REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 147 of 2007

DWIJENDRA KUMAR VARMA T/A

RIFKINS BUSINESS COLLEGE…….APPELLANT

VERSUS
THE REGISTERED TRUSTEES OF
NATIONAL UNION OF KENYA MUSLIMS
COAST PROVINCE TRUST FUND……..…....……RESPONDENT

(An Appeal against the Judgment of the Learned Honourable T. Nzioka Resident Magistrate Mombasa delivered on the 30th August, 2007 in CMCC NO. 2328 of 2004)

JUDGEMENT

The Appellant has appealed from the decision of the Learned Honourable Magistrate T. Nzioki Resident Magistrate delivered on 30th August 2007 in CMCC No. 2328 of 2004 where the Appellant was the plaintiff and the Respondent the defendant. In the Memorandum of Appeal dated 10th September 2007 the Appellant contends that the trial magistrate was wrong both in law and fact as set out in grounds 1 to 13 on the face of the Memorandum of Appeal. The Appellant proposes to seek Orders that:

a) The appeal be allowed.

b) THAT part of the judgment or order made on 30th August 2007 dismissing the prayer for injunction be set aside and an order be made granting the Appellant an injunction as sought before the Resident Magistrates Court.

c) The part of the judgment and or order made on 30th August 2007 dismissing the Appellants suit and awarding costs to the Respondent be set aside.

d) The costs of this Appeal and the court below be awarded to the Appellant.

e) Such other or further relief that the court may deem fit to grant.

The Appellant had sued the Respondent in the Resident Magistrates Court seeking an injunction restraining the respondent from levying distress for rent for 4 years from the period June 2003 in respect of the premises rented by the Appellant being Mombasa/Block XXI/43. The plaintiff contended that through an agreement dated 17trh April 2003 the Respondent had agreed to allow the Appellant to occupy the suit premises without paying rent for a period of four years if the Appellant surrendered 5 class rooms on the first floor. That vacant possession was to be given to the Respondent within three months of date

of registration of the agreement. That the agreement was registered on 28th April 2003 and the Appellant gave vacant possession of five class rooms which were leased out to another tenant. That the Respondent reneged on the understanding and demanded rent for the months of March and April 2004, The Appellant sought a declaration that the Respondent was bound by the Agreement dated 17th April 2003 particularly clause 1 and 6 thereof.

The matter was heard before Resident Magistrate T. Nzioka who in a considered judgment delivered on 30th August 2007 dismissed the Appellant's suit. The learned magistrate expressed herself as follows:

"I have listened to the evidence of PW-1 and DW-1, watched the demeanor of the two witnesses and considered the submissions by the learned advocates for the parties. In my view, I do not find any breach of the agreement by the defendant. The plaintiff has failed to perform the provisions of the agreement exhibit no. 5. He has lived on the defendant's premises while carrying his business of school since 17th April 2003 without paying rent. He has failed to construct a single room. In the circumstances I find that the equitable remedy of injunction cannot issue in favour of such party as prayed for in prayer number (a) of the Plaint.

It is my judgment that the plaintiff's suit lacks merit. I dismiss prayer No. a of the plaint. I declare that both the plaintiff and the defendant are bound by all clauses if it meant to carry out the demarcation of the area for the extension. To the contrary the plaintiff was evasive and show lack of interest to perform clause No. 3."

It is this decision that gave rise to the present appeal. The parties filed written submissions which were highlighted before me. The contention of counsel for the Appellant is that the trial magistrate did not properly construe the agreement dated 17th April 2003. The understanding of the parties was that the Appellant would surrender 5 classrooms on the first floor in consideration of the Respondent forbearing to demand rent for a period of four years from the date of obtaining vacant possession of the 5 class rooms. He particularly pointed out clause 1 and 6 of the Agreement.

Counsel for the Respondent supports the decision of the trial magistrate. Counsel submits that the Appellant was seeking equitable relief. He had not done equity. He was in breach of the agreement. That the agreement should be read as a whole and not selectively as proposed by counsel for Appellant. He urged that the appeal be dismissed for lacking merit.

