



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 7 of 2003

HUSSEIN OPERO ADAN PLAINTIFF

VERSUS

MERU BAKERS COMPANY LTD 1ST DEFENDANT

JOSPHAT KIRIGIA 2ND DEFENDANT

RULING

The applicant herein instituted this suit against the respondents for a declaration that the applicant is legally entitled to collect rents from the sub-tenants and further that no contractual relationship exists between the 2nd respondent and the applicants' sub-tenants. The applicant also sought orders restraining the respondents from interfering with the applicant's quiet and peaceful enjoyment of premises in dispute.

The background to the dispute can be stated briefly as follows:-

The applicant and the 1st respondent entered into a lease agreement where the former leased the land premises comprised in No. B11 151, Meru Municipality for a period of ten years from 1st February 1996 at a monthly rent of Kshs. 15,000/=. It was a term of the lease agreement that the applicant would be at liberty to sub-let any part of the premises.

On the taking possession the applicant sub-let part of the premises to eighteen (18) sub-tenants. The applicant alleges that on or about 7th January 2003, the 2nd respondent, purporting to be the registered owner of the disputed property, appointed an agent to manage and collect rents directly from the sub-tenants and also from the applicant, who I suppose, also occupied part of the premises. This action prompted the filing of this suit.

Filed simultaneously with the suit was chamber summons seeking a temporary injunction to restrain the respondents from interfering with the applicant's occupation and quiet enjoyment of the leased premises. That relief was granted.

Later on on 4th February 2005 the parties recorded a consent settling the matter on condition among others, that the applicant pays to the 2nd respondent Kshs. 190,000/= being rent arrears in respect of the suit premises. The parties also agreed that after the applicant paid Kshs. 30,000/= (which was infact paid) the balance would be liquidated by monthly instalments of Kshs. 5,000/=. That the applicant would also continue to pay rent falling due at the rate of Kshs. 20,000/= per month and that upon completion of the payment of rent arrears, the applicant and the 2nd respondent would execute – lease agreement in favour of the applicant.

Finally they agreed that in default of any one condition of the consent the 2nd respondent would be entitled to vacant possession of the suit premises. Subsequent upon this consent order, the respondents in their application filed on 6th May 2006 sought orders of vacant possession of the suit premises. That application was dismissed.

The applicant's application of 2nd May 2006, seeking restraining orders against the respondents was, however, allowed. Then the present application was brought and in it the applicant is seeking that the respondents be restrained by an order of injunction from taking possession of the suit premises and from interfering with the suit premises.

The applicant states that the respondents acting in breach of the tenancy agreement and the consent order between them and the applicant, the 2nd respondent has closed part of the suit premises and issued the sub-tenants with notices of the closure, thereby taking over the premises. Replying to these averments the 2nd respondent has deposed that the lease agreement in question expired on 1st September 2007 and further that in terms of the consent order of 8th August 2005 the respondents were only obliged to renew the lease agreement if the applicant continued to pay rent. The respondents alleged that the applicant having defaulted in the payment, they were not under any obligation to renew the lease. They put the arrears in rent at Kshs. 67,000/= as at 1st September 2007.

Finally, they state that following this default they have taken possession and therefore this application has been overtaken by events. Joel Murori, one of the eighteen (18) sub-tenants has also sworn an affidavit on behalf of the rest in which he has confirmed that the applicant vacated the suit premises in 2007. That all the sub-tenants have now signed lease agreements with the respondent.

I have considered these arguments and the single authority cited. Being an application for an injunction, it must meet the usual strictures enunciated in **Giella V. Cassman Brown Ltd** case.

First the applicant must show that he has a *prima facie* case with a probability of success at the trial. Secondly it must be remembered that an injunction will normally not issue unless the loss the applicant is likely to suffer cannot be compensated by an award of damages. If the court is in doubt, it must resolve the dispute on a balance of convenience.

In considering the first condition, the court is not called upon to decide the matter on merit. In that regard, has the applicant demonstrated a *prima facie* case? It was argued for the respondents that since the suit was compromised by the recording of the consent, there cannot be an application for an injunction without a pending suit.

Secondly, it has been argued that the injunction sought will be in vain as the applicant is no longer in occupation of the suit premises and finally that the applicant has not approached the court with clean hands as he is in rent arrears and for having failed to disclose that he is no longer in occupation. By dint of order 39 Rule 2 of the Civil Procedure Rules, the court can only issue an injunction where there is a suit for restraining the respondent from committing a breach of contract. It is important that the provisions of Rule 2 above be set out below,

“2. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”
(emphasis mine).

The applicant filed this suit on 21st January 2003 and sought a declaration relating to certain contractual relationships and restraining orders. At any time after the commencement of the suit and either before or even after judgment the applicant was at liberty to seek an injunction, so long as the anticipated breach of contract relates to the suit. The suit was compromised by the parties on 4th February 2005 when they

recorded a consent.

In that consent they agreed, among other things, that should the applicant default on any one of the conditions in the consent order, the 2nd respondent would be entitled to vacant possession.

The respondents have annexed a list tabulating the dates of default in rent payment between January 2005 and August, 2007. The applicant has merely averred that he is not in arrears of rent without furnishing any evidence of payment. Indeed with effect from 22nd June 2006, he recorded another consent in court to the effect that rent due at that date and subsequent ones would be paid to the advocate of the respondents.

There is no evidence that this was complied with. Secondly it is clear to me that when this application was brought, the tenancy had expired and the applicant vacated the suit premises. The orders sought cannot, in the circumstances, be issued as they will serve no useful purpose, the lease agreement having been spent and the applicant being in breach of the consent order. For these reasons, I find that the applicant has not shown a *prima facie* case.

Secondly, the loss the applicant is likely to suffer can be computed and appropriate compensation awarded. The balance of convenience is in favour of the respondent who is the registered proprietor of the property and who has entered into fresh tenancy agreements with the eighteen (18) tenants. The applicant, as I have already found, is no longer in occupation.

For all these reasons, I find no merit in the application and the same is dismissed with costs.

Dated and delivered at Meru this 12th day of May..... 2008.

W. OUKO

JUDGE