



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

Civil Suit 698 of 1988

NEW BALLISTO BAR (suing as a Firm).....PLAINTIFF

VERSUS

LAND SECURITIES LIMITED.....1ST DEFENDANT

ADOLF ISAAC MUCHIRI

t/a Dolline Auctioneers (sued as a Firm).....2ND DEFENDANT

KAMAU JOHN KINYANJUI

(t/a K.J. Kinyanjui & Co. Advocates).....3RD DEFENDANT

J U D G M E N T

I am writing this judgment because this case was finally assigned to me on 14th March 2007 after the Judge who heard evidence from witnesses, Justice Sheikh Amin, retired after hearing the case but before writing the judgment. The parties in the case agreed that I write judgment using the evidence recorded by Sheikh Amin J and that is what I am doing.

From that evidence, it would appear the Plaintiff and the First Defendant never had good relationship and resolutions of their never ending disputes never were quickly forthcoming as the several cases filed remained pending indefinitely. That being the trend, I am writing this judgment at this time – after hearing of evidence from witnesses closed on 31st October 2001, written submissions subsequently filed, Justice Amin’s offer to write the judgment after starting his retirement turned down and as a result the court case file having passed through the hands of a number of other Judges to write the judgment which was never written.

From what I can gather from the proceedings, the Plaintiff became a tenant of the premises known as Derby House on LR 209/928/9 and 209/28/1 situate along Moi Avenue Nairobi as tenant of Barclays Bank Trust Company of Kenya

ed. There was subsequently a change of ownership of the premises which the Plaintiff seems not to have been comfortable with. The First Defendant became the new owner of the premises and therefore the new landlord of the Plaintiff under provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya. That was during the first half of the year 1979.

On 7th August 1979, problems started for the Plaintiff as on that date the First Defendant in its capacity as the landlord served the Plaintiff with a Notice to terminate the tenancy on the grounds that the First Defendant wished to reconstruct and develop the premises. The Plaintiff objected to the said Notice and filed a reference B.P.R.T. 314 of 1979 at the Business Premises Rent Tribunal.

As that reference was still pending, the First Defendant served another Notice to the Plaintiff, this time to increase the rent. Negotiations followed resulting into an amicable settlement and therefore no reference was filed as the increased rent took effect from 1st May 1983.

But before the end of that May the First Defendant served the Plaintiff with another Notice to increase the rent, this time to Kshs.18,376/=. The Plaintiff objected and filed a reference in the Business Premises Rent Tribunal No. BPRT 239 of 1983. That made the references then pending between the two parties to be two.

The First Defendant perhaps decided to have the number of such cases increased as he gave another notice to terminate the tenancy. The notice was dated 8th June 1985. The Plaintiff objected and that resulted in the filing of a reference No. BPRT 344 of 1985 and subsequently the notices giving rise to references No. BPRT 314 of 1979 and BPRT 239 of 1983 were withdrawn.

On 3rd April 1986, another notice of termination of tenancy, this time with effect from 1st June 1986 was served. The Plaintiff again objected pointing out also that the Notice contained some legal defects. But reference was not filed within the stipulated time and the Plaintiff's application to extend time to file the reference was dismissed by the Tribunal on 20th November 1986.

The Plaintiff lodged an appeal in the High Court, against that dismissal and the same appeal was served upon the Third Defendant who was acting as the First Defendant's Advocate. Notwithstanding that, however, on 9th, 10th and 14th January 1997 the three defendants sent their agents to levy distress, evict the plaintiff and demolish the premises. The said demolition was completed on 14th January 1997 and it is the Plaintiff's case that by that time the Plaintiff had obtained and served on the First Defendant and its agent carrying out the eviction and demolition, the Tribunal order requiring the First Defendant to restrain from evicting the Plaintiff until the dispute is fully heard and determined. The order was issued by the Business Premises Rent Tribunal in that Tribunal's case No. 13 of 1987.

The Plaintiff goes on to say that following that failure by the Defendants to comply with the Tribunal's order, aforesaid, the Plaintiff complained to the Business Premises Rent Tribunal regarding the said failure of the defendants and the Tribunal gave an order suspending the Plaintiff's payment of rent until the premises are restored to a habitable state.

Since the Plaintiff considered that what the defendants did fell within the scope of actions that constitute the tort of conspiracy to commit trespass and nuisance upon the Plaintiff's goods and to harass and intimidate the Plaintiff's servants, the Plaintiff filed this suit by way of a plaint dated 23rd February 1988 praying for the following orders:-

“1. Judgment against all the defendants jointly and severally for exemplary damages for trespass, forcible entry, eviction and subversion of the course of justice.

2. Judgment against the first defendant for

(i) Kshs.2,213,359.50 being the value of the items, furniture, cooking apparatus, fittings and other chattels of the plaintiff destroyed or removed and taken away by OSS Limited, as the agent of the first defendant.

