



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1276 of 2006

MAGNATE VENTURES LTD ::: APPLICANT

VERSUS

DILBAG SINGH BROTHERS (INVESTMENTS) LTD ::::::: RESPONDENT

RULING

The Plaintiff/Respondent moved to this Court by way of a plaint dated 1st November, 2006 and filed on 1st December, 2006 among others averring that:-

- Them Plaintiff requested for ushers space from the defendant/applicant as the landlord of the premises.
- Negotiations were done verbally and agreed pending formalization of the leave.
- These from the Respondent/Plaintiff contented that they had given rise to a valid tenancy agreement between the parties.
- The terms were one year tenancy commencing 1st June 2006 at a monthly rent of Kshs 60,000.00 payable quarterly in advance.
- The Plaintiff was to be responsible for any portioning fixtures and fittings, would be entitled to quiet enjoyment and in-in tempted possession of the shop, re-enter by the landlord breach of any of the covenants or default on payment of rent for at least one month and if lease was not executed the tenancy agreement could be brought to and end by either party giving a reasonable notice.
- Possession was granted on 1st June 2006.
- With approval of the landlord, the plaintiff undertook installation of electricity, extensive partitioning and fixing of fixtures and futures worth Kshs 1,500,000.00.
- The plaintiff confirmed in quite enjoyment of the premises from 1st June 2006 until 17th November 2006 when the landlords advocate gave an unlawful notice requiring the plaintiff to vacate the premises by 30th November, 2006 followed by a final reminder on 29th November, 2006.
- The Plaintiff contended the notice was illegal and also in breach of the agreement and gave particulars of the same in paragraph 11 of the plaint.

- Asserted that him Plaintiff was not in breach of any of the terms of the covenant.
- Contends the notice was in adequate.
- That if the landlord is not restrained the plaintiff would suffer damage.

In consequence thereof the Plaintiff ought a permanent injunction restraining the defendant by itself, agents, servants or otherwise howsoever from the perusing upon accessing removing and for destroying the plaintiff's portioning, fixtures fittings, stock in trade and mechanize on L.R. NO. 209/5023 Nairobi and/or interfering in any manner whatsoever with the Plaintiffs quiet possession of the Shop and Workshop.

(b) A permanent injunction restraining the defendant whether by itself, agents, servants or otherwise howsoever from evicting the plaintiff from Shop and Workshop on L.R. No. 209/5023, Nairobi and or interfering on any manner whatsoever with the plaintiffs quiet possession of the shop.

(c) General damages

(d) Costs of the suit

(e) Any other or further relief as this honourable Court may deem appropriate.

The plaint was accompanied by an inter application by way of chamber summons dated 1st day of December, 2006 and filed the same date seeking the restraint orders in the plaint first pending hearing of the application inter parties and pending the disposal of the suit. A perusal of the grounds in the body and supporting affidavit reveals that these are a reiteration and elaborately of the content of the plaintiff as proof of the tenancy relationship and proof that the plaintiff carried out business at the said premises.

In response to the application the respondent/defendant entered appearance and put in a replying affidavit sworn by one Kuljeet Dhami on 6th day of December, 2006 and filed the same date. The sum total of the salient features of the same for purposes of this ruling are:-

(i) The defendant is a registered owner of the suit property LR. NO.209/5023 situate along Kampala Road Industrial Area where it has constructed go downs on the same.

- That on 1st June 2006 the Plaintiff requested to use one of the go downs and then made a commitment to sign a formal lease, based on the terms contained in the letter of basic terms to be contained in the lease one of which was to the effect that the Plaintiff would occupy the said prizes for a period for 6 months only with effect from 1st day of June 2006.

- At the end or expiration of the said lease agreement the plaintiff was to give back the said premises in a tenantable state of repair conditions, the lease was to pay legal charges involved in the properties of the lease and no alteration or addition were to be made to the premises without the content of the landlord.

- That Plaintiff are guilty of non-disclosure of particulars that others in places a letter of offer to enter into a lease and or a lease.

- That when the 6th months period drew to a close, the Plaintiff never expressed a decree to renew the same hence the applicants were to issue notice for the termination of the lease and to embark on looking for another tenant for the premises which they got, and who has already signed a lease for the same.

- That the Plaintiffs continued occupation and use of the premises continue to arise, the defendant and the new tenant irreparable loss and damage.

- The Plaintiff has had by saying that the tenancy was for one year hence the plaintiffs continued occupation of the said premises is not only illegal but unlawful.

