



No. 193

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 183 OF 2010

WILKINS RANGERIA MENGE

CHRISTOPHER NYACHOTI MENGE (Suing as the Legal Representative

of

**Estate of JOSEPH MENGE OTUNDO,
(deceased).....PLANTIFFS**

-VERSUS-

RISPER KERUBO

ONSARE.....DEFENDANT

RULING

The plaintiffs are the legal administrators of the estate of **Joseph Menge Otundo** deceased by virtue of a grant of letters of administration Ad Litem. They in that capacity have brought this suit against the defendant seeking a declaration that the tenancy between the deceased and defendant was a controlled tenancy pursuant to the provisions of the **Landlord and Tenant (shops, hotels and catering establishments) Act**, a mandatory injunction do issue directed against the defendant to forthwith re-open the shop premises situate on **LR No. KISII MUNICIPALITY/BLOCK III/128 “the suit premises”** and put the plaintiffs in occupation thereof, general damages for trespass and costs of the suit. The facts leading to the suit were that the deceased was a lawful tenant of the defendant in the suit premises where he operated a shop until about 13th April, 2010 when he passed on. However on or about 20th April, 2010 and before the deceased could be buried, the defendant padlocked the shop premises

demised to the deceased as aforesaid without any lawful cause or basis and has since persisted in padlocking the same to date. As the tenancy between the deceased and the defendant was not reduced into writing, the same was therefore a controlled and could only be terminated in accordance with the provisions of the **Landlord and Tenant (shops, hotels and catering establishments) Act**. The defendant by her actions aforesaid purported to terminate or alter the terms of the tenancy in breach of the law. As a result the plaintiff had been denied and or deprived of access to the shop wherein the deceased had kept various documents, including personal effects as well as assorted merchandise and or stock in trade. Consequently, the plaintiff and the estate of the deceased had suffered loss and damage.

Contemporaneously with the filing of the suit, the plaintiffs took out against the defendant a chamber summons application under order XXXIX rules 1, 2A and 9 of the **Civil Procedure Rules**, Sections 1A, B, 3A 63(e) of the **Civil Procedure Act**, 2 and 4 of the **Landlord and Tenant (shops, hotels and catering establishments) Act** and **all other enabling provisions of the law**. In the application the plaintiffs sought in the main, a mandatory injunction to compel the defendant to reopen the suit premises pending the hearing and final determination of the suit as well as temporary injunction to restrain her from padlocking, closing or in any other manner, whatsoever interfering with the plaintiffs' possession of the suit premises pending the hearing and determination of the suit. The grounds in support of the application as well as the supporting affidavit were along the same lines as the facts informing the suit already set out elsewhere in this ruling. I need not repeat the same here therefore.

The application was resisted. The defendant in a replying affidavit filed in court on 12th July, 2010 where pertinent deponed that she was the owner of the suit premises. She did not have any landlord/tenant relationship with the plaintiffs nor with their deceased father. That it was inconceivable that the rent for the whole year for the premises could be a paltry Kshs. 66,000/= purportedly paid to her, falling far below rates applicable in the centre of Kisii town for such premises. She is also contended that the plaintiffs had no capacity to sue her since the grant issued to them did not indicate that it was for purposes of filing this particular suit. To the best of her knowledge, the deceased never left any stock in the suit premises. In any event the suit premises had been condemned by Public Health Office as requiring urgent repairs. Finally she deponed that the matters in issue in this case had been litigated upon before in Criminal Case No. 2258 of 2003.

The application came up for interpartes hearing before me on 14th July, 2010. **Mr. Oguttu** learned counsel for the plaintiffs submitted that the deceased was a lawful tenant of the defendant. In support of this submission counsel referred the court to a letter from the defendant's then advocates addressed to the deceased confirming his tenancy and also a decision of this court that addressed the defendant's attempt to terminate the tenancy of the deceased in breach of the law. Secondly, he submitted that as at the time of his death the deceased was in occupation of the suit premises and had stock therein. He had also paid rent upto and including December, 2010 for the suit premises. Thirdly, the tenancy having not been terminated in accordance with the law, it continued to subsist. Fourthly, he submitted that a tenant confronted with illegal actions of a landlord under Cap 301 had a recourse to this court and not the **Business Premises Rent Tribunal**. It is trite law that **Business Premises Rent Tribunal** cannot issue an injunction. Finally he submitted that **Res Judicata** was not available to the defendant.