(ii) Kshs.240,000/= being loss of profits at the rate of Kshs.20,000/= per month from January 1987 to January 1988 together with interest thereon at 14% p.a. from the 15th January 1987 until payment thereof in full.

(iii) Continuing loss of profit at the said rate of Shs.20,000.00 per month from February 1988 to the date when the suit premises having been fully restored to a fit and habitable condition shall be handed over to the Plaintiff or until the date of termination of the tenancy.

(iv) Costs of the suit together with interest thereon at court rates.

(v) General damages

(vi) Such further or other relief as the court may deem fit to grant.”

The Plaintiff refers to what was done by the defendants – the purported levy of distress and eviction – as unlawful acts carried out in defiance of the law and in defiance of an order of the Business Premises Rent Tribunal. The Plaintiff's witnesses gave evidence detailing what the defendants did and the Plaintiff maintains that the actions of the defendants made them liable jointly and severally to pay exemplary damages to the Plaintiff. In seeking damages for loss of profits, the Plaintiff says that the First Defendant has breached the terms and conditions implied in the tenancy that is denying the Plaintiff quiet enjoyment of the premises and the First Defendant has deliberately rendered the premises unfit for occupation by the Plaintiff.

The First Defendant in its defence denies that it was the Plaintiff's landlord at the material time as the First Defendant maintains that the Plaintiff's application to the High Court for a stay of execution having been refused and the notice for eviction having been served on the Plaintiff under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, being in force, the existence of a landlord/tenant relationship had ceased and the eviction of the Plaintiff was proper.

Evidence from Mr. Joseph Musile Ndolo who was a director of the First Defendant was that the First Defendant instructed the Third Defendant, in the Third Defendant's capacity as an advocate, to obtain possession of the suit premises in accordance with the law. But he denied that the First Defendant instructed the Third Defendant and OSS Limited to forcefully evict the Plaintiff.

The Second Defendant, Dolline Auctioneers, said it was instructed by the Third Defendant to distrain the goods belonging to the Plaintiff. He told the court that he visited the premises on 9th January 1987 and carried out a proclamation. He denied that the Plaintiff's goods were removed from the premises or that his men evicted the Plaintiff from the premises. He said he was made to believe, by the Third Defendant, that the Notice of Termination of Tenancy was sufficient authority to evict the Plaintiff from the First Defendant's premises. He also said that OSS Limited had been contracted by the First Defendant to demolish the building.

Although it would appear that the Second Defendant was actually instructed to distrain the goods belonging to the Plaintiff and subsequently evict the Plaintiff, the Second Defendant does not want to say that much. But he goes on to say that in carrying out the eviction he was acting as an agent of a disclosed principal who had undertaken to indemnify him against any liability.

The Third Defendant told the court that he was instructed by the First Defendant to sort out the issues pertaining to determination of tenancy that existed between the plaintiff and his client, the First Defendant. He was instructed by a director of the First Defendant the late S.M. Maina, to instruct auctioneers to evict the Plaintiff from the premises. He produced the instruction letter which was marked "KSK 2" in the 3rd Defendant's bundle of Documents. Upon receiving the said instructions, he instructed the Second Defendant to carry out his client's instructions.

He said that as an Advocate, he had no doubt that he was acting within the law when he instructed the Second Defendant to evict the Plaintiff. He held discussions with the director of the First Defendant and advised the said director that the Plaintiff could be lawfully evicted by either the use of reasonable force or by applying for an eviction order from the court. The First Defendant opted to use one of the recommendations and that was use of reasonable force which method the Third Defendant said was lawful in view of the fact that the Tenancy Notice had already taken effect. That is what the First

Defendant told the Third Defendant who subsequently looking at what had happened believed the instructions from the First Defendant to be the proper and lawful as set out in **Civil Appeal No. 267 of 1996 – Nairobi, - Jitendra Mathurda Kumar, Jayantilal Mathudras Kanabar, Mathurdas K. Kanabar –vs- First And Meat Limited** where the Court of Appeal held that a tenancy notice has the effect to terminate a controlled tenancy from the date specified therein, where there is no reference to the Business Premises Rent Tribunal (BPRT) or where a reference has been struck out.

It is the Third Defendant's case that the Second Defendant did not evict the Plaintiff as had been instructed by the Third Defendant. That is also the case the Second Defendant is advancing. According to the Third Defendant therefore, there are two limbs to this matter as far as the issue of liability of respective defendants is concerned. The first limb is that any liability attributed to the Third Defendant, if any, would of necessity have to be limited to and including acts of and upto 9th January 1987. No liability should be attributed to him as his instructions, which were proper and legal, were never carried out by the Second Defendant on and including the 9th January 1987 or on any other day subsequent thereto. He maintains that there never was any trespass or forcible entry or eviction on the 9th January 1987 by the Second Defendant, or any precedent or subsequent date visited upon the Plaintiff on those instructions. Moreover, upto that date all his acts were legal, proper and justifiable. No subversion of the cause of justice can be attributed to him upto 9th January 1987, or on any other date thereafter.

