



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 111 of 2008

PETER SOLACHER T/A PETLEY'S LAUNDING PLAINTIFF

VERSUS

DIANI PEAK LIMITED DEFENDANT

RULING

In a plaint filed on 2.5.2008, Peter Sollacher T/A Petley's Laundering (hereinafter "the plaintiff") claims primarily a declaration that the threat and/or intended eviction of the plaintiff is in breach of a lease Agreement and therefore unlawful and for an injunction to strain the defendant from evicting the plaintiff from the premises known as Petley's Inn Hotel building or in any other way interfering with the plaintiff's peaceful occupation and enjoyment of the said premises.

The foundation of the plaintiff's claim is that the plaintiff is a tenant of the defendant in respect of the said premises and has diligently complied with the terms of the said lease but the defendant, in breach thereof, threatens to evict the plaintiff on unfounded allegations of violation of the lease.

On 11.11.2008, the defendant delivered its defence to the said claim and also set up a counter-claim for vacant possession and mesne profits. The basis of the cross-claim is that there is neither a lease nor a tenancy existing between the plaintiff and the defendant and the defendant has served a valid quit notice which has taken effect.

In a ruling delivered on 3rd April 2009 on the plaintiff's application for an interim injunction, I restrained the defendant from evicting,

re-entering, repossessing, disconnecting power or water supply, interfering with the plaintiff's enjoyment of the bar known as Petley's Inn Hotel building pending the hearing and determination of this suit.

Two days after the said ruling the defendant lodged an application by way of Notice of Motion under Order XXXV Rule 1 of the Civil Procedure Rules for summary judgment for vacant possession and mesne profits as prayed in the counter claim. That is the application which came up before me for hearing on 14.5.2009 and is the subject of this ruling.

The application is based on the main grounds that the tenancy existing between the defendant and the plaintiff was terminated by 1.5.2008 and there is now no landlord/tenant relationship between the parties. The application is supported by an affidavit sworn by one Josef Brunlehmer, the defendant's Managing Director. It is deponed in the said affidavit, *inter alia*, that in 2008 the defendant served the plaintiff with a notice terminating the tenancy that existed between the parties and subsequently the defendant has

neither accepted nor demanded rent from the plaintiff. It is further deponed that despite service of the counter-claim upon the plaintiff, he has not filed a defence to the same and that the issue of termination of the lease has therefore not been challenged in this suit.

The application is opposed and there is a replying affidavit sworn by the plaintiff. His advocates have also filed Grounds of Opposition. In the replying affidavit, the plaintiff avers that there is a lease agreement between the parties which is expected to expire in the year 2014 but the defendant has unreasonably refused to accept the reserved rent. It is further deponed, on advice of counsel, that summary judgment is not available to the defendant as the plaintiff has a defence to the counterclaim which raises bona fide triable issues including whether the said lease agreements created a valid lease over the suit premises; whether the lease, if any, is or is not a protected tenancy or non-controlled tenancy; whether the termination notice is valid; whether the plaintiff is in breach of the tenancy in any and so forth.

The plaintiff further avers, on information of counsel, that a defence to the counter claim was filed and served albeit belatedly but before any judgment was entered and pleads that the same be deemed duly filed with the leave of the court. To the said affidavit are annexed numerous exhibits including copies of a lease agreement and the extension thereof, eviction Notice, letter forwarding bankers' cheques and letters returning the said cheques.

When the application came up for hearing as aforesaid, counsel agreed to file written submissions. The submissions substantiate the parties stand-points taken in their respective affidavits.

I have considered the pleadings the affidavits filed and the submissions of counsel. I have also given due consideration to the authorities cited. Having done so, I take the following view of the matter. This application has been brought under Order XXXV Rule 1 of the Civil Procedure rules. Rule 1 (1) (b) allows a plaintiff to seek summary judgment for recovery of land with or without a claim for rent, or mesne profits. The defendant's primary reason for seeking possession and mesne profits is that there is no landlord and tenant relationship between it and the plaintiff particularly as a termination notice was served and has taken effect. The defendant's contention is hotly contested by the plaintiff. In his view his tenancy over the suit premises is anchored in the lease agreement executed by the parties and mutually extended to the year 2014. He challenges the termination notice served by the defendant and maintains that he is not in breach of the terms of the said lease - but to the contrary it is the defendant which has unreasonably refused to accept the reserved rent. The termination notice is being challenged both in form and substance. All that has emerged from the material availed to the court which include the replying affidavit, the annexures thereto and the reply to defence and defence to counter claim admittedly delivered outside the prescribed period.

Order XXXV Rule 1 (1) (b) of the Civil Procedure Rules as already stated is intended to enable a plaintiff with a claim for recovery of land/premises to obtain a quick and summary judgment without being unnecessarily kept from his 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. On the basis that the defendant is a plaintiff with respect to its counter claim, the same principle would apply. In this case the defendant has raised several bona fide triable issues with regard to the very foundation of its claim. In Giciem Construction Company – v – Amalgamated Traders & Services [1983] KLR 156, the Court of Appeal held, *inter alia*, as follows: -

“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.”

The court cited with approval the case of Zola Limited and Another –v- Ralli Brothers Limited and Another [1969] EA 691 where it has held, *inter alia*, that the court should not grant an application for summary judgment where there is a reasonable ground of defence.

That decision was followed in Nuru Chemist Limited & Another

-v- National Bank of Kenya [CA 219 of 2002] (UR) in which the following passage is found: -

“The discretion under Order XXXV should be exercised cautiously because as it was stated in the case of James – v – Stone (1894) AC 123

‘The powers to give summary judgement under Order XXXV is intended to apply to cases where there is no reasonable doubt that a plaintiff is

entitled to judgment and where therefore it is

in expedient to allow a defendant to defend for

mere purposes of delay.’ ”

In this case as already stated the plaintiff has demonstrated by affidavit that he should have leave to defend the defendant’s counter-claim. I cannot therefore accede to the defendant’s application dated 15.4.2009 which is accordingly dismissed.

In order to expedite a speedy disposal of the dispute between the plaintiff and the defendant, the plaintiff’s reply and defence to counter claim filed on 11.5. 2009 is deemed duly filed with the leave of the court.

With regard to costs, I am of the view that each party should bear its own costs as the delay in filing the reply and defence to counter claim may have triggered the filing of this application. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF AUGUST 2009.

F. AZANGALALA

JUDGE

Read in the presence of: -

No appearance for either party.

F. AZANGALALA

JUDGE

27.8.2009