



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 182 of 2007

TESCO CORPORATION LTD.....PLAINTIFF

VERSUS

BANK OF BARODA (K) LIMITED.....DEFENDANT

R U L I N G

The Plaintiff was a lawful tenant of the Defendant pursuant to a Lease Agreement executed between the two parties in respect of the Mezzanine and ground floors of the premises erected on the property known as LR No 209/1419 Nairobi.

On 19th June 2007 the Defendant served and or caused to be served upon the Plaintiff a notice inter alia purporting that the Plaintiff was in breach of the terms of the lease by permitting a bank to use part of the suit premises. This forced the Plaintiff to file this suit against the Defendant seeking:

- (1) A declaration that the Plaintiff has fully complied with and has not breached the Lease Agreement.
- (2) A declaration that the Notice dated June 19, 2007 and any consequential notice on purported breach of the Lease is illegal null and void.
- (3) A permanent injunction to restrain the Defendant either through itself, servants, and/or agents from interfering with the Plaintiff and the bank's occupation of the demises premises in any event howsoever till lawful expiry and/or termination of the Lease Agreement.
- (4) General damages for breach of contract.
- (5) Costs of the suit plus interest at commercial rates.
- (6) Any other remedy that this Honourable Court deems just and expedient to grant.

Simultaneously with the Plaint the Plaintiff brought a Chamber Summons under Certificate of Urgency seeking orders:

- (a) That for reasons to be recorded, service of this Application be dispensed with in the first instance and the same to be certified urgent.
- (b) That pending the hearing and determination of this Application inter-partes the Honourable Court be pleased to issue a temporary order of injunction restraining the Defendants/Respondent either by itself, through its servants or agents from in any way howsoever interfering with the Plaintiff's occupation and enjoyment of the demised premises situate on Mezzanine and ground floors of the building erected on LR No 209/1419
- (c) That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary order of injunction restraining the Defendant/Respondent either by itself, through its servants or agents from in any way howsoever interfering with the Plaintiff's occupation of the demised premises situate on the Mezzanine and ground floors of the building erected on LR No 209/1419.

- (d) That the Plaintiff be granted the liberty to apply for any further orders as the circumstances of the case may permit.
- (e) That the costs of this application be provided for.

The application is based on the grounds as stated in the body of the Chamber Summons and supposed by an affidavit sworn by **MUKHTAR AHMED** a director of the Plaintiff Company.

The matter came before the Duty Judge (Visram J) who certified the application urgent and granted a temporary injunction on condition that the Plaintiff shall file an undertaking as to damages by 26th June 2007 and the Application was fixed for hearing inter partes on the 5th July 2007 and 29th October 2007 and was adjourned to 18th February 2008. But when the matter came up on 18th February 2008 the parties informed the court that the parties had agreed to negotiate to settle the matter. They recorded a consent order to take it out of the hearing list and have it stood over to 10th March 2008 for mention to record a settlement. The matter was mentioned on 10th March 2008, 30th April 2008 and 9th May 2008 but no settlement had been reached.

In the meantime the Defendant had on 20th November 2007 filed a Notice of Motion seeking order that the order of injunction made on 25th June 2007 be discharged varied and/or set aside and that the Plaintiff bears the costs of this application.

This application is based on the grounds:

1. That the Plaintiff is fundamentally in breach of the lease.
2. The Plaintiff has parted with the possession of the leased premises contrary to the executed lease between the parties.

The application is also supported by an affidavit sworn by David Ogega Nyaboga a manager of the Defendant Company.

Mr. Gitonga learned Counsel appearing for the Applicant submitted that this application is brought under provisions of Order XXXIX Rule 4 of the Civil Procedure Rules which provides:-

XXXIX “4” Any order of injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with such order.”

Counsel submitted that the order has been abused and in support of this contention he submitted that the Plaintiff has leased the occupation of the suit premises to a different entity called **NAKUMATT LTD**. He referred to an article in the Daily Nation of 19th November 2007 which states that TOM MBOYA Super-market is one of the Supermarkets taken over by Nakumatt Holdings. It used to be **TESCO** Supermarket but it is no longer **TESCO** Supermarket. The second ground given in support of the application is non payment of rent and urged the court to grant the orders as prayed.

While Miss Mugiro learned Counsel appearing for the Respondent in opposing the application relied on the grounds of opposition filed on 14th November 2008 she submitted that no sufficient material has been placed before the court to enable the court to exercise its discretion in favour of the Applicant.

First she submitted that the allegations made by the Applicant that the Plaintiff has parted with the suit premises are mere allegations and no documentary evidence to show that **TESCO LTD** has parted with possession of the suit premises and that **NAKUMATT** Holdings has taken over the suit premises. An article in the Newspaper is not sufficient to prove a fact that should be disregarded.

Secondly there is no evidence availed to prove the allegation that the respondent is in any arrears of rent.

In conclusion she submitted that the matters raised by the Applicant in the Notice of Motion could be raised in the opposition to the Chamber Summons dated 25th June 2007 which is part heard before this court.

Mr. Gitonga learned Counsel for the Applicant in reply to the submissions by Miss Mugiro learned Counsel for the Respondent submitted that newspaper reports are admissible in evidence. While Miss Mugiro maintained that newspaper report is not admissible in evidence and both Counsel made reference to the provisions of the Evidence Act Cap 80 Laws of Kenya.

The real question for consideration and decision by this court is as to whether on the evidence it has been satisfactorily established that the Plaintiff did part with the possession of the premises or any part thereof to any one in a manner to constitute a breach of contract. The only evidence relied upon by the Applicant is a Newspaper report contained in the Daily Nation of 19th November 2007. The issue here is admissibility of documentary evidence as to the facts in issue.

The provisions of Section 35 of the Evidence Act are very clear on this issue which provides:-

“35 (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, in production of the original document be admissible as evidence of that fact if the following conditions are satisfied that is to say –

(a) If the maker of the document either -

(i) Had a personal knowledge of the matter dealt with by the statement

or (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and or

Having considered the application in light of the affidavit evidence and submissions by both Counsel and the relevant law I am not persuaded that the Newspaper report is covered under the provisions of Section 35 of the Evidence Act.

Accordingly the Defendant's Notice of Motion dated 20th November 2007 is dismissed with costs.

Dated and delivered at Nairobi this 11th day of June 2009.

J. L. A. OSIEMO

JUDGE