The interim application came before Kihara J. on 1.12.2006 when interim orders were granted. Later on 2.5.07 the court adopted consent orders. These were recorded on the court ton the court record and then endorsed by Counsel of both parties. An extracted copy is annexed to the applicant's applicant as annexure Kd2. These were extracted on 11th day of January 2008. These read:-

- (1) *That the plaintiff do continue occupying the shop at the defendants premises plot LR.209/5023 Kampala Road Nairobi up to 31st day of December 2007.*
- (2) *That the plaintiff do pay the Defendant a monthly rent of Ksh s80,000/= payable quarterly in advance with effect from the 1st January 2007.*
- (3) *That the Plaintiff hereby agrees to surrender the shop to the defendant on the 31st day of December, 2007 in good and tenable state of repair and condition.*
- (4) *That the suit be and is hereby marked as withdrawn with no order as to costs.*
- (5) *That in default o f payment of the rent or any part of thereof execution to issue and the plaintiff be evicted from the shop without further notice”.*

It is against the afore set out background information that the defendant/applicant has filed the application by way of notice of motion dated 24th January, 2008 same date. It seeks three orders namely:-

- (1) *“This honourable court do order the plaintiff/respondent to be evicted forcefully from the suit premises LR. NO.209/5023 Kampala Road Nairobi forthwith.*
- (2) *This honourable Court do order the respondent tot pay all rent due plus water and electricity charges up to the date of eviction.*
- (3) *Costs of this application be provided for”.*

The grounds in support are set out in the body of the application, supporting affidavit, annextures and oral submission in Court and the central theme is:-

- (1) There is a consent executed by both parties whereby the plaintiff/respondent was to vacate the defendant/applicants premises by 31.12.2007 but have failed to do so.
- (2) That as such they are trespassers and therefore proper candidates for eviction.
- (3) That the Plaintiff moved to the premises on the strength of a lease for 6 months which expired and when notice was given to vacate the plaintiff rushed to court or obtained restraint orders.
- (4) Thereafter the stay was extended by mutual consent up to 31.12.07.
- (5) That when the were requested to leave they asked for time up to 31.3.08 but did not move and were still in the premises showing no sign of vacation of the said premises even at the time of argument of the application inter parties. As such the court should grant the orders prayed for.

In response to that application the Plaintiff/respondent filed a replying affidavit whose contents is valued upon as well as annextures annexed thereto and oral sub missions in court. The central theme in it is as follows:-

- (1) That the plaintiff has diligently adhered to the consent of 2.5.07 and duly paid rent and survive

charge as agree.

- (2) That the plaintiff was unable to move from the defendants premises as its movement to alternative place was hampered by violence that marked the country after the last general elections.
- (3) That the defendant was duly informed of the fact and they asked for time upto 31.3.08 in order to vacate and forwarded a cheque for rent for the said period.
- (4) As per the supplementary affidavit they had indeed secured alternative premises to which they intended to move but the prospective landlords upon leaning that the plaintiffs business involves among other construction and fabrication of huge billboards structures which undertaking requires heavy machinery and equipment currently housed in the applicants premises to prospective landlords declined or became reluctant to avail the same to the plaintiff.
- (5) In consequence of matters stated in number 4 above the plaintiff still continues to make diligent efforts to secure an alternative place to relocate.
- (6) In the meantime the plaintiff has shown good faith by continuing to pay rent promptly forth extended period.

On the Courts assessment of the grounds for and against the application subject of this ruling it is clear that:-

- (1) There is no dispute that a tenancy relationship was struck between the disputants starting first time 2006. By virtue of which the plaintiff was to occupy the premises for a period for 6 months only.
- (2) It is on record that the intended lease which was never executed and registered but parte is recognized the existence of the landlord and tenant relationship by each performing its duties and obligations expected of them and thereby respecting the others rights. By this the court means that the tenant duly paid the agreed rent as and when it feels due thereby respecting the landlord's right to accrued rent. On the other hand the landlord accepted and received rental proceeds thereby respecting the tenant's right to the quiet enjoyment of the occupation of the said premises.
- (3) It is on record that both parties read in the said unexecuted agreement a right to extend and terminate the relationship on either party. It is the contention of the defendant applicant that when the plaintiff ailed to give an intimation of a desire to have the same renewed, the landlord heard made the first move to have the same terminated, which action prompted the plaintiff to move to this court, file the current suit simultaneously within an interim application on the basis of which both parties received the consent executed by their respective counsels on 2.5.2007.
- (4) It is not disputed that by virtue of the term of the said consent, the plaintiff/respondent has obligated to vacate the suit premises by 31.12.07. It is also common ground that as at the time of argument of the application subject of this ruling on 23.07.08 the plaintiff had not vacated the said premises. The excuse given is found both in the respondents replying affidavit as well as supporting affidavit, which is to the effect that, them plaintiff failed to move to alternative premises firstly due to violence which locked the country after the last general elections, and secondly due to the fact that there is reluctance on the part of the intended landlords to accept the plaintiffs business on the premises on account of the said business being one which deals in heave machinery, and thirdly, that the plaintiff/respondent has shown good faith by paying rental due forth extended period.

