

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 109 of 2009

KATSURI LIMITED.....PLAINTIFF

Versus

NYERI WHOLESALERS LTD..... DEFENDANT

RULING

By a summons dated 3rd July 2009, the plaintiff applied for inter alia, an order of Injunction to restrain the defendant and its servants or agents from unlawfully evicting the applicant or interfering in any way with the applicant's quiet and lawful occupation of the suit premises standing on Nyeri Municipality/Block 111/66 pending the hearing and determination of the suit. The summons is supported by the affidavit of Bipinchandra P. Shah sworn on 3rd July 2009. The Defendant opposed the application by filing grounds of opposition and the replying affidavit of Pravin S. Shah sworn on 28th September 2009. When the summons came up for interpartes hearing learned counsels from both sides recorded an order of consent in which they agreed to have the summons determined by affidavit evidence.

I have perused the grounds set out on the face of the summons and the facts deposed in the affidavits for and against the application plus the grounds of opposition. It is the submission of the applicant that it would suffer irreparable damage if the defendant is not restrained from evicting it from its premises where it is operating a wholesale shop. The plaintiff has stated that there is a dispute over the lease agreement which is still pending determination. The plaintiff alleged that the defendant issued a demand notice dated 3rd September 2007 demanding payment of Kshs. 2,674,000/- being arrears of rent. That demand notice prompted the plaintiff to file Nyeri C.M.C.C. No. 585 of 2007. The Plaintiff further alleged that three different leases emerged from the pleadings filed in the aforesaid suit. On 19.1.2009 the defendant is said to have issued a notice of vacant possession of the suit premises. The defendant urged this court to dismiss the application for being an abuse of the court process. It is said that two suits over the same subject matter involving the same parties are pending. These suits are Nyeri C.M.C.C.C. No. 585 of 2007 and Nyeri B.P R.T. No. 62 of 2009. It is also argued that the terms of those leases complained of lapsed long time ago hence the suit lacks any legal foundation. It is said that the order sought by the applicant is tantamount to extending the term of the lease.

In deciding an application for orders of injunction, the principles are well settled. First an applicant must show that it has a prima facie case with a probability of success. Secondly, an applicant must show the irreparable loss it would suffer if the order of injunction is denied. Thirdly, if the court is in doubt, the application will be decided on the principle of convenience.

I have already set out in brief the background of this dispute. It is the submission of the plaintiff that it has a prima facie case with a probability of success. The plaintiff avers that it has a lawful lease to occupy the premises standing on Nyeri Municipality Block 111/66 where it operates a wholesale shop. It is alleged that the defendant wants to unlawfully terminate the tenancy and then evict the applicant. The defendant is of the contrary view that there is no subsisting lease.

I have carefully considered the competing arguments. There is no doubt that the plaintiff is in occupation of premises standing on the parcel of land known as Nyeri Municipality Block 111/66. It operates a wholesale shop. There is no dispute also that the lease ran from 15th May 2004 for a period of 5 years one day. There is no doubt that the plaintiff in the course of the life of that tenancy fell into

arrears of rent. This culminated into the filing of Nyeri C.M.C.C. No. 585 of 2007 and Nyeri B.P.R.T. No. 62 of 2009. The aforesaid lease lapsed on or about 15th May 2009. It is specifically deponed by Pravin Shah in paragraph 11 of the replying affidavit as follows:

“ ii. *That the lease having been for a term of 5 years one day from 15/05/2004, the same expired and or lapsed on 15/4/2009 by effluxion of time and the plaintiff was well in advance informed by the defendant of non renewal or extension of the duration.*”

The aforesaid averments were not controverted by the plaintiff. It is therefore obvious that the substratum of the plaintiff suit has collapsed. I agree with the defendant that the plaintiff is seeking to extend the term of its tenancy by a court order. Courts are not allowed to draw agreements for the parties. It is apparent from the above submissions and findings that the plaintiff does not have a prima facie case with any chance of success. For the above reasons I do not think the plaintiff can be said that it will suffer irreparable loss if the order is denied. I have not entertained any doubt hence I will not belabour to consider the third principal of convenience.

In the end and on the basis of the above reasons the summons dated 3rd July 2009, is found to have no merit. It is dismissed with costs to the defendant.

Dated and delivered this 13th day of October 2009.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Gori for Applicant Mr. Kiminda H/B for Kabethi for Defendant/Respondent.

J.K. SERGON

JUDGE