



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 254 OF 2011

NORTHLAKE LIMITED.....PLAINTIFF

VERSUS

TRANSALLIED LIMITED.....DEFENDANT

RULING

Coram: Mwera J.

Mrs Shaw for Plaintiff

Kounah Defendant

Court clerk Njoroge

Before court are 2 applications to be decided side by side. The plaintiff company filed its notice of motion dated 3.6.11 under Order 40 rule 2 of Civil Procedure Rules and section 3A Civil Procedure Act for the main order

i) that the defendant company be restrained from interfering with the plaintiff's ownership and possession of the property comprised in LR No. 330/351 & 377.

It was contended in the grounds that the lease granted to the defendant had expired. The defendant was no longer in possession of the suit property so the plaintiff had moved to court to recover it. The respondent owed rent arrears of sh. 500,000/= and it had breached the lease terms.

Millicent Weru, a director of the plaintiff company, swore a supporting affidavit. The company was the registered proprietor of the suit premises. On 10.6.09 it leased it off to the respondent for 2 years. During the tenancy the defendant/tenant breached the lease terms by failing to pay rent and putting the property to use other than that that the title allowed. Such acts led the City Council of Nairobi to demolish the

structures built by the respondent and in the process the respondent's agents damaged the suit property. From 22.12.10 the respondent had not been in possession of the premises nor has it been undertaking any commercial activity there in any form. On 29.3.11, the plaintiff served a notice of intention to terminate the tenancy at its expiry on 31.5.11. The respondent then failed to pay rent totaling sh. 500,000/=. It instead proceeded to the Business Premises Rent Tribunal (BPRT) and obtained an order to restrain the plaintiff from "harassing or intimidating" it. To the plaintiff the BPRT had no jurisdiction to entertain the respondent's complaint. Its court actions are frustrating the plaintiff. It cannot re-enter the premises and the defendant has no reasonable defence here at all. The applicant got an interim injunction.

On 8/6/11 the respondent filed a notice of motion under Order 40 rule 7 Civil Procedure Rules and sections 1A, 1B, 3, 3A, 63 (e) of Civil Procedure Act with the prayers;

- a) that the *ex parte* injunction of 3.6.11 be discharged; and
- b) there be an injunction against the plaintiff from forcefully evicting the respondent from the subject premises, using the Kenya Police etc

The grounds therein claimed that the injunction order of 3.6.11 was obtained by misrepresentation and non – disclosure of material facts. The respondent enjoyed a controlled tenancy because their lease did not exceed 5 years. The defendant/respondent had built a car wash on the premises and is in occupation with its facilities and personnel, including subtenants.

One subtenant had refused to pay rents due to the acts of the plaintiff -a subject of HC ELC No. 206/11. The plaintiff instigated the City Council to destroy the respondent's property on the premises and had now gotten the local D.C to dispatch APs to the site to enforce the orders of 3.6.11. The defendant had been, in the circumstances unable to collect rents from its subtenants, resulting in court cases. It should not be evicted. The issue of expiration of the tenancy was pending in BPRT C. No. 930/2011. Then a supporting affidavit of Mary Mukami Mwangi followed.

The court considered that the 2 motions be argued together. That of the plaintiff being opposed by that of the defendant. Both sides submitted.

The plaintiff went over the background of this cause adding that the 2 years lease had a condition that in the event the respondent breached any term therein, a 3 - month written notice to terminate would issue. Acting under its statutory mandate, the City Council demolished the structures the respondent had illegally erected on the premises and in the process the respondent's agents damaged the applicant's property. Then the respondents failed to pay two months rents, totaling sh. 500,000/= in breach of Clause "B" in their lease. It was added, but this court wonders why and how, that the property in question falling under the Government Lands Act, the parties executed a void and unenforceable lease in terms of sections 99, 100 of the Act. The respondent was no longer in possession. When it breached some terms of the lease, a termination notice of 29.3.11 issued. The applicant had thus made out a *prima facie* case warranting an injunction. Indeed rent arrears had not been denied. As for being in possession, it was the subtenants of the defendant and not the defendant itself. Regarding the claim that police had moved on the premises to throw out the respondent, the court was told that when it was served with the orders of 3.6.11, the respondent posted armed men on the site. Police only went there to keep peace.

On its part, the defendant's position was that the applicant had fraudulently used this court's orders of 3.6.11 to "**evict by demolishing the defendants premises on the site.**" This allegation is coming up for the first time and in a manner that baffles the court. Baffling in the sense that in the grounds set out in its notice of motion of 8/6/11, it was contended:

"4. That the orders issued by this court were first forwarded to the District Commissioner Westlands who sent Administration Police to effect the orders and are guarding the property at gunpoint having tried to chase away the defendants' guards and employees at the site."

Mary Mukami Mwangi repeated the same claim in the same terms in her supporting affidavit (paragraph 10). So where has this **demolishing** thing come from?

In the same affidavit the deponent confirmed (para. 8) that the subtenants refused to pay rents and then she went on to comment on some cases in court and before BRPT whose impact and position the applicant was said not to have disclosed here.

It was further submitted that the letter of termination of lease dated 29.3.11 was opposed by the respondent and that was the subject in BPRT C No. 930/10. The defendant as well as its subtenants were still on the site with car wash equipment etc. There was Nothing in the order of 3.6.11 to evict the plaintiff. Cases were cited.

At this point, what the court focuses on while considering interim injunction to be granted or not, is: has a **prima facie** case been made out? The parties, as they appeared to do here, need not delve into asking this court at this stage to determine whether their tenancy has either been terminated or has expired, whether it was valid or null; whether it was a controlled tenancy or not; whether the head or the subtenant is in possession or not. That is for the trial court.

For now and from the conflicting claims by the parties, the court would assume that there was/is a tenancy relationship of whatever nature by which the two litigants came together. Neither side appears to be saying it all at this stage. While the plaintiff stated in its motion that:

“a) The lease granted to the tenant had been (sic) expired,”

it submits that the defendant breached clause “B” in the agreement, by failing to pay rent. And so it was served with a written notice of 29.3.11 to **terminate**. So which is which? And on its part as stated above, the defendant first claimed that APs had gone on the site using the order of 3.6.11 to keep its guards and staff out and in the submission the court is told that that order was being used to “evict and demolish”! Again which is which? But it is clear admission on the part of the respondent that itself with its subtenants have refused or neglected to pay rents. The applicant puts the sum at sh. 500,000/=.

In noting that the parties are before other fora on account of their lease agreement over the suit premises, each asking or contesting whatever claims there, it will only be fair to state that the respondent do remain in the premises on condition that it pays the claimed rent arrears of sh. 500,000/= or such sum as has accrued since to the plaintiff, in the next 14 days and continue paying the lease rents promptly and regularly until further orders of the court. In default of this condition, then the plaintiff will surely be justified as per the claims before this court to bar the respondent and its tenants from the premises. At least the defendant/respondent did not claim that orders in the cases in the other court or tribunal excused it from paying rents and regularly so, pending resolution of those cases.

Orders:

- (a) the respondent to remain in the premises;
- (b) the respondent to pay rent arrears up to the date hereof, in 14 days and continue to pay them promptly and regularly thereafter until further orders of the court or their cases elsewhere are resolved;
- (c) in default, the plaintiff to bar the defendant from the premises;

(d) each side to bear its own costs.

Delivered on 30/6/11

J. W. MWERA

JUDGE