



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 434 OF 2005

ZEE-NET LIMITEDPLAINTIFF

V E R S U S

MBUCHIA INVESTMENT LIMITEDDEFENDANT

R U L I N G

The Plaintiff filed this suit on 18th April, 2005 by plaint of the same date. It pleaded that it was the Defendant's tenant in business premises situated on land parcel **L.R. No. 1870/IX/112 & 113 (Shop No. 8, Mbuchia House, Westlands, hereinafter called the suit premises)**. The Plaintiff further pleaded that its tenancy was a controlled one under the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301**.

The Plaintiff's case as set out in the plaint is that on 11th April, 2005 the Defendant illegally and forcibly, and in purported levy of distress for rent, repossessed the suit premises and thereby denied the Plaintiff access to the same. The Plaintiff sought the following main reliefs:-

1. A mandatory injunction directing the Defendant to allow the Plaintiff access to the suit premises to conduct its business therefrom.
2. A declaration that the "purported" distress levied by the Defendant was wrongful and illegal.
3. General and special damages for "loss of business and wrongful distress".

Together with the plaint the Plaintiff filed **chamber summons also dated 15th April 2005**, seeking a mandatory injunction to direct the Defendant to allow the Plaintiff access to the suit premises, and to carry on business therein without interruption or disturbance. That application came up before Ransley, J on 26th May, 2005. The learned judge granted the mandatory injunction subject to the Plaintiff paying to the Defendant KShs. 360,000/00 (apparently arrears of rent) within 15 days of that date.

On 30th November 2005, the Defendant applied by a **notice of motion of the same date** seeking a variation of the said order of 26th May, 2005. It wanted to be permitted to occupy the premises because, it claimed, the Plaintiff had neglected or refused to avail itself at the premises for purposes of enabling the Defendant to open them for it. The Plaintiff apparently paid the KShs. 360,000/00. This application was compromised on 18th January, 2007 before Ang'awa, J. The application was by consent withdrawn with no order as to costs. It was further ordered by consent as follows:-

“2. The Plaintiff’s and the Defendant’s representatives do meet at the suit premises.....on 19th January, 2007 at 11.00 a.m. for the Defendant to hand over the suit premises to the Plaintiff as per the orders of Ransley, J of 26th May, 2005.

3. That the advocates for both parties do attend the exercise at the suit premises at 11.00 a.m.”

On 13th February, 2007 the Plaintiff applied by **notice of motion of the same date** seeking leave to institute contempt proceedings against the Defendant, its managing director (one MOSES MBUGUA MWANGI) and its advocate (one G. W. WESONGA) for alleged disobedience of the consent order of 18th January, 2007. That application came up for hearing on 17th June, 2008 before Waweru, J. The following consent order was recorded:-

“1. The parties and their advocates to meet at the suit premises on 19th June, 2008 at 2.00 p.m. for purposes of handing over the suit premises by the Defendant to the Plaintiff in terms of the order of the court entered on 18th January, 2007.

2. Mention on 20/06/08 for further orders.

3. Costs in the cause.”

On 20th June, 2008 a further consent order was recorded as follows:-

“1. In reference to the consent order of 17th June, 2007, the Defendant did give to the Plaintiff vacant possession of the suit property on 19th June, 2008 as per the consent.

2. The application by n/m dated 13th February, 2007 be and is hereby marked as settled with costs in the cause.

3. Further mention on 04/07/08 for further orders.”

On 4th July, 2008 the learned counsels for the parties again appeared before Waweru, J. Counsel for the Defendant (Mr. Kulecho) informed the court, and counsel for the Plaintiff (Miss Waigera holding brief for Mr. Mogeni) agreed, **that the only outstanding issue then was costs of the suit**, upon which they could not agree. They invited the court to determine that issue. The matter was then fixed for submissions on costs on 29th September, 2008.

On that date the Plaintiff’s learned counsel informed the court that the Defendant had locked up the premises after 3 or 4 days since it handed them over to the Plaintiff. He wanted that issue attended to first before the issue of costs of the suit could be determined. The matter was stood over to 6th October, 2008 to enable the Defendant’s counsel to take instructions.

On that date the Plaintiff’s counsel informed the court that the Defendant had removed its padlock but had given its caretaker instructions not to give to the Plaintiff access to the premises. The Defendant’s counsel stated that it was not true that the Defendant had locked up the premises.

Representatives of the parties were then before the court. The court emphasized to them that it had no time for games, and the need for them to act within the law. The Defendant particularly was advised not to unlawfully interfere with the Plaintiff’s lawful possession and enjoyment of the premises. The court also gave the Plaintiff liberty to remove any padlock that may be unlawfully placed on the premises to deny it access thereto. Submissions on costs of the suit were then set down for 6th November 2008, but apparently the matter was not listed.

On 21st January, 2009 the Plaintiff approached the court *ex parte* for leave to institute contempt proceedings against the Defendant and its managing director(s) for alleged disobedience of the orders of

18th January, 2007 and 6th October, 2008. The court granted the leave sought. Such proceedings were instituted by **notice of motion dated 4th February, 2009** which is the subject of this ruling.

