



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 129 OF 2010

LEXIS INVESTMENTS LTD.....PLAINTIFF

VERSUS

J. J. OKWARO & COMPANY LTD.....DEFENDANT

RULING

The brief back ground information to the application is that the applicant is the current owner of the suit premises having purchased the same from the previous owner Sansora Group Ltd. As at the time of purchase of the premises the Plaintiff /Applicant was informed that there were tenancies subsisting was among them, those of the defendants which had expired on 31st day of October 2009, after running for a period of two years from the first day of November 2007. Apparently, the tenant held on it is alleged. That it transpired that the premises had been leased out as a residential office business but it was discovered that the defendant had made extensions onto a public side walk and converted the same into a restaurant and eating house known as Lake Side Meeting Point which premises was being operated beyond the demised premises. The premises had encroached onto the common car park area of the property, upon acquisition of the property the Plaintiff / Applicant invited the defendant to accept an offer of lease of shop number 4 the ground floor which the defendant declined but continues to occupy the premises without paying rent and for this reason among others the Plaintiff sought orders in a summary from to require the defendant dismantle the illegal structures, vacate the premises, pay damages and costs and grant vacant possession of the premises. Further that the defendant commenced BPRT case number 49 of 2010 Kisumu seeking protection as a protected tenant under Section 12 (4) of the Land Lord (Shops Hotels and Catering Establishment) Act Cap 301 (the Act). There appears to have been issued orders in the said BPRT case which grieved the applicant forcing them to proceed to file HCCMISC APPLICATION 33 OF 2010 at Kisumu High Court pending disposal. It appears the defendant entered appearance and filed a defence which invited the filing of a reply to defence and amended reply to defence. Also as part of the back ground information, the plaintiff herein presented an application for an injunctive relief vide an application dated 1/ 10 / 2010 and filed on 4/ 10/ 2010 which was defended, heard inter partes and resulted in a ruling delivered by J. R. Karanja Judge on the 5th day of December 2010, whose end result is that the plaintiff's plea for an injunctive relief directed to the defendant, its employees, servants and or agents to be restrained by orders of injunction from operating on the premises of all that property known as a parcel of land known as KISUMU MUNICPLAITY / BLOCK 7 / 360 and on the public sideways outside the entrance and with the rear common car – park area of the property any part thereof pending the hearing and determination of the suit was refused.

The plaintiff / applicant has once more presented an application by way of Notice of Motion dated 4th day of March 2011, and amended and filed on the 9th day of March 2011. The reliefs sought are three namely:-

1. Spent

2. The defendant, its employees, servants and / or agents be restrained pending the hearing and determination of this suit either from purporting to sub-let, to any persons all or any part of the suit premises comprising a ground floor, shop in the commercial building on Kisumu Municipality / Block 7 / 360 situate along market street within treasury square in the Central Business District of Kisumu or from purporting to conduct therein any activity different from that which it had contracted to do by the lease with its former land lord under which it first entered the premises.

3. The costs of this application be provided for.

The grounds in support are set out in the body of the application and the supporting affidavit and a brief summary of the same are as follows:-

- **The plaintiff is owner of the suit premises and is the land lord.**
- **The defendant was a tenant to the former land lord.**
- **The deponent of the supporting affidavit has deponed that in December 2010, the defendants remove all their properties from the said premises, but retained the possession and access to the same.**
- **That events leading to the filing of the application subject of this ruling is that the applicants accessed information to the effect that the defendants intend to sub-let the said premises illegally to 3rd parties, hence the need to have them restrained from sub-letting the property to 3rd parties .**
- **They rely on the annexed documents to fortify their assertion.**

The respondent put in a replying affidavit deponed by one Johnstone Ombima Okwaro on the 11th day of March 2011 and filed the same date. The salient features of the same are as follows:-

- **Concedes the defendant was leased the premises by the former owner.**
- **Concedes that the defendant is a limited company with numerous types of objects it can pursue.**

- Concedes to have operated a restaurant business which they merged within another business before closing the same.

- That the plaintiff has no right to choose which business the defendant should do and for this reason the prayer for restraining the defendant from carrying out activities should be disallowed.

- The court is assured that the defendant has no intention of subletting the premises to 3rd parties. It only has an intention of carrying out its own business in the same premises.

- Concedes to have parted with keys to the premises but these were handed over to their advocates for onward transmission to the plaintiff in the event that the matter herein is settled amicably to their satisfaction (defendants’).

- Appreciate that they are aware of the shortage of staff office space in Kisumu which make any party looking for office space to be attracted to any apparent vacant space and inquiries made about such premises does not amount to subletting.

