REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

CIVIL CASE 79 OF 2009

PAMELA MUYESHI (t/a FRONTPAGE AGENCIES) .....PLAINTIFF

VE R S U S

CHINESE CENTRE FOR PROMOTION OF INVESTMENT, DEVELOPMENT AND TRADE IN KENYA LIMITED.....DEFENDANT

R U L I N G

The Plaintiff herein was at all material times the Defendant's tenant in business premises situated within Nairobi at land parcel L.R. No. 209/393/1 (I.R. No. 25678). Those premises will hereinafter be called the suit premises. There was a written lease agreement between the parties dated 4th September, 2006. The term of the lease was six (6) years from 1st August, 2006. Rent was payable quarterly in advance.

Clause 5(b) of the lease agreement provides as follows:-

"If the rent or any other payment due by the Tenant or any part thereof is unpaid after it becomes due, whether legally demanded or not, or if there is any breach, non-performance or non-observance by the Tenant of any of the covenants or agreements herein and on the part of the Tenant to be performed and observed, then the Landlord may at any time thereafter enter upon the premises and....repossess and enjoy as in its former estate, anything herein contained to the contrary in anywise notwithstanding, without prejudice to any right of action or remedy of the Landlord in respect of any antecedent breach of any covenants by the Tenant."

This clause accords the landlord the right to enter and repossess the premises in the event of default by the tenant to pay rent, or on account of some other defaults under the contract.

It is common ground that the Plaintiff fell into substantial arrears of rent as at 30th November, 2008. The exact amount of the arrears is in dispute. The Defendant levied distress for rent. The Plaintiff challenged the distress in a subordinate court (Nairobi CMCC No. 105 of 2009). The suit was eventually withdrawn as that court did not have jurisdiction to deal with it.

It would appear that the distrained goods were sold, but the arrears of rent persisted. The dispute as to the exact amount of rent still owing also persisted.

There appears to have been a further distraint for rent in the course of which the premises were locked up by the Defendant, and the Plaintiff was unable to gain access into the same. She therefore filed the

present suit. She has sought three main reliefs:-

1. A mandatory injunction to direct the Defendant to unlock the suit premises and give the Plaintiff unhindered access thereinto.

2. A permanent injunction to restrain the Defendant from repossessing the premises, or evicting the Plaintiff from the premises, or in any way whatsoever interfering with the Plaintiff's occupation and enjoyment of the premises, or breaching the lease agreement by entering into a new lease agreement with a third party.

3. General damages and interest thereon at court rates.

Together with the plaint the Plaintiff filed an application by chamber summons dated 24th February, 2009. She sought in effect two main orders:-

1. A mandatory injunction to compel the Defendant to forthwith unlock the suit premises and give the Plaintiff access thereinto pending disposal of the suit.

2. A temporary injunction to restrain the Defendant from repossessing the premises, or evicting the Plaintiff, or in any other way interfering with the Plaintiff's peaceful occupation and enjoyment of the suit premises, pending disposal of the suit.

The application is brought under the inherent powers of the court (for the mandatory injunction) and under Order 39, rules 2, 3 and 9 of the Civil Procedure Rules (the Rules). It is supported by the Plaintiff's affidavit to which are annexed a number of documents, including the lease agreement between the parties.

The Defendant has opposed the application. It filed a notice of preliminary objection in which the following grounds are set out:-

1. That the application is premature, unprocedural, *res judicata* and bad in law in that it offends Order 24, rule 4 of the Rules. Further, that the Defendant is entitled to costs in Nairobi CMCC No. 105 of 2009 "estimated at KShs. 200,000/00", and that therefore the proceedings herein ought to be stayed.

2. That the application is made in bad faith, is oppressive to the Defendant, and is full of material non-disclosure.

3. That the application is an abuse of the process of the court, is "superfluous", and the orders sought are incapable of being granted in the circumstances.

As it happened, the preliminary objection was never argued, and for good reason. None of the grounds set out in the notice could be argued as pure points of law upon which the application could be disposed of. No application for stay of the subsequent suit was made under Order 24, rule 4 of the Rules. In any event, the costs in the previous suit had not been ascertained or demanded.

Whether an application is in bad faith, or whether there has been material non-disclosure, are matters of evidence, which evidence in this case is obviously disputed. There would also have to be some evidential basis upon which a claim can be made that an application is an abuse of the process of the court. Such evidential basis is not established. In other words, no pure point of law is raised in any of the grounds set out in the notice of preliminary objection.

