



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 99 of 2007

HELY LIMITED.....PLAINTIFF

VERSUS

THAMO HOLDINGS LIMITED.....DEFENDANT

RULING

In a plaint filed on 25th April, 2007, **Hely Limited** (hereinafter “*the plaintiff*”), seeks, *inter alia*, a declaration that the plaintiff’s tenancy of the demised premises is a controlled and protected tenancy under the **Land Lord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya** and that the defendant be restrained from among other things evicting the plaintiff therefrom. In its defence and counter-claim delivered on 23rd July, 2008, **Thammo Holdings Limited** (hereinafter “*the defendant*”) denied the plaintiff’s claim and averred, *inter alia*, that the plaintiff’s tenancy was to expire on 31st October, 2008. It sought a declaration that the plaintiff was not a protected tenant and an order requiring the plaintiff to vacate the demised premises.

The defendant now seeks by its Notice of Motion lodged on 25th November, 2008 that the plaintiff be ordered to vacate and give vacant possession of shop No. 3 on L.R. No. XXXIV/21 along Nkrumah Road Mombasa (hereinafter “*the suit premises*”) to the defendant. The motion has been brought under the provisions of Order XXXV Rules 1 (a) and (b) and 2 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and all enabling provisions of the Law. Rule 1 (1) (b) allows a party to seek summary judgment for recovery of land with or without a claim for rent or mesne profits. In the grounds on the face of the application, the defendant states that the plaintiff is no longer a tenant of the defendant in respect of the suit premises as the term for which the premises were let out has expired by effluxion of time and is only fair that the plaintiff do vacate the said premises. The defendant further states that it is carrying out major renovations in the suit premises and would like to restructure the building as per approved plans and also do rewiring of electricity as per demand from Kenya Power and Lighting Company Limited. The application is supported by an affidavit sworn by one **Solomon Mutungi**, a Managing Director of Nairobi Homes (Msa) Limited, who is said to be the Managing Agent of the suit premises. To the said affidavit are annexed, *inter alia*, a letter of offer executed by Fredrick Rukunga as Managing Director of an entity called Hotel Masters, a notice and a response thereto. It is deponed in the said affidavit, *inter alia*, that the lease over the suit premises expired on 31st October, 2008 and it is only fair that the Land Lord gets vacant possession in order to continue its reconstruction.

The application is opposed and there is a replying affidavit sworn by the said **Fredrick Thuranira Rukunga**, the Managing Director of the plaintiff. In the affidavit, he swears, *inter alia*, that the suit premises were initially offered to M/S Hotel Masters which did not take the offer due to internal disagreement. He further swears that by oral agreement the plaintiff was accepted as a tenant of the suit premises by the Land Lord’s former agents M/S Regent Management Limited. The plaintiff therefore contends that as no formal lease was executed in respect of the suit premises, it enjoys a controlled tenancy over the demised premises which tenancy has not been determined.

When the application came up before me for hearing on 5th May, 2010, counsel agreed to file written submissions which were duly in place by 9th June, 2010. The submissions reiterated their clients’ stand-points taken in their respective affidavits.

I have considered the pleadings, the affidavits, the annexures thereto and the submissions made to me by counsel. Having done

so, I take the following view of the matter. The gist of the defendants' case is that the tenancy of the plaintiff over the suit premises expired on 31st October, 2008 by effluxion of time. In that event, the plaintiff should vacate the suit premises. To buttress its argument, the defendant has relied upon the offer it made to Hotel Masters Limited on 1st October, 2002. By that offer the defendant intended to lease the suit premises to the said company for a period of six (6) years from 1st November, 2002. Hotel Masters Limited is however, not the plaintiff nor is it in occupation of the suit premises. The suit premises are occupied by the plaintiff on the basis of what it says is a controlled tenancy. In support of that contention, the plaintiff has exhibited rent receipts dated 3rd February, 2004 and 13th April, 2004 issued to it by M/S Regent Management Limited, the former Management Agents of the defendant. Also exhibited is a letter dated 19th January, 2005 from the present Management Agents (Nairobi Homes (Mombasa) Limited in which the said agents requested the plaintiff to return a lease duly executed. There is no evidence that the plaintiff ever executed a formal lease over the suit premises. Yet the defendant treated it as its tenant. That is why it sought to terminate the tenancy in its letter dated 1st February, 2007. The affidavit evidence disclose several bona fide triable issues. Key among those issues is the type of tenancy which exists between the defendant and the plaintiff and the status of that tenancy.

Order XXXV Rule 1 (1) (b) of the Civil Procedure Rules is intended to enable a plaintiff whether by plaint or by counter-claim with a claim for recovery of land to which there is no bona fide defence, to obtain a quick and summary judgment without being unnecessarily kept from his/its property by the delaying tactics of the defendant. However, where there is even one bona fide ground of defence to the plaintiff's claim, the plaintiff is not entitled to summary judgment. In this case the plaintiff, which is the defendant to the defendant's counter-claim, has raised not just one bona fide triable issue but several and the key issue I have identified above goes to the root of the defendant's counter-claim.

In Giciem Construction Company – v – Amalgamated Trades & Services [1983] KLR 156, the Court of Appeal held, *inter alia*, as follows:-

“9. The general principle applicable to applications for summary judgment is that where the defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even fair probability that he has a bona fide defence he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried.”

That case followed the decision in Zola and Another – v – Ralli Brothers Limited and Another [1969] EA 69 where the court held, *inter alia*, that the court should not grant an application for summary judgment where there is a reasonable ground of defence.

In the end result, the defendant's application dated 21st November 2008 and lodged on 25th November, 2008 has no merit and is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 15TH DAY OF JULY 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Arombe for the Applicant and Nyongesa for the Respondent.

F. AZANGALALA

JUDGE

15TH JULY 2010