The plaintiff / applicant filed written submissions dated 15th day of March 2011 and filed on the 15th day of March 2011 and a perusal of the same reveals that the following have been stressed:-

- The court is invited to note the contend written in the defendant’s deponements with regard to the handing over of the keys to their advocates. It is not clear whether the keys were handed over for purposes of renovation as per the notice on the door or as per annexures MAO – 1 or to be handed over to the plaintiff as per the aforesaid deponement in the replying affidavit.

- Contends that the lease agreement between the defendant and former land Lord was explicit as to the nature of the business to be carried out on the said premises. The applicant is therefore a stranger to the Respondents contention that it could carry on any other business as per its articles of association

- The court is invited to note that indeed there were admitted inquires by 3rd parties with regard to the subletting of the said premises and for this reason the applicants fears and concerns are well founded.

- There is silence from the defendant ‘s counsels’ office with regard to the allegations that inquiry with regard to payment of good will by a 3rd party for the same premises had been made and when the issue was raised with the said counsel by the plaintiff /applicants counsel it was not responded to.

- The net result of the aforementioned concerns is that the balance of convenience puts tilts in their favour as there is demonstration that the defendant who has illegally remained in occupation d and has denied the rightful owner mesne profits is fraudulently attempting to usurp the plaintiffs rights as a proprietor of the premises and then seek to benefit in respect of the said premises by receiving income from 3rd parties over the same premises.

The submissions by the defendants dated 17th day of 2011 and filed the same date has stressed the following :-

- **Contends that this current application is res judicata as this court has ruled on a similar earlier application.**
- **That when dismissing the earlier application, the court ordered the parties to maintain the status quo and it has not been demonstrated herein that the status quo has been upset.**
- **In the alternative they contend that there is clear demonstration that the plaintiff / applicant has resorted to harassing the defendant with a view to forcing them to give vacant possession.**
- **Concede the tenancy was for residential office business, but as at the time the plaintiff purchased the premises, the defendant was operating a restaurant business without any complaint from the former owner.**
- **That the defendants' tenancy is protected**
- **That the course of controversy between the parties is the plaintiff's demand of rent of 83,242/= up from Kshs. 34,200/= without negotiation**
- **Disagreements on the rental payable led to the plaintiff declining to accept the old rent on the pretext that the defendant is an illegal tenant, an action which forced the defendant to file BPRT 49 / 2010 where injunctive orders were issued against the plaintiff, and in favour of the defendant which orders led to the filing of HCCMISC APP 33 of 2010, for Judicial Review seeking to quash the tribunals orders and the filing of these proceedings seeking vacant possession both of which are still pending disposal.**
- **That the plaintiff filed a notice of appeal against the earlier refusal to issue an injunction which has not been processed.**
- **That by reason of their assertions above it is clear that the plaintiff / applicant is simply harassing and the defendant preventing quiet enjoyment of the said premises and for this reason the orders sought should be declined court was referred to an extract from Halsburys on case law the laws of England Volume 23 at page 595 paragraphs 1284 and page 599 paragraph 1291.**

The court has read the same and in a summary it is to the effect that “ **renovation and alteration by the tenant are permissible on condition that the same are within the terms of the lease. Any excess will amount to the tenant being accused of committing waste. Secondly, that the land lords' right of re-entry has to be based on breach of the terms of the lease by the tenant**”.

There is also the case of **Devani vs= Bhadressa and another [1972] EA 22** where the court of appeal for Eastern Africa held inter alia that “**only where there is a plain breach of a clear covenant must an interlocutory injunction issue without regard to the balance of convenience**

(i) Where there is substantial questions to be investigated, the judge has a discretion and must consider the balance of convenience and the extent to which damages, would be more appropriate than an injunction.

This court has given due consideration to the aforesaid rival pleadings, arguments, submissions, legal texts and case law and in this, courts opinion, the following are own framed questions for determination in the disposal of this application:-

(i) Is the current application res judicata?.

(ii) What relief is the applicant seeking?

(iii) What are the ingredients required to be established before one can earn such a relief.

(iv) Has the applicant brought itself within the ambit of those ingredients

(v) What are the final orders to be granted herein in the disposal of this matter?. In response to own framed questions, the issue of res judicata arises because there was an earlier injunctive relief sought herein by the applicant. In order for this plea to hold, the defendant / respondent who has raised the same has to bring itself within the ingredients set by Section 7 of the Civil Procedure Act Cap 21 laws of Kenya. The section reads.

“Section 7 No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.....”