The second limb on the issue of liability is as regards the actions and activities that took place between the 10th and 14th January 1987. The Third Defendant totally disowns knowledge or participation in those actions and activities when the Plaintiff was forcibly evicted and Derby House, the suit premises, partially demolished. He says all that took place on those days were actions of the First Defendant.

As such any damage or injury visited upon the property and business of the Plaintiffs was certainly not due or as a result of any unlawful actions of the Third Defendant or any such common intent with any party, because none was ever formed or conceived.

After all the above has been said it becomes apparent that the problems in this case emanates from the fact that parties especially the Defendants, were giving themselves power to decide issues which the Tribunal or the court was the only authority to decide. The main issue was whether there was still a tenancy between the Plaintiff and his landlord. It was the Third Defendant who advised the First Defendant that there was no tenancy between the Plaintiff and the First Defendant and went on to advise the First Defendant how the Plaintiff could be removed from the suit premises. It was not vice versa as the Third Defendant is trying to put it.

The First and Third Defendant's should have sought the Tribunal's decision on whether the Tenancy still existed before starting the process of levying distress a process which triggered the rest of what followed. If they felt the Tribunal no longer had jurisdiction in the matter, the First and Third Defendants should have sought the decision of the High Court.

The two were saying what they said and went to levy distress yet when that stage was exceeded and action moved from the levying of distress into eviction, the Business Premises Rent Tribunal, upon the Plaintiff's complaint, issued an Order restraining the First Defendant from evicting the Plaintiff until the dispute between them was fully heard. Had the tenancy been ended, as the Third Defendant had advised the First Defendant, the Tribunal would not have issued that order and it would instead have told the Plaintiff that he was no longer the First Defendant's tenant and was therefore not entitled to raise that complaint.

In any case, the tenancy may or may not have been ended but the decision was to be the Tribunal's decision and not the Defendant's decision in this matter which was already in the Tribunal. Furthermore, once the Tribunal issued its order following the Plaintiff's complaint, that order ought not to have been ignored or disobeyed by the Defendants whether or not they were unhappy with it. The eviction and subsequent demolition went ahead after the order had been served something which should have put law abiding citizens onto a halt saying: Here is a Tribunal order. We are not happy with it. Let us suspend

eviction and demolition so that we go to the Tribunal or a court to question this order – in order to know the right way forward.

That was not done. The Tribunal order was disobeyed and the eviction and demolition went on as if no order had been made by the Tribunal against the eviction and demolition. As a result the Plaintiff filed a Tribunal case No. 13 of 1987 as a result of which the covenant to pay rent implied in the tenancy was suspended until the premises are made fit and habitable again.

Learned Counsel for the Plaintiff found it necessary to quote provisions of Section 60 of the Constitution of Kenya and Order XXXV rule 1 (1) (b) of the Civil Procedure Rules under the Civil Procedure Act to rightly point out that the High Court had jurisdiction in the matter if the Defendants felt the Tribunal had no jurisdiction at the material time. Counsel went on to say, and I agree with him, that from those provisions of the law, it is clear that for a landlord to lawfully evict a tenant in a situation as that which the First Defendant found itself, an application seeking the eviction had to be made to the High Court. In failing to adhere to this statutorily prescribed mode of recovery of possession, it is clear that the First Defendant as landlord together with the Second and Third Defendants, acting as its agents, acted unlawfully and are legally liable for any loss to the Plaintiff as a result of their said activities. The First Defendant is also vicariously liable for the acts of OSS Limited who as their agents were acting under their instructions.

These were acts not carried out inadvertently as a result of ignorance of the law but were a deliberate conspiracy by the Defendants aimed at harming the Plaintiff's business. The purpose was to defeat the course of justice, the actions of the three defendants having come within the scope of a conspiracy to commit trespass and create nuisance upon the plaintiffs goods and to intimidate and harass. The purpose was not to serve the bona fide and legitimate interests of the three defendants.

From the foregoing, what should this court award the Plaintiff? The Plaintiff's claim is seen in his plaint and the prayers have been quoted above. I note the evidence adduced during the trial and the table computing interest on special damages arising from loss of profits as appended by the Plaintiff's Counsel to his written submissions. I will make the awards in accordance with prayers in the plaint.

With regard to prayer number one therefore and bearing in mind all that has been brought before me in the circumstances of this case, I do hereby award the Plaintiff the sum of Kshs.5,000,000/= against all the defendants jointly and severally for exemplary damages for trespass, forcible entry, eviction and subversion of the course of justice.

With regard to prayer number two (2), the same is granted in terms of paragraphs (i), (ii), (iii) and (iv) only.

Paragraphs (v) and (vi) of prayer number two (2) are each dismissed.

Dated and delivered at Nairobi this 21st day of June 2007.

J.M. KHAMONI

JUDGE