



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 174 of 2007

ELDORET TRAVEL AGENCY LIMITED PLAINTIFF

VERSUS

SAMWEL KANDIE & ANOTHERDEFENDANTS

RULING

Before court is an application brought under the provisions of order XXXIX rules 1, 2, 3 and 9 and all other enabling provisions of the law. It was initially brought under a certificate of urgency and at that ex-parte stage mandatory order did issue to the defendants jointly and severally to forthwith vacate and open up those premises known as Eldoret Municipality Block 7/69 (shop 1) and deliver possession thereof to the plaintiff. Similarly an order of injunction restraining the defendants jointly and severally by themselves or agents from further disturbing or interfering with the plaintiffs quiet peaceful occupation and possession of the said premises issued. In this application those orders are sought so as to be in force until the suit is heard and determined.

In the affidavit sworn in support of the application by a director of the plaintiff company it is deponed that the plaintiff is the tenant in the premises owned by the late father of the 1st defendant and the 2nd defendant is the auctioneer who attempted to levy distress for arrears of

rent and who ended up locking the premises until they were ordered reopened by the court. The plaintiff states that it was not in any rent arrears and attempts to resolve the dispute between landlord and tenant had been frustrated by the non co-operation of the landlord and inconsistent and contradictory rent claims. That the 1st defendant landlord had issued a notice on 31.07.2007 under the Landlord and Tenant (Shops Hotels and Catering Establishments) Act Cap 301 of the laws of Kenya asking for vacant possession of the premises for his personal use and no arrears of rent were then sought because there were no such rent arrears. That notice was contested by the plaintiff vide an objection dated 29.08.2007 and as at the time of going to court that Rent Tribunal case was still pending determination. The plaintiff further denied that the 1st defendant had locus standi to defend the suit or even to deal in the property of his father.

The 1st defendant in his Replying Affidavit swore that the premises were mutually closed by both parties pending the resolution of the rent dispute and that the applicant was in rent arrears. The 2nd defendant also swore a Replying affidavit. In the affidavit by the 1st defendant he stated that he issued a quit notice to the plaintiff for vacant possession as he wanted the premises to use for his dealership with BAT and that notice did not preclude him from levying distress for rent. His further case was that as the tenant was in arrears of rent he did not have a case with any probability of success and whatever loss he could suffer could be compensated by damages. He stated that the dispute can only be determined at a full trial.

In the supplementary affidavits sworn one for the plaintiff and the other for the 1st defendant it was stated for the 1st defendant that the tenant was in arrears of rent in excess of Kshs.350,000/- and as it had not filed a reference to the Termination Notice, the plaintiff became a tenant at will upon the expiry of that notice. The 1st defendant described the application as being brought with mala fides and ill-will and it ought not to be granted as the same was an abuse of the process of the court.

Submissions for the plaintiff were that there was no rent arrears and even if there were that was a matter for determination at trial and there cannot be an eviction without an order of the court. That the alleged proclamation was illegal as there was already a dispute as to what was owing and the Respondent cannot suffer damage which cannot be redressed by damages.

For the defendants it was submitted that no prima facie case was made out as arrears of rent were not disputed only how much was due was the unresolved issue. It was denied that the closure of the premises was by the defendants but that it was mutually agreed by the parties. That by the time of rushing to court the plaintiff was a tenant at will not having objected to the notice to terminate the lease and he should not be allowed to extend his lease through the court. That the 1st defendant having dealt with the suit property since 1996 and the plaintiff having paid rent to the 1st defendant, the plaintiff is now estopped from denying that relationship. The plaintiff was described as a chronic rent defaulter who was not entitled to equity.

I have carefully considered all the issues in controversy in this application. I discern them to be that the 1st defendant holding the position that the plaintiff was a chronic rent defaulter and himself wanting the premises for his own use gave a termination of lease notice to the plaintiff. The plaintiff holds that it was not in any rent arrears and even if there were such rent arrears, that could not be used as the basis for evicting it from the suit premises without an eviction order and in any case the dispute remained unresolved at the Tribunal. Those are the issues as I see them. The rest, such as whether or not the closing of the premises on 6/10/2007 was mutual or not are side shows that the court will not concern itself with save to mention that that conclusion was by no stretch of imagination contentious as claimed by the defendants. The circumstances of the closure, the presence of the auctioneer with six muscle men to aid in throwing out the plaintiff's workers and goods if they resisted and threats of using actual force are not ingredients of consent. That the 1st defendant was using the 2nd defendant and the issue of unpaid rents to evict the plaintiff is clear from the application affidavits annexures and submissions.

The basic position of the law is that there cannot be eviction without a court order. None was sought and obtained from court in this case.

The attempted levying of distress clearly showed that the plaintiff was considered by the 1st defendant as still a tenant. The dispute as to what rent was in arrears cannot justify the act of the defendants of locking up the suit premises. I find that the 1st defendant was attempting to obtain possession of the suit premises by the act of levying distress and more pointedly by locking up the premises. That is wrong. The 1st defendant needed an order of court or competent statutory tribunal to take possession and not otherwise see **GUSII MWALIMU INVESTMENT CO. LTD. V.S. MWALIMU HOTEL KISII LTD C/A 160 OF 1995**

If the issue of the locus standi had been raised as a preliminary point and no grant of letters of administration to the 1st defendant was produced then that would have determined the suit instantly. That point although raised was not taken as a preliminary one. If the 1st defendant were not the legal representative of the deceased landlord then he should not have been sued and the orders obtained in favour of the plaintiff against the 1st defendant would be in vain and self defeating. The plaintiff had better decide what its case is!

As regards the issues of the closure of the premises distress for rent and seeking an eviction and obtaining possession of the premises by those methods, it is my finding that the defendants were on the wrong side of the law. Accordingly I allow the application and hereby grant orders 4 and 5 of the chamber summons under consideration.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF JULY, 2010.

P.M. MWILU

JUDGE

In the presence of;

Gumbo Advocate for Plaintiff/Applicant

N/A for Advocate for Defendant/Respondent

Andrew Omwenga – court clerk

P.M. MWILU

JUDGE