



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

Civil Appeal 466 of 2008

AVENUE FRESH PRODUCE LIMITED.....APPELLANT

VERSUS

VIJAY KUMAR SHAMJI PATEL.....RESPONDENT

R U L I N G

1. Avenue Fresh Produce Limited, the applicant herein, is aggrieved by the Judgment of the Business Premises Rent Tribunal delivered on 29th August, 2008 in Tribunal Case No.148 of 2008. The Tribunal case related to godown No.38 situated on LR No.9042/242 (hereinafter referred to as the suit premises). The applicant was a tenant in the suit premises which are owned by Vijay Kumar Shamji Patel (hereinafter referred to as the respondent). In its judgment, the Tribunal allowed a notice issued by the respondent, terminating the applicant's tenancy, and gave the applicants 30 days to vacate the premises. The applicant has lodged an appeal against that judgment.

2. The applicant has also moved this court under Order XLI Rule 4(1) and 4(6) of the Civil Procedure Rules seeking *inter alia*, orders as follows:

(i) Spent

(ii) That pending the hearing and determination of the application herein and for the ends of justice and so as to prevent abuse of the process of the court a temporary injunction do issue ordering the respondent to restore and/or reinstate the appellant into quiet occupation, possession and/or enjoyment of the premises namely L.R. No.9042/242 Off North Airport Road, Embakasi.

(iii) That the O.C.S Embakasi Police Station do supervise and ensure compliance by the respondent of any orders issued herein above in favour of the appellant.

(iv) That pending the hearing and determination of the appeal herein a temporary injunction order do issue to restrain the respondent either by himself, his agents and/or servants from evicting or otherwise howsoever interfering with the appellant's quiet occupation, possession and/or enjoyment of the premises namely L.R.No.9042/242 Off North Airport Road, Embakasi.

(v) That pending the hearing and determination of the appeal filed herein there be a stay of execution of the order issued on 29th August 2008 by the Business Premises Rent Tribunal.

3. The application is supported by an affidavit sworn by Charles Muchiri, the managing director of the

appellant. Muchiri depones that following the order of the Tribunal allowing the notice from the respondent, the respondent's agents proceeded to the suit premises on 30th and 31st August, 2008 and attempted to forcefully evict the applicant from the suit premises.

4. As a result, the applicant's advocate went back to the Business Premises Rent Tribunal, in an effort to obtain orders against the attempted illegal eviction. The Tribunal gave a ruling confirming that any attempt by the respondent to evict the applicant from the suit premises before the expiry of the 30 day period, was illegal and unlawful. Notwithstanding this, the respondent unlawfully evicted the applicant from the suit premises and removed the gate, doors, windows and roofing. The respondent also disconnected the electric supply to the premises.

5. The applicant contended that the respondent's action was intended to render the applicant's appeal nugatory. The applicant further maintained that as a result of the respondent's action, it has suffered substantial loss as its business has been grounded.

6. Counsel for the applicant submitted that the applicant having been evicted from the suit premises without any court order, the circumstances justified the granting of a mandatory interlocutory injunction. Counsel further submitted that the appeal being founded on the controlled transaction which existed between the parties prior to the orders of the Tribunal, the applicant will suffer substantial loss if the property is disposed off so that the possession changes. Counsel maintained that the respondent will not suffer any prejudice if the orders sought are granted as he will still be entitled to his rental income.

7. In response to the application, the respondent swore a replying affidavit and a supplementary affidavit. He deponed that the reason for the termination of the tenancy was to enable him renovate the suit premises as they were in a dilapidated state. The respondent stated that following the granting of the notice by the Tribunal he sent his agents to the premises to take stock of the required repairs and samples of the materials. This was done on 30th August, 2008 on which day the applicant also began to voluntarily move their goods out of the suit premises. On the following day i.e 31st August, 2008, the respondent's agents were in the same area having gone to check on another premises whose tenant was also moving out. It was then that they realized that the applicant was vandalizing the suit premises claiming to be removing what belonged to him. The matter was reported at Embakasi Police Station. On the 1st September, 2008, the respondent's agent went back to the premises and found the applicant's officers still attempting to vandalize the premises. There was a scuffle between the applicant's officers and the respondent's agents. The respondent's agents thereafter kept vigil at the premises. On 5th September, 2008, the respondent having realized that the applicant had obtained *ex-parte* orders from the Tribunal proceeded to the Tribunal to file an application to set aside the *ex-parte* orders. The Tribunal ordered a rent inspector to visit the premises to establish the position on the ground. Following the report of the rent inspector, the Tribunal determined the proceedings before it, ruling that it had no jurisdiction as there was no longer any tenancy in place.