In his submissions in response, **Mr. Khapoya**, learned counsel for the defendant submitted that there was no tenancy landlord relationship between the plaintiffs and the defendant. The plaintiffs have taken out a limited grant to file suit. Any other acts by the plaintiffs will be tantamount to intermeddling with the estate of the deceased. The dispute in any event ought to have been filed in the Business Premises Tribunal. The suit was also **Res Judicata**. No rent had been paid upto and including December 2010. The only amount paid was a paltry sum of Kshs. 60,000/=.

Having carefully considered the application, the supporting and replying affidavits as well as annexures thereto, the rival oral submission and the law, I am satisfied that the issues for determination are:

- Whether the deceased was a tenant of the defendant
- Whether the tenancy was terminated in accordance with the law.

- Whether plaintiffs have capacity to sue the defendant.
- Whether the orders sought should issue.

Whilst I am aware that at this interlocutory stage I need not make specific findings on the issues aforesaid, for that will have to be the subject of the main suit, I nonetheless have to address them albeit carefully since they form the basis of the twin applications for mandatory and temporary injunction and the response. Further, it must be appreciated that since the plaintiffs are seeking a mandatory injunction, such an injunction can only issue if the court is satisfied that the case is unusually strong and clear. See **East African Spinners Limited & Others –vs- Bedi Investments Limited, C.A. no. 72 of 1994 (UR)**. That being the case answers to this issues may not be avoided wholly.

With regard to the 1st issue, and on the material placed before me there is a possibility that the deceased was a tenant of the defendant. The defendant has alluded to the fact albeit indirectly when she deponed in her replying affidavit thus:-

“10. THAT the plaintiffs never informed me at any time that they had been appointed or nominated to continue their father’s alleged business”.

11. THAT to the best of my knowledge the deceased did not leave any stock in the shop worth talking about....”

This is an admission that the deceased left some stock in the suit premises which according to the defendant was not worthy writing home about. That stock despite what the defendant says belonged to the deceased. The deceased must have left it in there on the basis of some relationship, basis or arrangement. The defendant is not forthcoming though on the basis upon which the deceased left the items in the suit premises. In any event, the defendant in her own submissions has admitted that she was paid Kshs. 60,000/= by the deceased. She claims that the said sum was paltry though. Much as she claims that no rent had been paid by the deceased for and upto including December, 2010, she does not say on what basis again she was paid by the deceased the paltry sum of Kshs. 60,000/=. If it was a donation or gift by the deceased to her, nothing stopped her from declaring so. There is evidence as well that as at the time the deceased passed on, he was in possession and occupation of the suit premises. The defendant does not say the basis of the deceased occupation of the same. If he was her relative, friend or whatever, nothing stopped her from stating so as well. Again there is a letter dated 14th December, 2004 from the defendant’s then advocates **Messrs Momanyi Aunga & Co. Advocates** addressed to the deceased on the instructions of the defendant. That letter categorically stated that the deceased was a tenant of the defendant. This fact was further confirmed by the court proceedings in respect **H.C Misc. Civil App. No. 226 of 2004**. In that suit the deceased was among the applicants. **Bauni J.** in a ruling in the said application treated the deceased as a tenant of the defendant. Then there are single business permits issued to the deceased by the Municipal Council of Kisii in respect of the suit premises.

The totality of all the foregoing is that the deceased was in some sought of relationship with the defendant. Most likely that relationship was one of a tenant despite the defendant’s protestation to the contrary.

