



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC NO. 632 OF 2010

RAJIV MAINIPLAINTIFF/APPLICANT

V E R S U S

ORGANIX LIMITEDDEFENDANT/RESPONDENT

R U L I N G

It does not appear to be in dispute that the Defendant is the owner of L.R. No. 1870/111/554 on Lower Kabete Road, Nairobi, on which there is a building known as Samar Heights which has a flat No. C42. The Plaintiff agreed to rent the flat for 2 years beginning 1st April 2010 for a monthly rent of KShs. 130,000/= paid quarterly in advance. A deposit of KShs. 130,000/= was agreed to be paid as a deposit to be held by the Defendant for the duration of the tenancy. It was paid on 25th February 2010. Pursuant to the agreement signed on that day, the Plaintiff took possession of the flat about 1st April 2010. It was agreed that a formal lease be drawn by the Plaintiff's advocates and, subject to the execution by the Defendant, be registered. The parties were unable to agree on the terms of the lease and therefore none was executed. On 8th December 2010 the Defendant gave the Plaintiff a notice to vacate ("RM3") on or before 8th January 2011. The notice said that:-

"If you fail to vacate the premises on or before 8th January 2011 we shall take the appropriate legal action at your risk as to the costs and consequences incidental thereto."

On 27th September 2010 the Plaintiff had filed this suit seeking specific performance of the said agreement, damages and costs. On 14th October 2010 the Defendant filed a defence and counterclaim. It pleaded that there was no formal agreement or lease signed between the parties, and that the payment of the deposit and the subsequent occupation by the Plaintiff of the flat were subject to the agreement and lease which did not materialize. The relationship between the parties was therefore that of a tenancy at will terminable by giving notice. Otherwise, the Plaintiff was on the property without permission and interfering with the Defendant's right to quiet enjoyment, it was pleaded. The counterclaim sought vacant possession, eviction, *mesne* profits and costs.

On 15th December 2010 the present chamber application under Order 39 rule 1, 2, 3 (1) and 9 of the Civil Procedure Rules, section 3A, 6 and 8 of the Civil Procedure Act and sections 52 of the Transfer of Property Act was filed for a temporary injunction to restrain the Defendant and all those acting under it from interfering with the Plaintiff's quiet enjoyment of the flat until the suit was heard and determined. A further injunction was sought restraining the Defendant from instituting any proceedings against the Plaintiff for vacant possession in respect of the premises until the present suit was heard and finalized.

It is the notice above that prompted the application. The court cannot stop a party from filing a suit

of any kind, but the right to litigate will be subject to the provisions of the Civil Procedure Act and Rules, and any other written law. The court should not anticipate a suit and injunct it even before it is filed. The prayer in (3) of the application cannot therefore be granted.

Regarding prayer 2, it is now settled that for the same to be granted the Plaintiff has to demonstrate that he has a *prima facie* case with a probability of success; that he will suffer such loss or injury that damages cannot adequately compensate; and, if the court is in doubt, it will decide the application on the balance of convenience (**Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**).

There was no formal agreement or lease that was signed between the parties. The correspondence (“AS 1 (a) – (d)”) annexed to the replying affidavit of Aasit Shah, director of the Defendant company, shows negotiations were conducted but eventually collapsed without a formal agreement. Mr. Odhiambo for the Defendant relied on **Contract Law** by Roger Halson, University of Hull, in which the writer at page 444 says the following about specific performance:-

“A party who seeks specific performance is asking the court to enforce a contract. It follows that the remedy cannot be granted if no contract comes into existence (often, but misleadingly, described as a ‘void’ contract) or if the contract was liable to be set aside. There are several restrictions or ‘bars’ upon the availability of specific performance. The most important of these is the principle that specific performance will not be granted if an award of damages would be an adequate remedy.”

Counsel further cited the decision in **David Njuguna Ngotho –Vs- Florence Wanjiru Muthee & 4 Others, HCCC No. 694 of 2006 at Nairobi** in which Justice Osiemo observed as follows:-

“Specific performance is an equitable remedy and the court has a discretion whether to grant it or not and it will not be ordered if the agreement is uncertain in any material respect or if it involves hardship. Specific performance cannot be granted in the absence of a valid legal contract”

Specific performance as a remedy is maintainable where a party to an agreement has refused or omitted to perform his part of the bargain (**Ongecha –V- The City Council of Nairobi [1982] KLR 151**). It follows that there has to be an agreement whose terms are clear before a party can claim that the other has breached it. In the instant case there was no such agreement and therefore it may be difficult for the Plaintiff to show that he has a *prima facie* case as far as his plea for specific performance is concerned.

Secondly, the notice did not threaten to evict the Plaintiff. It sought to seek legal redress which cannot be injuncted. Thirdly, there was no indication by the Plaintiff that damages cannot provide adequate compensation if the application is not allowed.

In short, the application is not merited and is therefore dismissed with costs.

**DATED AND DELIVERED AT NAIROBI
THIS 22ND DAY OF FEBRUARY 2011**

**A. O.MUCHELULE
J U D G E**