The application is supported by the affidavit of one **PETER ODENY**, the operations manager of the Plaintiff. It is alleged in this affidavit that between 25th and 31st December, 2008 the Defendant “barricaded the doors to the main entrance of the (suit) premises and proceeded to partition the suit premises with a view of offering the premises to another tenant without prior notice to the Plaintiff...”. This is the act that is said to constitute contempt of the orders of 18th January, 2007 and 6th October, 2008. It is to be noted that the act of alleged contempt of court complained of was committed nearly six months after the court was informed on 4th July, 2008 that the suit was settled except for the issue of costs.

On 22nd January, 2009 the Plaintiff had also filed an application by **notice of motion dated 21st January, 2009**. It sought a mandatory injunction to direct the Defendant to allow the Plaintiff access into the suit premises. That application is pending, awaiting disposal of the contempt application.

The Defendant has opposed the contempt application as set out in the replying affidavit filed on 13th March, 2009. It is sworn by one **ELIZABETH WANJIKU MBUGUA**, the property manager of the Defendant. The allegations of disobedience of the court orders are denied. The Defendant has also raised the following issues in the replying affidavit, *inter alia*, and in a further replying affidavit filed on 27th March, 2009:-

1. That the Plaintiff, by the application, is abusing the process of the court to frustrate the Defendant after it was served with notice to terminate tenancy dated 4th September 2008 under Cap. 301 aforesaid for default in paying rent and other substantial breaches of its obligations under the tenancy.
2. That in any event the Plaintiff has not been in actual occupation of the premises for over 2 years, which premises have remained empty.
3. That as confirmed by the Registrar of Companies, as at 10th March, 2009 there were no records of any company called **ZEENET LIMITED**.
4. That the Registrar of Companies confirmed the availability of the name ZEENET LIMITED for registration, and in fact the deponent incorporated ZEENET LIMITED on 20th March, 2009 to demonstrate that the entity ZEENET LIMITED did not exist when this suit was filed, rendering the suit bad in law.

The Plaintiff responded to the issue of its legal existence by filing an amended plaint on 18th March, 2009 wherein it corrected its name to read “**ZEE-NET LIMITED**”. In the further replying affidavit filed on 27th March, 2009 the Defendant pointed out that ZEE-NET LIMITED was incorporated on 29th January 1998, long after one **PARVEZ HOODA** who was the true tenant of the Defendant, had been in the premises for over 22 years. It was also stated that there was never any formal hand-over of the tenancy to the Plaintiff by the said Parvez Hooda.

The Defendant has also stated as follows:-

1. That the Plaintiff was in arrears of rent of KShs. 1,755,000/00 as at 2nd October, 2008.
2. That the Defendant as a result took the appropriate step of terminating the tenancy by serving the Plaintiff requisite notice under the law.
3. That the Plaintiff was never evicted as the premises were empty.
4. That persons other than true directors or shareholders of the Plaintiff are masquerading behind the

Plaintiff in this suit in order to frustrate the Defendant in the enjoyment of its property.

As is self-evident, I have closely perused the court record and also read the affidavits sworn in support of and in opposition to the application. I have also given due consideration to the submissions of the learned counsels appearing, including the authorities cited.

As has been seen, the court has spent a lot of time on this matter. **But happily, the parties reported to court on 4th July 2008, that in effect, the dispute between the parties had been settled, and that the only outstanding issue was costs of the suit.** This was after the parties reported to court by the consent order of 20th June, 2008 that the Defendant did give to the Plaintiff vacant possession of the suit premises on 19th June, 2008 as per the consent order of 17th June, 2008. That consent order referred back to the initial consent order of 18th January, 2007.

In these circumstances, the Defendant was in full compliance with the orders of 18th January, 2007 and 17th June, 2008. That is why it was reported to the court on 4th July, 2008 that the only outstanding issue was costs of the suit. If the Defendant subsequently interfered with the Plaintiff's occupation of the suit premises, that would constitute a new cause of action which is actionable by the Plaintiff by a fresh suit. It cannot constitute disobedience of the orders of the court of 18th January, 2007 and 17th June 2008, which orders had already been complied with fully by the Defendant. The admonition by the court to the parties on 6th October, 2008 to act within the law does not change that position. Further, that admonition did not constitute an order of the court that was capable of being disobeyed.

It is also to be noted that the Plaintiff has not responded to the allegation by the Defendant that it is in huge arrears of rent, and that due notice to terminate the tenancy on that count was served upon it under the relevant law. It should thus pursue its rights as provided for in Cap. 301 if it wishes to resist the notice to terminate tenancy. It cannot do so by contempt applications in this present suit which has been largely compromised.

In these circumstances I hold as follows:-

1. As reported to court by the parties on 4th July 2008, this suit stood settled on that date except for the issue of costs. That position remains.
2. The Defendant was in full compliance with the consent orders of 18th January, 2007 and 17th June, 2008.
3. Any act by the Defendant after 4th July, 2008 that may have interfered with the Plaintiff's tenancy constituted a new cause of action, not a disobedience of the consent orders of 18th January, 2007 and 17th June, 2008.
4. I find that the Defendant was not in contempt of the said orders.
5. The application by notice of motion dated 4th February, 2009 has no merit. The same is hereby dismissed with costs to the Defendant.

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