The question to be determined by this Cur tin view of the findings in number 1,2,3 and 4 above is whether the explanation given by the Plaintiff/respondent is sufficient justification to put hold the applicants ground match to recover the premises, vide prayers sought in the application subject of this ruling. In this courts opinion, the answer is "**NO**". It is known because:-

- (1) First indeed the country experienced a wave of violence after the last general elections that the

Court has judicial notice of because it was a matter of public notoriety for all citizens of this country to take note of. However, there is no deponent on the part of the plaintiff/applicant that this violence continued beyond the 31.3.08 date that they had asked for extensions to.

(2) Secondly there is an allegation that alternative premises had been obtained, but the plaintiff had not disclosed the particulars of these alternative premises in terms of:-

- (a) Plot number
- (b) Landlord name
- (c) Location of the premises for verification purposes.

(3) Thirdly nothing has been exhibited by the Plaintiff/Respondent from any intended landlord who has shown reluctance to accept the plaintiff as a tenant of their premises on account of his business dealing in heavy machinery full knowledge and information concerning this matter and I am competent and duly authorized to swear this affidavit on behalf of the plaintiff”.

Also paragraph 1 of the supplementary Affidavit sworn by the same Standly Kinyanjui on 14th day of May 2008 and filed on 19th May 2008 is worded in a similar manner like the previous one and it reads thus:-

“I am the managing Director of the Plaintiff. I have full knowledge and information concerning this matter and I am competent and duly authorized to swear this Affidavit on behalf of the Plaintiff”

The reason for setting out these paragraphs is because they do not comply with the provisions of order 1 rule 12(2) Civil Procedure Rules which reads:-

“O.1 rule 12(2). The authority shall be in writing signed by the party giving it and shall be filed in the case”. This position was confirmed by the Court of Appeal in the case of RESEARCH INTERNATIONAL EAST AFRICA LTD VERSUS JULIUS ARISI AND 213 OTHERS. NAIROBI C.A. 321 F 2003 PG.8 line 12 from the bottom where it is stated:-

“But rule 12(2) of order 1 emphatically provides; (2) the authority shall be in writing signed by the party giving it and shall be filed in the case”.

Applying the above principle to the above set out paragraphs it follows that in the absence of there being an authority in writing having been annexed to the affidavit the effected affidavits have been faulted. This Court has judicial notice of the fact that both disputants are limited companies and therefore body corporate. Being body corporate, it is common knowledge to both parties and it is also a matter of public notoriety but also a matter of judicial notoriety that body corporate have a legally accepted mode of communicating such authority. The accepted mode is by way of resolutions of either board of Directors or share holders in an Attorney General. In the absence of such resolutions being exhibited and annexed to these paragraphs, the authority to depone is missing and if it is absent then the affidavits as invalid then it qualifies to be struck out.

The question is whether the parties are to be sent back on to the drawing board. The answer is “No.”. The reason being that there is consent in record and the aggrieved party could have even moved the court orally for the relief sought. For this reason and for the reasons in the assessment. It will be injustice to allow the plaintiff to benefit from his default for the reasons already set out herein. The defendant/applicant is rightfully entitled to the vacant possession of his premises after the expiry of the period agreed upon by parties as per their consent. The Plaintiff/respondent has not cross applied to have the consent, period extended for him. It will therefore be injustice to hold on insolvent party at ransom for the benefit of a party in default. Justice therefore demands that the technicality observed above in the wake of the peculiar circumstances of this case be excused as they do not go to the root of the matter. The court says that they do not go to the root of the matter because the consent of the affidavit do not oust

the consent of the consent order. Whether an affidavit is in place or not the court cannot ignore the fact that there is consent on record and that there are oral representations on the record by which the plaintiff respondent has not shown sufficient justification for his continued stay in the applicants premises. The court is therefore enjoined to opt to apply substantial justice as opposed to technical justice and hold that the defendant applicant's affidavit dated 21st day of January 2008 and filed the same date be oral is hereby allowed on the following terms.

- (1) The Plaintiff/Respondent has 30(thirty) days form the date of the reading of this ruling to remove themselves, together with their servants, agents and all belonging and equipment from the occupied premises of the defendant/applicant namely from LR. No. 209/5023 Kampala Road Nairobi Industrial Area failing which the defendant/applicant be at liberty to evict them at the expiry of 30 days without further recourse to this court.
- (2) Eviction may be effected thro ugh the help of a court bailiff or O.C.S. (Officer in Commanding Police station) in whose jurisdiction the suit premises is situated.
- (3) The plaintiff also ordered to pay all rent due up to and inclusive of the date of the departure together with all waters and electricity expenses so far incurred up to the date of departure inclusive of other incidentals payable by the tenant.
- (4) In default of number 3 above the defendant/applicant to be at liberty to institute appropriate measures herein to recover the same.
- (5) The defendant applicant will have costs of the application.
- (6) There will be liberty to apply vital to the issue of payment of rent due water, electricity and other incidental expenses payable by the plaintiff/respondent upon departure if the same upon departure.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2008.

R.N. NAMBUYE

JUDGE