



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 506 of 2004

PHOTOS LIMITED ..... PLAINTIFF

VERSUS

MERU CENTRAL FARMERS CO-OPERATIVE UNION LIMITED.... DEFENDANT

RULING

By a notice of motion dated **14<sup>th</sup> August, 2007** brought under **Order XXXIX Rule 8, Order L rule 1 & 2** of the Civil Procedure Rules and **Section 3A** of the Civil Procedure Act. The Applicant (**Photos Limited**) seek an order that they be allowed to deposit the rent for suit premises known as **LR. NO.209/2437 Imenti House Nairobi** (hereinafter referred to as the suit property) being Kshs.25,500/= per month into this court pending the hearing and determination of this suit. The application is supported by grounds stated on the body of the application, the affidavit of Rakesh Gadhia sworn on **18<sup>th</sup> August, 2007** and a further affidavit sworn by Rakesh Gadhia filed on **27<sup>th</sup> September, 2007**. It is contended that the Plaintiff/Applicant has been a tenant at the suit property for the last forty three (43) years. Sometime in the year 2004, the plaintiff filed this suit after the defendants served them with a notice to vacate and threatened to forcefully evict them from the premises. On the **10<sup>th</sup> February, 2005**, this court issued an interlocutory order restraining the defendant from evicting the plaintiff from the suit property or interfering with the plaintiff's peaceful occupation pending the hearing and determination of suit.

On the **11<sup>th</sup> July, 2007**, the defendant forcefully entered the plaintiff's premises and threw out the plaintiff's goods in an attempt to evict the plaintiff from the premises. Following the intervention of the plaintiff's security guards, the defendant retreated threatening to come back to accomplish their mission. Since that incident, the defendant has refused to accept rent from the plaintiff with no explanation. The Plaintiff tried to forward the rent through their advocates, but the defendant's advocates refused to accept the rent claiming it had no instruction to receive any rent from the plaintiff.

The plaintiff is therefore apprehensive that the defendant may levy distress for rent against it and also attempt to evict the plaintiff from the premises. It is for this reason that the plaintiff has sought the intervention of the court.

The Plaintiff maintains that the defendant has no legal basis to refuse to accept rent for the premises as the defendant's tenancy is still subsisting.

In support of the application, the plaintiff's advocate contended that the defendant was in breach of the previous court order as refusing to accept rent was one way of interfering with the plaintiff's occupation. The plaintiff denies that there has been any change in the tenancy. Relying on **Civil Appl. No. Nai 186 of 1992**, Kamau Mukuha vs. The Ripples Ltd, and **Civil Appeal No.160 of 1995**, Gusii Mwalimu Investment Co. Ltd & 2 Others vs. Mwalimu Hotel Kisii Ltd, it was submitted that the defendant ought not to be allowed to take the law into his hands by forcefully interfering with the plaintiff without reverting to the court.

The defendant has responded to the application through an affidavit sworn by its general manager Fredrick Mburugu on **17<sup>th</sup> September, 2007**. It is contended that Rakesh Gadhia the deponent of the

supporting affidavits is neither a director nor a shareholder of the plaintiff company and therefore lacks capacity to purport to represent the plaintiff company.

In his affidavit, Mburugu contends that the plaintiff company abandoned the suit premises in the month of **May, 2007** and put up a notice indicating they had moved to Westlands. On **30<sup>th</sup> May, 2007**, there was an anonymous advertisement for sale of a shop within the suit premises, whose description corresponded with the shop which had been leased by the plaintiff.

**In July, 2007**, a messenger from PC World came to pay rent to the plaintiff in the sum of Kshs.25,500/=. The defendants managed to get hold of the remittance advice. Thereafter, the defendants noticed that whereas the plaintiff company was previously paying its rent by company cheques, the rent was now being paid by banker's cheques. The defendant realized that the plaintiff had purported to transfer the premises to a third party who was purporting to be the plaintiff company. It was for this reason that the defendant refused the rent from the strangers.

It was contended on behalf of the defendant that the order of prohibitory injunction was in favour of the plaintiff company and not the third parties who were in the premises. It was contended that the plaintiff's purported change of directorship had not been communicated to the Registrar within fourteen (14) days as required under **Section 201 (4)** as read with **Section 201 (5) (b)** of the Companies Act. It was maintained that the purported change was in fact only communicated after the defendant had threatened to evict the third parties from the premises.

It is further contended that the applicants have made no efforts to pursue contempt proceedings an indication that there was in fact no contempt. Counsel for the Plaintiff relied on **Re-resolute Tanzania Ltd [1999]1 EA 297**.

I have considered the application, the affidavit in support and in reply, the annexures thereto and the submissions of counsel, I do note that the interlocutory injunction order given on the **10<sup>th</sup> February, 2005**, by Hon. Emukule, J restrained the defendants from evicting the plaintiff from the suit premises pending the determination of this suit. Apparently, no action was taken by the plaintiff from the time that order was made until **14<sup>th</sup> August, 2007** when the present motion was filed.

It is contended on behalf of the Plaintiff that there has been a change of directorship in the plaintiff company. The Defendant has contended that the Plaintiff has in fact parted possession of the suit premises, and that the person currently in possession of the suit premises is not the Plaintiff Company and the purported change is to facilitate that arrangement. Given the alleged change of the directorship, and the fact that this change was apparently communicated to the Registrar of Companies after the date of the alleged parting of possession, I find that there is some substance in the contention of the defendants. Rakesh Gadhia the deponent of the two supporting affidavits, has not satisfied this court that he is a duly appointed director of the Plaintiff Company in the light of the evidence of the official search from the Registrar of Companies dated **7<sup>th</sup> September, 2007** which did not reflect his name as a director. It is strange that none of the old directors found it fit to swear an affidavit to confirm Rakesh Gadhia's contention that he has joined the Board of Directors.

In the circumstances, I am inclined to accept the contention of the defendants that the plaintiff has parted possession of the suit premises and that this motion is in actual fact an attempt to protect a third party. The order of interlocutory injunction which was made on the **10<sup>th</sup> February, 2005** only restrained the defendants from evicting the plaintiff or interfering with the plaintiff's peaceful occupation of the suit premises. It cannot be extended to third parties. For this reason, I find no merit in the motion dated **14<sup>th</sup> August, 2007**, and do therefore dismiss it with costs.

The temporary orders which were issued on **14<sup>th</sup> August, 2007** are hereby discharged.

Orders accordingly.

**Dated, signed and delivered on this 13<sup>th</sup> day of March, 2008**

**H. M. OKWENGU**

**JUDGE**