Following the death of the deceased, the defendant padlocked the suit premises, effectively terminating the tenancy. The defendant does not dispute the fact. The tenancy being a controlled tenancy could only have been terminated in accordance with the provisions of Cap 301. There is a line of authorities for this proposition. The defendant was expected to issue a notice to terminate or alter the terms of the Tenancy and wait for it to take effect. If no reference was filed then the defendant would be entitled to obtain an order of eviction and effect it against the estate of the deceased and bring the tenancy, if any, to an end. However if a reference was filed, then the defendant would have had the case heard in the **Business Premises Tribunal** and judgment delivered with regard to the tenancy, if at all. The defendant never opted to pursue her rights under Cap 301. Instead she took the law into her own hands literally speaking and must bear the consequences.

Yes, the plaintiffs could have pursued this case in the **Business Premises Tribunal**. However considering the circumstances obtaining it would have been foolhardy for them to have recourse to the **Business Premises Tribunal**. The defendant had padlocked the suit premises. It is trite law that the **Business Premises Tribunal** do not issue injunctions, mandatory or otherwise as sought in this suit. The tenancy having been terminated not in accordance with the law, the plaintiffs were entitled to approach this court for assistance. The tenancy did not die with the deceased. It survived him as he had paid to the defendant some money which to him he considered to be rent for upto and including December, 2010. The defendant thinks otherwise though. That tenancy, if any therefore formed part of the estate of the deceased. The plaintiffs having obtained a grant of letters of administration Ad Litem, they were entitled to approach this court for assistance.

The case for the defendant is that though the plaintiffs had been granted a limited grant, it did not entitle them to file suit since it does not indicate that it is for purposes of filing this particular suit. Nothing can be further from the truth. The limited grant of letters of administration Ad Litem issued to the plaintiffs on 28th June, 2010 could not have been any clearer. That grant was “...*limited to the purposes only for filing suit* ...”. The plaintiffs duly proceeded to file this suit. There is no evidence that they filed another suit using the same grant. I do not even see how after filing of this suit, any further acts by the plaintiffs would be tantamount to intermeddling with the deceased’s estate as submitted by the defendant. The case of **Joyce Mumbi Mugi -vs- The Co-operative Bank of Kenya & Others, NYR HCCC No. 209 of 2000** does not advance the case of the defendant any further. All in all therefore, the plaintiffs are ceased of capacity to bring this suit vide the limited grant issued to them.

The lease having not been terminated in accordance with the law, it subsists and the act of locking and padlocking the suit premises by the defendant is an illegality which a court of law should not countenance. The padlocking the suit premises is not denied by the defendant. In so doing however, the defendant was clearly stealing a match on the estate of the deceased. Afterall she knew that the deceased had passed on. She had received payments from the deceased which he considered to be rent upto and including December, 2010. She was aware that the deceased had stock in the premises which now belonged to his estate. By padlocking the suit premises, she had denied the plaintiffs access to part of the deceased estate. For as long as the suit premises are locked, the estate of the deceased will never have access to part of its assets. Infact and contrary to the submissions of the defendant, it appears to me that it is the defendant who is in fact intermeddling with the estate of the deceased.

There was no previous suit involving the parties herein. Therefore **Res Judicata** is applicable in the circumstances of this case.

On the whole and applying the principles enunciated in **Giella V Casman Brown & Co. Ltd (1973) E.A 358**, I am satisfied that the plaintiffs have managed to persuade me that they have a strong prima facie case with probability of success. I do not think in the circumstances of this case that the likelihood of irreparable damage caused to the estate of the deceased can be compensated for by an award of damages. In any case, the balance of convenience tilts in favour of the plaintiffs. Their deceased father was in occupation and possession before he passed on. No prejudice will be suffered by the defendant if the plaintiffs were allowed back in the shop. Afterall she has received what the plaintiffs claim to be rent upto and including December, 2010. Thereafter the defendant can elect to terminate the tenancy in accordance with the law. This case on the basis of the materials laid before me is also a fit and proper case for the grant of mandatory injunction as stated in the case of **East African Fine spinners Ltd & Others (supra) of 1994 (UR)**. This is a case that is unusually strong and clear. It calls for mandatory injunction.

Accordingly I allow the application in terms of prayers 3, 4, 5 and 6 on the face of the application.

Ruling dated, signed and Delivered at Kisii this 16th day of September, 2010.

ASIKE-MAKHANDIA

JUDGE