



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 122 of 2012

COAST BRAKES & CLUTCH LTD.....PLAINTIFF

VERSUS

1. MUSLIM ASSOCIATION MOMBASA

2. MURPHY MEERCHANTS.....DEFENDANTS

Coram:

Mwera J.

Asige for Plaintiff

Magiya for Defendants

Court Clerk Furaha

RULING

The plaintiff company filed a notice of motion dated 22nd June, 2012 under Order 40 rule 4 of Civil Procedure Rules praying:

i) that the defendants be restrained from terminating the protected tenancy enjoyed by the applicant on plot No. MBA/BLOCK/XVI/11.

It was advanced in the grounds that the 2nd defendant had instructions from the 1st defendant to sell the plaintiff's goods. Such move ought to be stopped by an injunction or irreparable loss shall be suffered. That the plaintiff had paid all due rents up to July, 2012 and had applied for extension of time at the relevant tribunal. This latter ground was not readily understood at this stage.

In the supporting affidavit the plaintiff company's director averred that it was a protected tenant under Cap. 301. At a meeting (annexture MFD1) between the subject property supervisor and all tenants including the plaintiff it was passed that the plaintiff pay Shs. 35,000/= rent per month with effect from 1st December, 2011. That agreement could be followed by a formal lease. That pending the preparation of the lease the plaintiff continued to pay the old rents of Shs. 15,000/= per month which the 1st defendant accepted. That it surprised the plaintiff to receive a letter from the 1st defendant's lawyers late May, 2012 to the effect that the notice of 20th September, 2011 was operational and accordingly rent arrears had accumulated to Shs. 70,000/=. That the 1st defendant instructed the 2nd defendant to proclaim and attach the plaintiff's goods on that account. So the plaintiff applied to the Business Premises Rent Tribunal

(BPRT) to file a reference out of time, seemingly as regards the rent increment. The plaintiff termed the imminent distress for rent unlawful and so it ought to be stopped.

On 22nd June, 2012 the applicant was directed to deposit the claimed rent arrears in court and move to fix the hearing of the present application. That was done.

In the replying affidavit sworn by the chairman of the 1st defendant association, it was stated that the plaintiff refused to sign the agreement (for the new rents?) and instead continued to pay the old rent at Shs. 15,000/= instead of the new rate of Shs. 35,000/= per month with effect from 1st December, 2011. Thus the plaintiff had not disclosed all material facts to the court. That by a notice dated 20th November, 2011 the plaintiff was required to pay rent of Shs. 70,000/= per month. The plaintiff did not comply or otherwise file a reference with the Business Premises Rent Tribunal. So the notice took effect and any rent arrears can properly be recovered by way of distress. That the plaintiff did not warrant the injunction. Either side submitted.

In this court's review of the present matter, there appears to be two issues the parties have as regards rent. The first is in respect of the tenants/landlord meeting held on 21st November, 2011 which the plaintiff's representative (Farook Din) attended. It was agreed that the plaintiff do pay new rents @ Shs. 35,000/= per month from 1st December, 2011. Other tenants had their rates stated. It was in the letter referring to that meeting, added that appropriate leases could be signed with M/S Y.S. Ali. The plaintiff instead continued to pay the old rents at Shs. 15,000/= per month. It does not say why it did not go by the agreement at the meeting of 28th October, 2011 to pay Shs. 35,000/=per month. The outcome of that meeting while setting Shs. 35,000/= for the plaintiff, did not allow it to pay the old rents or state that the view rents could only be paid after signing the leases. There was no protest registered or a reference filed. So the plaintiff was obliged and should at this time be paying Shs. 35,000/= per month. And if there is any arrears, they should be regularly recovered. That includes Shs. 70,600/= deposited in court. It should be released to the 1st defendant.

The next issue is the notice dated 20th September, 2011. The plaintiff did not refer to it at any point and that leaves one with a suspicion that it was withholding material facts. Material because that notice was dated 20th September, 2012. Probably that is the one about which an application was made to the Business Premises Rent Tribunal to enlarge time to file a reference. The court can only guess that because as the time extension featured in the grounds, it was not stated on account of what.

Then there is the aspect that the notice dated 20th September, 2011 issued before the meeting of 20th October, 2011 was held. The 1st defendant told the court that that notice was not challenged so it took effect. That could as well be true. However, since the plaintiff did not disclose to the court the existence of that notice to increase rent to Shs. 70,000/= per month and the 1st defendant has not told the court that the distress for rent is in respect of that notice, this court is left to assume that the distress is in respect of rent arrears at Shs. 35,000/= per month with effect from 1st December, 2011 as arrived at at the tenants/landlord meeting of 28th October, 2011. And so it shall be. The court is therefore unable to issue an injunction to stop payment of rents as arrived at on 28th October, 2011 with effect from 1st December, 2011. The plaintiff did not challenge it and yet on its own it decided to pay the old rent which the 1st defendant properly accepted but could still move to recover the arrears. The notice to increase rent dated 20th September, 2011 apparently not being the subject of these proceedings, this court need not comment on it.

In sum, the application before court is dismissed with costs. The 1st defendant is entitled to all rents payable by the plaintiff at Shs. 35,000/= per month with effect from 1st December, 2011.

Delivered on 8th November, 2012.

J. W. MWERA

JUDGE