The Defendant filed a replying affidavit on 4th March, 2009. It is sworn by one YUAN HUI, the property manager of the Defendant. The following additional grounds of opposition to the application emerge from the replying affidavit:-

1. That the Plaintiff persistently defaulted in paying due rent.

2. That for the year 2008 the Plaintiff was in arrears of rent and service charges in the sum of KShs. 609,656/00.

3. That the Plaintiff proposed to pay the arrears by post-dated cheques, which proposal the Defendant rejected, and that it is not true that the Defendant ever refused to accept rent-arrear payments.

4. That the Defendant distrained for rent as it was entitled to under the law.

5. That the Defendant repossessed the suit premises as it was entitled to do under the lease agreement on account of the Plaintiff's persistent default in paying rent after it became due and payable.

There is a supplementary affidavit filed by the Plaintiff in response to the replying affidavit. It joins issue with the Defendant upon various issues of fact.

I have considered the submissions (both written and oral) made on behalf of the parties, including the authorities cited. I have also closely read the three lengthy affidavits filed. It is not denied that the Plaintiff was in substantial arrears of rent when the Defendant levied distress. The Defendant was of course entitled to levy distress for rent under the Distress for Rent Act, Cap. 293. The issue raised by the Plaintiff in this regard is the exact amount of the arrears. What cannot be in dispute is that the arrears were substantial: well-over KShs. 400,000/00, at least. In the course of the distraint for rent the Defendant repossessed the premises. The Plaintiff does not dispute the Defendant's right under the lease agreement to repossess the premises on account of non-payment of rents that have become due and payable. The issue she has raised is the manner of such repossession. It is her case that lawful repossession can be only through an order of a court of competent jurisdiction, and there was no such order.

The Plaintiff relied on the well known case of GUSII MWALIMU INVESTMENT CO LTD & OTHERS –VS- MWALIMU HOTEL KISII LTD, Court of Appeal at Nairobi, Civil Appeal No. 160 of 1995 (unreported). The Court of Appeal held that unless the tenant consents or agrees to give up possession, the landlord has to obtain an order for possession from a competent court or statutory tribunal (as appropriate). The court expressed itself thus in the judgment of Shah, J.A:-

"I have no hesitation whatsoever in holding that the landlord did all it could to obtain the possession unlawfully .....If what the landlord did in this case is allowed to happen we will reach a situation when the landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain....possession."

In the above case, the landlord had repossessed the premises in the course of distraining for rent, in purported exercise of a right of repossession under the lease contract for default of payment of rent that had become due and payable. In this respect the case is on all fours with the present case. The point the Court of Appeal emphasised was that a landlord cannot exercise his right of repossession that has accrued by taking the law into his own hands. He must seek and obtain an order of repossession from a competent court of law or tribunal (as the case may be). Landlords should not use auctioneers to evict their tenants in the guise of levying distress for rent.

The statute that gives landlords the right of distraint for rent, that is Cap. 293 aforesaid, does not itself countenance a situation where the tenant will be evicted in the course of the distress. Far from it. Under section 4 of the Act the distrained goods must be left in the premises for at least 10 days. If the tenant does not pay the rent arrears within those 10 days the distrained goods can then be sold on the premises or removed and sold elsewhere. There is no suggestion in the Act at all that the tenant should be locked out of the premises during the distraint, or otherwise hindered in his possession and enjoyment of the premises.

In the present case the Defendant, by repossessing the premises in the course of distraining for rent, and without an order for repossession from a competent court of law, clearly acted against the edict of the Court of Appeal seen above. The purported repossession was illegal. I therefore have no hesitation at all in granting the Plaintiff the mandatory injunction sought. I direct that the Defendant shall forthwith unlock the suit premises and give back possession thereof to the Plaintiff pending disposal of the suit.

Having granted that mandatory injunction, I hold that it will be necessary to protect the Plaintiff's peaceful occupation and possession of the suit premises by temporary restraining injunction pending disposal of the suit. The lease between the parties still has a long way to run – over 3 years. The Plaintiff appears to have invested heavily in terms of money and effort in the business that she conducts in the suit premises. I am satisfied that she stands to suffer irreparable loss unless the temporary injunction sought is granted. Needless to say, having found that the Defendant unlawfully repossessed the suit premises, the Plaintiff has established a *prima facie* case with a probability of success.

The temporary injunction now granted is conditional upon the Plaintiff paying all arrears of rent within 30 days of the date of delivery of this ruling. These arrears shall not include rent for the period that the Plaintiff has been shut out of the premises on account of the repossession. The rents for that period are obviously in dispute, which dispute will be resolved at the trial of the suit. The Plaintiff must of course pay rent as provided for in the lease contract once she resumes occupation.

I will award costs of the application to the Plaintiff. Those will be the orders of the court.

DATED AT NAIROBI THIS 18TH DAY OF JUNE, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 19TH DAY OF JUNE, 2009