I have perused the written submissions of the Appellant especially page 6 on the interpretation of clause 6 of the Memorandum of Agreement. I have also perused the Memorandum of Agreement produced as P Ex. 5. The contention of the Appellant is that the consideration for vacating five classrooms was a rent waiver for 4 years from the date of handing over possession. If read in isolation this is the impression it gives. But the agreement cannot be read in isolation. It is relevant to set out the relevant provisions of the Memorandum of Agreement:

"Now this Agreement witnesseth as follows:

1. THAT the tenant shall hand over vacant possession of all the five class rooms on the first floor on the opposite side of the corridor fronting the Landlord offices and opposite the reception offices for the tenant, to the Landlord after three months from the date of registration of this agreement.

2. THAT the landlord hereby permits and consents to the extension and construction of class rooms on the roof of the building by the tenant upon the presentation and approval of the building plan by both the Mombasa Municipal Council Engineer and the Land Lord.

3. THAT the extension and construction to be undertaken by the tenant shall be on such an area and/or space as shall be specifically agreed upon and demarcated by both the parties hereto.

4. THAT the tenant shall bear all the costs for the preparation of building plan and approval thereof and for the extension and construction of the new class rooms on the top of the roof of the building.

5. THAT the extension and construction to be undertaken by the tenant shall be done in such a manner as to permit and allow further extension thereof upwards should the landlord in future so consider to carry out further extensions and construction on top of the class.

6. THAT the landlord hereby undertakes not to levy charge and/or demand any rentals from the tenant for a period of (4) years commencing from the date of receiving vacant possession of the aforesaid five classrooms from the tenant.

7. **THAT upon the lapse of the aforesaid four years grace period the tenant shall pay a monthly rent of Kshs. 25,000/= in advance on the 5th day of each beginning month for a period of five years. . ..”**

The landlord was to receive vacant possession from the tenant. What was the consideration moving from the tenant in support of the agreement? This is the gist of the appeal. Is the Memorandum of Agreement ambiguous as to require an elaborate interpretation as contended by counsel for the Appellant. It is important to appreciate that the Respondent was the owner of the premises. As a tenant the Appellant was contractually bound to pay rent for the five classrooms that he was occupying on first floor. The Memorandum of Agreement does not state why the Appellant was surrendering the five classrooms. The agreement must be read as whole to ascertain the intention of the parties. As prudent business men the Respondent desired to have five classrooms on the first floor and the Appellant needed more space in the form of classrooms. The Respondent states he does not have money to build the class rooms now. The Appellant offers to build the class rooms in consideration that he recovers the costs by way of offsetting from the rent that he would have otherwise paid to the Respondent. They took into account the cost of the project and they agreed on a period of four years as sufficient for the Appellant to have recouped costs of the project. They reduced the understanding into writing.

The contention by the Appellant that the surrender of the 5 classrooms was in consideration of rent waiver does not make commercial sense. Case law relied upon does not support the contention put forward. Each case must be considered on the basis of its own facts. Why would a landlord allow a tenant to occupy premises for free for four years? Such an interpretation does not give commercial efficacy to the Agreement. It is unreasonable interpretation that am satisfied the Respondent would not have agreed to. The Agreement if interpreted as contended would mean that the Appellant would stay four years without paying rent and leave without construction and that the Respondent would be contractually helpless to do anything about it. Consideration must be something of value. The value need not be adequate but it must move from the promissor to the promisee. If the Appellant was not paying rent for the 5 class rooms on the first floor, then one would understand that the Respondent was gaining by the surrender of the 5 class rooms and the Appellant was losing. But such is not the contention. The Appellant was a difficult tenant in terms of paying rent. I think this informed the decision to reduce his space so that he could be left with what he can pay. The five class rooms were leased out to another tenant.

I have re-evaluated the evidence of PW-1 and DW-1 and I see no reason to fault the conclusion of the trial Magistrate. The Appellant was clearly in breach of the Agreement. The Agreement was binding on the parties as a whole and not only clauses 1 and 6 as contended. An injunction been an equitable remedy would not issue where a party was clearly at fault and did not come to court with clean hands. The discretion of the trial court was exercised properly. For these reasons I see no merit in the appeal. In addition, I take note that the agreement has lapsed by effluxion of time. The court cannot revive it. That would be the effect of grating the orders sought in the appeal. The Appeal is hereby dismissed with costs to the Respondent. It is so ordered.

Dated AND Signed At Nairobi ON This 24TH Day Of AUGUST 2012.

M. K. IBRAHIM
JUDGE

DATED AND Delivered at Mombasa on this 25TH day of September

2012.

j.w. mwera
JUDGE

Delivered in the presence of:

N/A. Judgment delivered. Parties to collect copies of judgment from the registry.