



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 95 OF 2011

KENOL KOBIL LIMITED.....PLAINTIFF

VERSUS

BERNARD KATHANGA J. NGUGI..... DEFENDANT

RULING

This is the Notice of Motion dated 3/8/2011 brought under Order 40 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules for the following orders;

- 1. A temporary injunction order to issue restraining the Defendants, its servants or agents including Quickline Auctioneers from levying distress upon the Plaintiff's property or breaching the terms of the lease agreement dated 22/12/2010 or in any other way interfering with the Plaintiff's rights under the said lease agreement.***
- 2. That pending the hearing and determination of this suit, the Defendant and its agent, M/s Quickline Auctioneers be restrained from taking any action or further action on the proclamation dated 21/7/2011.***
- 3. Costs of the Application be provided for.***

It's premised on the grounds that there is a lease agreement dated 22/12/2010 which lease agreement has been breached by the Defendant. And the said breaches are a violation of the Plaintiff's rights under the said agreement.

The General Manager of the Plaintiff "DAVID OHANA" has filed the supporting affidavit. He refers to the contract dated 22/12/2010 and annexed as DO1. He says access to the premises was granted to the Plaintiff for branding and testing of equipment in readiness for taking over the petrol station on 1/1/2011. And on 1/1/2011 possession was given to the Plaintiff. DO2 shows photos of the rebranded station. Documents were prepared for approval by the Plaintiff's lawyers when the Plaintiff sensed delay. DO4. Therefore the Defendant refused to execute the lease DO5. Auctioneers proclaimed the Plaintiff's goods DO8 and even the Plaintiff's licence was cancelled. The Plaintiff has already incurred heavy losses because of the Defendant's breaches.

The Respondent has opposed the Application and filed a Replying Affidavit in which he says the document dated 22/12/2010 was a mere memorandum of understanding subject to a formal document being made. i.e. A LEASE. He says the access to the premises was for purposes of branding the station and testing equipment and nothing more. No business was to commence without a formal lease being executed. A lease was prepared but upon presenting it to the Defendants Counsel a lot of errors were

pointed out to him and so was the Plaintiff informed BKJN2A-E.

He justifies his action to bring auctioneers on board because the Plaintiff was occupying his premises while paying no rent. He said he was not agreeable to the lease prepared by the Plaintiff. Any losses incurred by the Plaintiff were of its own making.

Both counsels filed written submissions. The facts presented before the court are very clear. The Plaintiff stresses that it has a legal right over the premises and which legal right has been violated. It therefore prays to be protected by the law.

The Plaintiff says the agreement dated 22/12/2010 created a contract through which the Defendant is demanding for a monthly rent from the Plaintiff. The Plaintiff's counsel asks the court to find for the Plaintiff and grant the order of injunction.

Counsel for the Defendant says the agreement of 22/12/2010 was a pure memorandum of understanding subject to the drawing and execution of a lease. The MOU did not create any legal rights, and therefore the Plaintiff cannot rely on it. He says that agreement is not in conformity with the provisions of the law of contract. He also raised the issue of as company seal which was missing on the said agreement. In brief he submits that the 'agreement' cannot be binding because it was not registered, stamp duty was not paid and that it cannot stand the test of time. Therefore the application should not be issued.

I have carefully considered this application, the affidavits in support of and against, the annexures to the Affidavits and the able submissions of the learned counsels. I also appreciate counsels for the authorities they cited.

What we all must understand and appreciate is that this is not the full hearing of the suit but an application for an injunction. The principles governing the granting of an injunction were laid down in the case of **GIELLA VS CASMAN BROWN & CO. LTD. [1973] E.A. 358.**

They are:

- 1. An applicant must show a prima facie case with a probability of success.**
- 2. An injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury.**
- 3. When the court is in doubt, it will decide the application on the balance of convenience.**

Another principle that has gained full legal support is that an injunction order being an equitable remedy must be issued to one who has come to court with clean hands. (**ALBERT MARIO CARDEIRO VS CYPER ENTERPRISES LTD. & OTHERS HCCC NO. 2430/96**)

In the instant case it is not disputed that there is no formal lease that has been executed between the parties.

- There is also no dispute that the Plaintiff is on the suit property. It is not clear whether the business of petrol station is running. But what is however clear is that the Plaintiff has remained in possession after rebranding and testing equipment.
- It is also not disputed that the Defendant herein is the registered owner of the suit premises.

Since there is no formal lease then what is the Plaintiff relying on to remain in the premises? There is an agreement (DO1) entered into by the parties. Para 6 of the agreement refers to it as an MOU. It is not the lease. Para 5 of the agreement states;

“upon signing and registration of the lease we shall pay you an advance rent for 2 years amounting to KShs.6,000,000/=”

Para 5 has not been complied with as there have been disputes on the terms of the lease. The Defendant has not come up with a lease and so the Plaintiff came up with one whose terms have not been accepted by the Defendant. Therefore the lease has not been complied with.

Para 13 clearly states this:

“We shall take over the service station, assume operations and its running upon executions and registration of these lease documents”

Contrary to what is contained in this agreement which was drafted by the Plaintiff itself and served on the Defendant the Plaintiff has taken over the station, assumed operations and its running before executions and registration of the lease documents!

The plaintiff says he is on the suit property with the Defendant’s authority. He relies on Para 6 of the agreement which provides:

“Upon signing of this MOU and not later than 15/12/2010, you will allow us to commence branding of the petrol station and testing of the equipment in readiness to taking over on 1/1/2011”.

The terms of this agreement are very clear. Para 6 clearly shows that there was to be a taking over on 1/1/2011 which would have given the Plaintiff possession on 1/1/2011. Was there such a taking over? The defendant is complaining that when the Plaintiff entered the premises to rebrand and test the equipment, it decided to go on and on and has remained there. The annexures herein show that there was communication exchanged between the parties over the prolonged stay on the premises by the Plaintiff yet the lease has not been executed and registered. And the Defendant was right in raising these concerns. Para 5, 6, 13 of the MOU was not complied with and yet the plaintiff has taken possession.

My finding is that the initial entry was with permission but the prolonged one was not with authority of the owner of the premises who is the Defendant. The Defendant as a lessor was rightly concerned because his premises was in occupation yet for 8 months he was not receiving rent. It was an order of the court that rent was now remitted and continues to be remitted. There is no outstanding rent and so the Auctioneers may not have reason to distress for rent, at the moment.

Issues have been raised about the Agreement/MOU signed by both parties herein. I have pointed out above that there are breaches of this agreement. This Agreement did not indicate who was to prepare the LEASE AGREEMENT, so that the court can decide who is in breach of this one.

I will ably deal with the issues raised concerning this agreement when the matter comes for full hearing and evidence is adduced. Dealing with them now and making decisions would leave the court with nothing to deal with when the case comes for full hearing.

The plaintiff will continue to pay rent as ordered by Justice Maraga because the Plaintiff cannot occupy someone’s premises and not pay rent while hiding under non execution of the lease.

I will also not stop the Defendant from levying distress for rent as long as the Plaintiff is still in occupation and fails to remit rent. It is not wholly Defendant’s fault that the lease documents have not been executed and registered. Both parties have their share of blame.

I therefore find no good reason to make me grant the orders prayed for. Save for what I have indicated above about Rent, the Application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT EMBU THIS 7TH DAY OF DECEMBER 2011.

**H. I. ONG’UDI
JUDGE**