IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 39 OF 2011

KIKUYU NURSING HOME (1977) LTD…….....…….. PLAINTIFF

VERSUS

DR. SUNIL PATEL……. DEFENDANT

Coram: Mwera J
Nyang'au for plaintiff
Thuku for Njuguna for defendant
Njoroge court clerk

RULING

In the application dated 28.1.11, brought under Order 40 rule 1, 2, 3, 4 of Civil Procedure Rules and sections 1A, 1B, 63 (c) (e) of the Civil Procedure Act the plaintiff prayed:

i) that the defendant be restrained from evicting it from 2 plots of land known as KIKUYU/KIKUYU BLOCK 1/30, 40.

It was claimed in the grounds that the litigants had a tenancy agreement between them dated 06.04.04. The plaintiff was not in any rent arrears yet the defendant was laying such a claim and intending to levy distress for it. That the plaintiff was a medical institution and evicting it could cause suffering to innocent people – its patients.

Dr. P J Patel, a director with the plaintiff company deponed that the lease agreement between the parties pegged the rent at sh. 20,000/= per month for the first 2 years and any increase thereafter would be mutually agreed. There had never been any negotiations in that direction yet the defendant has unilaterally increased the rents, creating the claimed arrears for which he has threatened a levy for distress. He also issued a termination notice of 08.09.10 (exhibited) due to expire in February 2011. There are no rent arrears to justify the levy.

In the replying affidavit the defendant claimed that the plaintiff had fallen in rent arrears amounting to sh. 1,134,000/= as a result of rent increments since 2004 to date and various correspondences were annexed. That the applicant had also failed to carry out repairs thereby running down the let premises, contrary to the clauses in their lease agreement. Further, that the plaintiff had sublet the premises contrary to the tenancy agreement and without permission of the defendant. So the defendant had given a 6 – month notice to terminate as per the lease document. Accordingly the plaintiff had not made out a case to warrant an injunction. It had not come to court with clean hands and neither had it disclosed all material facts.

Asked to submit the plaintiff maintained that it should not be evicted from the premises because of sums beyond sh. 20,000/= rent per month purportedly considered as rent arrears due. No levy for distress should proceed on this basis either. The lease permitted rent increments after the two initial years but only to be arrived at by way of agreement or arbitration. Nothing of the sort took place; the defendant had unilaterally increased the rents, purported to levy distress for the arrears and now he has served a 6 month quit notice. The plaintiff asserted that there was no agreement to raise the rent beyond sh. 20,000/= per month except by mutual agreement or determination by a land valuer. Those were the clauses in the tenancy. The purported increases were considered in breach of the lease. The plaintiff had nonetheless continued to pay sh. 20,000/= with no arrears accruing. The injunction sought is warranted otherwise the patients in the suit premises will be subjected to suffering greatly while the plaintiff's machinery and equipment would be damaged if not carefully handled.

The defendant submitted that the lease agreement allowed for review of rent but when that was done, the plaintiff did not pay the new rent and not even the old one. So the defendant resorted to levy distress for sh. 1,13m. The plaintiff failed to repair damaged parts of the premises – a thing not disclosed to the court. A valid quit notice had been issued and loss incurred by the plaintiff could be compensated by an award of damages. If the plaintiff disputes the sum put forth, it should deposit it in court or pay it over to the claimant.

From all the above, the issue coming up for determination centres on levy for distress for rent and then the notice to quit.

The parties have exhibited the lease agreement of 6.4.04. It said *inter alia* (clauses 1,2) that rent during the first and second years was sh. 20,000/= per month. Then thereafter increased rent may be or could be mutually agreed for every 2 years but if that did not materialise, a land valuer appointed by the chairman, Law society of Kenya would determine such rent not being lower than the starting rents of sh. 20,000/= per month. While the plaintiff claims that there had been no mutually agreed rent increase or any that was determined by a land valuer, the defendant says absolutely nothing about this mode of increasing rent. He simply stated that rent reviews were provided for in the lease. In such circumstances the court is inclined to accept that the defendant has been unilaterally increasing rents contrary to the lease agreement. Although no party put forward evidence of continued payment or non-payment of sh. 20,000/= per month, it is more likely than not that that sum has been paid and the so-called rent arrears only came by with the increases the defendant imposed contrary to the clauses of the lease agreement.

It is the position of the defendant that the plaintiff was not paying rents and had also defaulted in repairing the premises – a thing that had been notified to the plaintiff as per the letter by Mr. R. Manek, Advocate dated 8/6/09. And on its part the plaintiff says absolutely nothing about this claimed breach of lease. The court was therefore left with the impression that the plaintiff has likewise breached the lease terms. Now with both sides in breach, this court is minded to let things remain as they are. Accordingly, the defendant is restrained from levying distress of rent arrears because none have been shown to have accrued because of the operation of the lease agreement. New rents have never been mutually agreed or set by an independent valuer. Similarly the defendant cannot claim as part of the notice to vacate of 8/9/10, that there has been persistent default in rent payment, besides failure to repair the premises. One cannot on one hand breach an agreement and on the other purport to invoke the same agreement to gain benefit/relief thereof. If such is permitted by the court one can discern an element of injustice.

In sum the prayers sought are granted but each part will bear its own costs of this application. The parties should do well in the meantime to regularize their rent approach as well as the issue of repairs.

Ruling delivered on 14.3.11.

J. W. MWERA
JUDGE