rent against it. The Court also granted an order for restitution of the properties attached in the distress.
3. In both suits the Plaintiff was the tenant of the 1st Defendant in the suit premises. Its lease had expired but it claimed that it had held over in possession thus creating a month-to-month tenancy

controlled under the **Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap 301**. The 1st Defendant counterclaimed for vacant possession and *mesne* profits. The 2nd Defendant was the executing auctioneer under instructions from the 1st Defendant.

4. After consolidation of the suits hearing commenced *de novo* before Waki, J on 8th October 2002. The hearing was not completed and the suits remain part-heard. At some point the Plaintiff's suits were dismissed with costs for non-attendance at hearing but the Court (Ochieng, J) subsequently set aside the dismissal order.
5. Then the 1st Defendant filed the application that is the subject of this ruling. It is the **notice of motion dated 28th September 2010**. It seeks two main orders –

- (i) That the *status quo* order given in HCCC No 1004 of 1997 on 25th April 1997 and the temporary injunction given in HCCC No 203 of 1997 on 18th June 1999 be discharged.

- (ii) That if the court is not inclined to discharge the said orders the suits be ordered to proceed to hearing on priority basis.

6. The application is stated to be brought under **Orders XXXIX, rule 1 and XVII, rule 11** of the **Civil Procedure Rules** then in place (the **Rules**). **Sections 63 and 3A** of the **Civil Procedure Act, Cap 21** are also cited. The grounds for the application stated on the face thereof include –

- (i) That the Plaintiff is an ex-tenant of the 1st Defendant whose lease expired in the year 1997.

- ii. That on the strength of the orders now sought to be discharged the Plaintiff has remained in possession of the 1st Defendant's premises without any lease.

- iii. That the Plaintiff does not pay any rent or *mesne* profits and has not been keen to prosecute its suits.

- iv. That there is danger of the Plaintiff subletting the premises.

- v. That the orders sought to be discharged have greatly prejudiced the 1st Defendant.

- vi. That it is fair and just that the orders sought be granted.

7. There is a supporting affidavit sworn by one **Betty Gikonyo**, the managing director of the 1st Defendant. It gives the background and history of the litigation.

8. When the application came up for hearing on 3rd May 2012 the learned counsel for the 2nd Defendant stated that the application did not concern the 2nd Defendant. The learned counsel holding brief for the counsel for the Plaintiff stated that his instructions extended only to seeking another hearing date. Learned counsel for the 1st Defendant then pointed out that no papers had been filed in response to the application, which had been served way back on 6th May 2011. Hearing notice for that day had been served on 28th March 2012. On that basis he opposed any adjournment. In refusing adjournment the Court noted that the application had been served nearly a year ago yet no papers had been filed in response, and that there was no indication that it was intended to oppose the application. The Court held that no useful purpose would be served by the adjournment sought. The 1st Defendant then presented its application *ex parte* through its learned counsel.

9. The Court then reserved its ruling, but because of pressure of work as the Civil Division sorely lacked in Judges because of recent elevations to the **Court of Appeal** and transfers, and the illness of one judge, it was not possible to prepare this ruling earlier. The delay is regretted.

10. On 28th May 2012 the Plaintiff through its learned counsel's letter of the same date addressed to the Court, irregularly filed a replying affidavit. As there was no word from the 1st Defendant's counsel in protest I would not know if the letter and replying affidavit were served upon them. But I have noted the contents of the replying affidavit since it is on the court record.

11. One or two facts are not in dispute in these two cases –

- i. The Plaintiff's formal lease of the premises expired in early 1997 by effluxion of time.
- ii. The Plaintiff did not hand over vacant possession of the premises and claimed to hold over in possession, as a result of which a controlled tenancy under Cap 301 was allegedly created. It seeks a declaration to that effect.
- iii. The 1st Defendant on the other hand has claimed that the Plaintiff was not entitled to continue in possession and should have given up vacant possession of the premises. It has counterclaimed for that with *mesne* profits.

12. This is an unfortunate case. A tenant's interest can never be superior to the landlord's proprietary interest in the premises. A proprietor should never be compelled to lease out to anyone his premises against his will. The Court should always assist a landlord and a tenant whose relationship is no longer tenable to bring that relationship to a just and fair end as soon as possible. Sixteen (16) years is too long a time for such a relationship to continue to fester!

13. The Plaintiff in this case has continued in possession by virtue of the *status quo* order granted *ex parte* on 25th April 1997 in HCCC No 1004 of 1997 and also the temporary injunction granted *inter partes* on 18th June 1999 in HCCC No. 203 of 1999. Those orders, when made, were obviously meet and just in order to allow an expeditious disposal of the suits. Such expedition has been elusive, perhaps not with the fault of any of the parties. But what is now clear is that the said orders are no longer just and they are wreaking undue hardship and injustice to the 1st Defendant.

15. I therefore have no hesitation in allowing the application as prayed in prayer 2 of the notice of motion. The *status quo* order granted in HCCC No 1004 of 1997 on 25th April 1997, and the temporary injunction granted in HCCC No 203 of 1999 on 18th June 1999, are hereby vacated.

16. Costs of this application shall be in the cause. It is ordered.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF SEPTEMBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 5TH DAY OF SEPTEMBER 2013