8. The respondent therefore contended that the applicant will not suffer any substantial loss having voluntarily surrendered the tenancy in question. The respondent further maintained that he has now entered into a sale agreement with one George Augustine Arwa, for the sale and transfer of the suit premises, and will therefore be greatly prejudiced if the orders sought are granted.

9. Counsel for the respondent maintained that there was no longer any controlled tenancy in existence. He contended that the circumstances in this case were neither clear nor exceptional as to warrant the granting of an order of mandatory injunction. He further contended that the conditions necessary for the granting of an order of prohibitory injunction had not been satisfied to warrant the granting of such orders. Counsel also maintained that the applicant has failed to establish any substantial loss which cannot be compensated by an award of damages, nor has he offered or provided any security. Counsel submitted that the applicant was not demonstrating any good faith as it is the one who had demanded the repairs to the premises in the first instance. Finally it was contended that the premises had now been transferred to a 3rd party and orders sought cannot be enforced against a person who is not party to the proceedings.

10. I have carefully considered the application, the affidavit in support and in reply together with annexures therein. It is evident that the applicant is no longer in the suit premises. This was established by the Rent Inspector who visited the suit premises. There is a dispute as to the circumstances in which the applicant vacated the premises. The applicant contending that he was unlawfully evicted by the respondent and the respondent maintaining that the applicant voluntarily moved from the suit premises.

11. The applicant seeks to be reinstated into the suit premises. It is an established principle that an interlocutory order of mandatory injunction can only be granted in very clear and exceptional circumstances. In the case of *Kenya Breweries Ltd vs Okeyo (2002) 1 EA 109*, the Court of Appeal approved the following test provided in Vol. 24 Halsbury's Laws of England 4th Edition par.948: -

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff mandatory injunction will be granted on an interlocutory application.”

12. In this case, the Tribunal had allowed the Landlord's reference for termination of the applicant's tenancy, giving the applicant 30 days within which to vacate the premises. Although the applicant contends that he was unlawfully evicted from the suit premises before the 30 day period, this has been denied by the respondent. It is evident that there are allegations and counter allegations which have been made in the respective affidavit. At this stage, it is difficult to determine who is telling the truth. The issue as to whether the applicant was unlawfully evicted from the suit premises therefore remains unresolved. Although it is evident that the suit premises were vandalized, it is not clear as to who is responsible. It cannot therefore be concluded that there has been any abuse of the process of the court to justify the intervention of this court.

13. The above notwithstanding, the fact remains that the applicant is no longer in occupation of the suit premises. It is also clear that the relationship between the parties has seriously deteriorated. Moreover, the applicant was required to vacate the premises to enable the respondent renovate the premises. A mandatory order of injunction reinstating the applicant into the suit premises will obviously hinder the required renovations. The respondent has indicated that he has in fact transferred the suit premises to a 3rd party. The position has therefore now changed as there is no tenancy to be protected.

14. Further, prayer (2) which was the prayer for mandatory injunction was an interlocutory prayer pending the hearing and determination of the motion. That means that the prayer ought to have been addressed as an interlocutory prayer before the determination of the notice of motion. On the 11th September, 2008, when the applicant's motion was certified as urgent, the matter was not raised. Nor was any attempt made subsequently, to raise the issue before the substantive hearing of the motion which proceeded before me on the 11th November, 2008. This means that the prayer has already been overtaken by events as the motion has now been determined.

15. It is apparent that the applicant's appeal has been severely compromised by the fact that the applicant is no longer in the premises. Nevertheless, I find that the applicant has not demonstrated a strong and straightforward case such as would justify the granting of an order of mandatory injunction. Moreover, as already stated, the prayer for mandatory injunction has been overtaken by events. The applicant's prayers for temporary injunction, i.e. prayer (4), and stay of execution, i.e. prayer (5), were dependent on the granting of the prayer for mandatory injunction, i.e. prayer (2), as it is presupposed that the applicant is in possession of the suit premises. The applicant's prayer for mandatory injunction having failed, prayer (4) and (5) cannot also stand. For these reasons this application must fail. It is accordingly dismissed.

Dated and delivered this 16th day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Mungai for the appellant/applicant

Advocate for the respondent absent