This court has judicial notice that this provision has been construed by the court of appeal in numerous case law and dutifully followed by the superior courts and subordinates courts with regard to the ingredients required to be established before a litigant can earn the relief of res judicata. In this courts opinion, these ingredients are as follows:-

(i) There has to be in place a court sought to be prohibited from deciding on the current suit.

(ii) There has to be demonstration that there has been in place either a former suit or issue similar to the current one

(iii) The suit or issue must be shown to have been between the same parties or between parties litigating through them or claiming under them.

(iv) The parties must be litigating under the same title

(v) The former issue must have been decided by a competent court and finally determined

This court has applied the afore set out ingredients to the rival arguments herein with regard to the earlier

application and the current application subject of this ruling, and in this court's opinion the following is the correct position of the two applications:-

- (a) Both were and are still being seized of by courts of competent jurisdiction.**
- (b) The parties are litigating under the same title as plaintiffs and defendants**
- (c) The relief sought in both is an injunctive relief**
- (d) It is however clear that the nature of the injunctive relief sought in both is different. In the first application dated 1st day of October 2010, and filed on 4th October 2010, the injunctive order sought to restrain the defendant from operating on the suit premises and on the side walk outside the entrance and into the road common car park. Where as the current injunctive relief being sought is to restrain the defendant from sub-letting premises to 3rd parties.**

For this reason the court is satisfied that the current application is not Res judicata.

In response to question 2 and 3, the relief being sought is one of an injunctive relief, the ingredients required to be established before one can earn such a relief are those set out in the famous case of **Giella vs Cassaman Brown [1973] EA 358** and these are:-

- (i) The applicant has to demonstrate that he has a prima facie case with a likely hood of success.**
- (ii) Demonstration that damages will not be adequate compensation**
- (iii) Where 1 and 2 does not apply the court will decide the matter on the basis of a balance of convenience.**

These ingredients have been applied to the rival arguments herein and the court makes the following findings in respect of the same;-

(a) On establishment of existence of a prima facie case with a likely hood of success, this court finds it established because of the following reasons:-

- (i) The applicant is the proprietor of the suit premises.**
- (ii) The respondent is a tenant allegedly holding over after their lease with the former proprietor expired**
- (iii) That there is clear disagreement over rent payable which has culminated in proceedings in other forums yet to be determined**

(iv) Currently no rent is being passed on between the defendant/respondent allegedly because the plaintiff / applicant has refused to accept the same in an inherited form and that he is asking for a higher figure which the defendant / respondent is not willing to offer.

(v) It is undisputed that the defendant has removed its properties from the premises allegedly for renovations. A situation which has led to expression of interest from the 3rd parties to let the vacant premises

(vi) It is the expression of interest from 3rd parties wanting to let the vacant premises allegedly under renovation evidenced by the exhibited documents which has led to the applicant moving to the seat of justice to forestall the possibility of the premises finding its way into the hands of 3rd parties who have no link with the plaintiff and over whom the plaintiff will have no control. The anxiety of the plaintiff is understandable as there is no demonstration that the defendant have a right to sublet even under the lease with the former proprietor.

As for damages, the court is satisfied that this will not be adequate compensation because damages can only flow to the applicant in a situation where there is a contractual obligation giving rise to existence of rights duties and obligations. In the absence of existence of a contract between the plaintiff and the intended 3rd parties, it will be difficult for the plaintiff to recover compensation from them. Likewise if the defendant the tenancy on to a 3rd party and then wriggles out of the tenancy with the plaintiff, the plaintiff will have to incur expenses and costs to pursue them to make good any damages that may have been occasioned.

Turning to the balance of convenience, the court is satisfied that this has been established in that the plaintiff as the proprietor is entitled to prevent his property from falling into the hands of 3rd parties. The first limb of prayer 2 is therefore established and well earned. The second limbs' reading "or from purporting to conduct there in any activity different from that which it had contracted to do by the lease with its former land lord under which it first entered the premises, is disallowed because it has resemblance to the earlier injunctive relief which was dismissed by Karanja J.

For the reasons given in the assessment

(i) The first limb of prayer 2 of the application amended on 9th March 2011 and filed the same date be and is hereby allowed to the effect that the defendant, its employees servants and or agents be restrained pending the hearing and determination of this suit from purporting to sub-let to any persons all or any part of the suit premises comprising a ground floor shop in the commercial building in Kisumu Municipality / Block 7/360 situate along market street within Treasury Square in the Central Business District of Kisumu.

(ii) The plaintiff / applicant who had a genuine complaint will have costs of the application.

Dated, signed and delivered at Kisumu this 8th day of July 2011.

R. N. NAMBUYE

JUDGE

RNN/aao