



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO**

Civil Suit 39 of 2008

MARTIN M. ODHIAMBO PLAINTIFF

VERSUS

KENYA FARMERS ASSOCIATION LTD 1ST DEFENDANT

M/S LIFEWOOD AUCTIONEERS LTD 2ND DEFENDANT

RULING

ON AN APPLICATION FOR INJUNCTION CHAMBER SUMMONS DATED 23RD SEPTEMBER, 2008

I: Background/Procedure

1. Martin M. Odhiambo & Express Automobile (K) Ltd filed suit on 24th September, 2008 against M/S Kenya Farmers Association Ltd (1st defendant) and Lifewood Auctioneers Ltd (2nd defendant) seeking orders in the main suit for an injunction to issue against the two defendants as landlord and auctioneers respectively from attaching and or levying distress to his goods. That as a tenant, he be allowed to pay a rent of Kshs. 20,000/= per month with portion of the premises be renegotiated.
2. The Plaintiff uses the premises in question as a commercial business premises.
3. By an application dated 23rd September, 2008, the Plaintiffs filed an application under certificate of urgency seeking injunctive orders restraining the said defendants from attaching his properties and do levying distress or interfering with his occupation.
4. Ex parte orders were granted to him on 24th September, 2008 (*G.B.M Kariuki – J*) and after the defendant 1 and 2 respondents entered appearance; inter parties hearing was rescheduled for 3rd November, 2008 (*Maranga– J*).

II: Application- 23rd September, 2008

i) *Arguments by applicant*

5. The applicant stated that the issue between the parties, whose relationship was of tenant/landlord, was that of rent payment. According to the applicant, he had paid his rent schedule in full. Despite this the

defendant No. 11 respondent levied distress and went further to threaten to evict him from the premises.

6. He admitted that he had proceeded to the Rent Business Premises Tribunal for protection. The purpose was to have the interpretation of his original lease with the first defendant determined, dated 8th August, 2006 as to its interpretation. He insisted that he was a protected tenant.

7. The issue of the interpretation of the clause of “*letter of offer*” is that the prescribed form of the lease agreement was not complied with. He prayed for a full hearing to produce his letter of offer that was sent by the landlord 1st defendant respondent and together with the rent schedule.

ii: Arguments by respondent

8. The advocate for 2nd defendant held brief on his behalf and that of the 1st defendant. The arguments put forward is that the said application was opposed. The Plaintiff as it stood was defective. He relied on the Preliminary Objection that was heard simultaneously with the application.

9. The suit before Court was filed in person but the plaintiff is also a limited liability company. No summons to enter appearance had been filed as required by law.

10. The lease that had been entered into by the parties was accepted by the plaintiff. The rent agreed upon was Kshs. 40,000/= per month. It came to a situation where the applicant had issued cheques which were returned unpaid due to lack of funds.

11. There is no cause of action and the injunction sought did not meet the requirements set out by case law.

12. Further, the applicant is in arrears of rent of Kshs. 441,000/=. He should be ordered to deposit this to Court, if the Court would be inclined to grant him his prayers.

III: Opinion

13. The Plaintiff/applicant applied for a lease to commercial premises LR 631/1/11 along Moi Highway Kericho. From the respondent No. ones’ affidavit, it was the applicant whom on application for the premises offered to pay rent of Kshs. 40,000/= per month. The agreement entered into by parties showed that the lease would be for five(5) years and three(3) months duration at a rent payable of Kshs. 40,000/= per month but payable quarterly, namely Kshs. 120,000/= every three months.

14. There seemed to have been no problems between the parties when the rents remained unpaid. According to the respondent No.1 the applicant had issued post dated cheques totaling Kshs. 360,000/= between the period of 2006 when the lease was signed to August, 2007. In 2008 a further cheque was issued to cover September, 2007 to December, 2008. All these cheques came back unpaid. The applicant explained this as being Cheques put in the account when lawful orders against the respondents had been issued by the Business Premises Rent Tribunal.

15. The question therefore arises as to what was the actual rent agreed between the parties that was payable? The respondent No.1 duly produced to Court the lease agreement dated 16th August, 2006 in a form of a letter that accepted to have the Plaintiff as a tenant for a period of five (5) years and three(3) months at a rent payable of Kshs. 40,000/=.

16. The applicant in his Plaintiff and in his application stated that the rent payable was Kshs. 20,000/= per month. This fact was indeed not correct according to the records held by the respondent. A rental account payment schedule marked MMOI is untrue and false and cannot therefore stand. This is a material non disclosure intended to mislead the court that the rent payable is Kshs. 20,000/= and not Kshs. 40,000/=.

17. Although not pleaded in the application the applicant tried to inform this Court that portion of the

premises had been given out to a third party. The 3rd party was never enjoined to this suit. The issue though is whether he paid his rents between September, 2007 to date? The respondent stated that he had not.

18. In deciding whether an injunction should be issued, I require to take into consideration of the circumstances prevailing in the country in December, 2007 and January, 2008 due to the election violence. One could excuse the Plaintiff's business not doing well and this inability to pay rent?

19. I would not be persuaded by this on the grounds that even if it was the case the applicant in any event failed to tell this Court that the agreed rent was Kshs. 40,000/= and not Kshs. 20,000/=. This was wrong on the part of the applicant. The courts of equity would not remedy a wrong doer.

20. Further, the issue arises as to the locus of the plaintiff. The agreement was indeed with M/S Express General Insurance Brokers Ltd. The applicant discloses himself as trading as Express Automobile (K) Ltd. Where, a limited liability company files suit there requires to be authority from the company to so file suit. The Plaintiff filed the suit in person without authority of the company, is an issue that is being agitated in the Preliminary Objection by the respondent.

21. The respondent nonetheless was dealing with the Plaintiff in his personal capacity and that of the M/S Express Automobile (K) Ltd. The respondent's concern was basically on the issue of rent. The applicant has failed to pay rent; the respondent distressed for rent and the Plaintiff applicant came to Court.

22. My opinion on the application for injunction is that the applicant signed a lease for five (5) years three (3) months. That this did not qualify him and the company to be protected under the Business Premises Rent Tribunal. The reference filed in that Tribunal Court No. 4 of 2008 was duly struck out as the said Tribunal has no jurisdiction to entertain lease agreements over five years.

23. The applicant still insists he is protected. His remedy, of course lies within the High Court, nonetheless the material non disclosure of the Court rent payable by the plaintiff/applicant removes this application from being granted injunctive orders. The probability of success diminishes as the requirements established under the case law of Gieilla Vs. Cassman Brown case has not been established.

24. I would accordingly dismiss this application with costs to respondent 1 and 2. The injunctive orders granted earlier by (*the Hon. Judge, G.B.M Kariuki – J and extended by Maranga -J*) be and is hereby set aside and vacated.

DATED this 4th day of November, 2008 at KERICHO

M.A. ANG'AWA

JUDGE

Advocates.

i) *I.O. Meroka advocate for the 2nd Defendant/Respondent and holding brief for J. Nyamwange advocate for the 1st Defendant/Respondent*

ii) *Martin Odhiambo – applicant in person*