



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC NO. 651 OF 2010

FAMILY BANK LIMITEDPLAINTIFF

V E R S U S

KOBIL PETROLEUM LIMITEDDEFENDANT

R U L I N G

In 2007 the property on L.R. No. 1/933 (original Number 1/440/5) along Argwings Kodhek Road, Nairobi belonged to Posta Investment Cooperative Society Limited and the Defendant was its tenant. On 20th December 2007, under a Licence Agreement, the Defendant let to the Plaintiff the commercial premises known as Portion A measuring about 6000 square feet of the property to operate its bank and Automated Teller Machines. This was for a period of 2 years at a monthly fee of KShs. 400,000/=. “MK 1” is a copy of the Licence and “MK 2” is the Lease between the Cooperative Society and the Defendant. The Lease was registered but the Licence was not.

By Agreement of Sale dated 27th May 2010 (“MK 3”) the Cooperative Society sold all the property known as L. R. No. 1/933 to Alfaways Limited. When the Defendant learnt of the Sale it filed **H.C. (Milimani Commercial Courts) C.C. No. 610 of 2010** against the Cooperative Society and Alfaways Limited claiming that under the Lease it was entitled to a written notice of the intention to sell and to be given the first opportunity to buy the property before any third parties, including Alfaways Limited, could be approached. The suit is pending.

Following the Sale, on 22nd October Alfaways Limited leased the premises above to the Plaintiff for a term of 6 years from 1st September 2010 (“MK 5”) which Lease has been registered. By letter dated 16th November 2010 (“MK 7”) the Defendant wrote to the Plaintiff demanding vacant possession of the premises saying it had terminated the Licence between them on basis that the Plaintiff had failed to pay the Licence fees. On 18th April 2010 (“MK 8”) the Plaintiff replied saying that the property now belonged to Alfaways Limited who had given it a Lease. The Plaintiff made reference to the suit the Defendant had filed at Milimani Commercial Courts which it said had acknowledged the fact of sale and dispossession of the property. The Plaintiff was saying that it was in possession of the property by virtue of the Lease and not the Licence, which Licence had allegedly been terminated by the fact of sale. It was further alleged in the letter that the previous landlord (the Cooperative Society) had not consented to the licence which made the licence revocable on transfer of the property.

This suit was filed on 24th December 2010 for a declaration that the Defendant had no legal rights over the premises and that the purported interference or threats to interfere with the Plaintiff’s possession and quiet possession of the same was illegal, null and void. It also sought a permanent injunction, general

damages and costs. With the suit was filed a motion under Order 40 rules 1, 2 and 4 of the Civil Procedure Rules to restrain the Defendant, its agents, or servants, from locking, denying access to or egress from, interfering or attempting to interfere, taking possession, trespassing or in any other way interfering with the premises.

The Defendant responded by filing a chamber application under section 6 of the Arbitration Act 1995 and Rule 2 of the Arbitration Rules 1997 seeking the stay of the proceedings to allow for the dispute to be referred to arbitration in terms of the Arbitration Agreement entered into between the parties on 20th December 2007.

There is no dispute that in Clause 11 of the Licence Agreement, it was agreed that any dispute with regard to any matter in connection with the Agreement be referred to an arbitrator. The Defendant stated that the dispute raises the following matters in connection with the Agreement which require resolution:-

- a) Whether the Plaintiff, having terminated the Licence Agreement, has a right to remain and occupy the said premises;
- b) Whether the Plaintiff, having terminated the Licence Agreement, has a right to occupy the premises leased by the Defendant for free, and deny the Defendant the right to occupy the same; and
- c) Whether the Plaintiff has a right to challenge the validity or otherwise of the lease marked as “DO 3” above which the licence is derived from.

“DO3” is the Lease dated 7th July 2000 between the Cooperative Society and the Defendant.

The Plaintiff’s case is that there is no dispute between the parties under the Licence Agreement that can be referred to arbitration. The Plaintiff stated that Clause 1(j) of the Lease between the Defendant and the Cooperative Society required the Defendant to obtain the consent of the Society before transferring or subletting the premises, and yet, in this case, the Defendant had sublet the premises through the Licence Agreement without consent. The Plaintiff argued that the Licence was therefore revocable. It was further argued that the Licence Agreement was revoked upon the transfer of the property to Alfaways Limited, and further that no relationship existed now between the parties herein capable of being referred to arbitration. This is because the Plaintiff was now the tenant of the new owner. The Plaintiff claimed that given the Lease between it and Alfaways, it could not vacate from the premises as it held a claim superior to that of the Defendant. Lastly, it was claimed that the arbitrator does not have jurisdiction to determine the dispute.

It was agreed that the Defendant’s chamber application be heard first and it is the one subject of this ruling. I received written submissions from Mr. Oyatsi for the Defendant and Mr. Mwaura for the Plaintiff. I have also considered the authorities that were cited.

There is no dispute that in the Licence Agreement dated 20th December 2007 between the Plaintiff and Defendant it was agreed in Clause 11 that:-

“Any dispute with regard to any matter in connection with this contract...”

be referred to arbitration. There was therefore a valid arbitration clause. It is important that where parties have agreed to oust the jurisdiction of the court and rather go to arbitration that has to be respected by both of them and the court. Parties know better how to resolve their disputes. But it has to be shown that the dispute in question is within the arbitration clause. The letter dated 16th November 2010 by the Defendant purported to terminate the Licence and sought vacant possession and the payment of the Licence fee and costs. The Plaintiff responded 2 days later to say that the Licence had been terminated by the operation of the law; the property had since been sold to Alfaways who had granted the Plaintiff a Lease; that the basis upon which the Defendant had granted it a Licence had ceased when the property acquired a new owner; and so on. Then there was the issue that the Defendant had sued both the

Cooperative Society and Alfaways Limited challenging the sale. It was the submission of the Plaintiff's counsel that these events had taken the dispute beyond what was contemplated by the arbitration clause.

As to whether the Plaintiff is the Defendant's licensee can only be of academic value. This is because the Defendant had a Lease from the Cooperative Society which was the basis upon which it granted the License. The Defendant no longer has the Lease. The Cooperative Society sold the property to Alfaways Limited which has granted a Lease to the Plaintiff. Whether or not the License was terminated or that, the Defendant is entitled to vacant possession and to the payment of the license fees would be matters to be resolved by arbitration. They would form a dispute under the arbitration clause. But, I think, this dispute is subordinate to the main dispute between the parties. The dispute is whether the Cooperative Society could sell the property, and with it the premises, to Alfaways Limited without reference to the Defendant. On basis of **Construction Engineering & Builders (Kenya) Ltd – Vs- Municipal Council of Kisumu [1982] KLR 399**, I find that it would be inconvenient to the Plaintiff to refer matter of a subordinate nature to arbitration and leave the main issues between the parties. I also consider that the efficient and effective resolution of the dispute between the parties will entail the consideration of the claims by the Cooperative Society and Alfaways Limited, both of whom are not parties to the arbitration agreement.

The result is that this chamber application is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI
THIS 23RD DAY OF MARCH 2010**

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