



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 319 OF 2008

KENT LIBISO.....1ST PLAINTIFF

INTRONIX.....2ND PLAINTIFF

VERSUS

CIRKON TRUST CO. LTD.....1ST DEFENDANT

SAMUEL MUGO WANGAI t/a
SANNEX ENTERPRISES.....2ND DEFENDANT

RULING

Application dated 16.06.2008 by Chamber Summons filed by the Plaintiffs.

Orders sought:

1. Respondents be restrained from alienating, disposing by public auction or otherwise the applicant goods attached by the 2nd Defendant on 13.06.2008 pending determination of this application.
2. That the first Defendant be restrained from evicting or interfering with the applicants quiet possession of the suit premises L.R. No. 1/811 Kilimani Nairobi.
3. That the Applicants goods be released to the Applicant.

The grounds upon which the Application is based are set out on the application and supporting affidavit sworn by the first Applicant showing that there was a lease tenancy agreement dated 19.06.2006 between 2nd Applicant and the 1st Defendant for a period of five years from 01.07.2006 to 30.06.2011 exhibit "KL1". The second Applicant has been operating from one of the flats.

It is also sworn that by a sale agreement dated 14.08.2007 for the purchase of whole property L.R. No.1/811 Nairobi a copy of Agreement is marked "KL 2" The first Applicant has been utilizing the premises for his residence with the full knowledge and consent of First Respondent and has carried out renovations and extensions to the value of Kshs.8 million. The completion date was on or before 30.11.07. The amount paid is Kshs.11 million. The final payment of kshs.14 million was due for payment on 30.05.2008 but the first Respondent has failed to perform his part has prevented completion.

Then the first Respondent proceeded to proclaim **“on 13.06.2008 a group of police officers and guards broke and entered the premises loaded chattels and household goods. There was attempted eviction.”**

Upon perusing the exhibits attached to Applicants Affidavit it is admitted that regarding purchase price, Kshs. 14 million is the balance unpaid and that in case agreement was cancelled 10 % deposit would be forfeited.

Therefore, out of already paid price only Kshs.2.5 million would be forfeited.

The other point is that in respect of sale agreement, the completion date was extended to 30.05.2008 by agreement see letter dated 23.02.2008 from Advocates of Defendant, letter of 14.05.2008 confirming completion date. However, the Defendants were to hand over documents as provided under special condition Numbered 1.

The so called completion notice was dated on 20.05.2008 before the agreed completion date. This was no notice at all. Such notice should be issued after the date of default. Under clause 11 of the parties agreement it is stated that in case of default 2 (two) weeks of grace shall be allowed and thereafter penalty payments shall be charged.

The completion date was the date after payment of last installment which was on or before 30.11.2007. However, it is clear the parties extended the completion date and fixed it on 30.05.2008. However, on that date the Defendant (vendor) was not ready to complete. It had not complied with special condition numbered 1.

On the issue of the lease, the document marked “KL 1” shows that the proposed lease was to be for 5 (five) years thereafter to be extended by mutual consent. The lease was in the name of 2nd Plaintiff and 1st Defendant. The premises comprised 2 (two) flats. But up to month of October rent has been paid. Second Applicant is not in arrears as in further affidavit sworn on 11.09.08 showing rent was paid for June and August. The Law Society Conditions of sale clause 6 (4) provides that where a purchaser is a lessee or tenant the contract does not determine or affect the lease or tenancy.

Therefore, the tenancy in this case continues until terminated in accordance with lease/tenancy agreement.

The case of ***Gusii Mwalimu Investment No. 2 and others –vs- mwalimu Hotel*** is relevant in this case. It was a court of Appeal decision where Shah J. A. when he pointed out that Section 90 Penal Code provides that any person who in order to take possession thereof enters on any lands or tenements in a violent manner, whether the violence culminates in actual force applied to any other person or threats in breaking, open any home or collecting a minimal number of people and whether he is entitled to enter upon the land or not, is guilty of misdemeanor termed forcible entry.

In this case, it is sworn that a large number of uniformed guards and some police officers without Court order took action **“even if I was to hold that the tenant was at the material time a trespasser and that it had not pleaded holding over, I would not sanction a situation such as in this case that is obtaining possession without a court order.”** The Judge added.

The application before me relates only to matters prayed under prayer 3. The applicants are still in possession.

It is my considered view that the Respondents were acting illegally in trying to gain entry into the premises subject to sale agreement. The sale agreement not having been lawfully rescinded and in view of there being no rent arrears and also in view of clause 6 (4) Law Society Conditions of sale. I allow this application in accordance with terms of Prayer 3 of the application. Costs to the Applicant.

It is so ordered.

DATED this 27th day of November, 2008.

JOYCE N. KHAMINWA

JUDGE