



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 60 of 2007

1. Land and Environmental Division
2. Subject of main suit: Contract
 - a. Landlord/Tenant relationship
 - b. Lease agreement to rent and business premises for 2 years at Ksh.20,000/- p.m.
 - c. New lease agreement at Ksh.30,000/- p.m. Improved premises by tenant
 - d. Tenant feared the Landlord would interfere with quiet possession of the plaintiff occupation
 - e. No reply made by defendant/respondent.
 - f. Advocate holding brief in attendance.
 - g. Held – Injunction granted 3 May 2007 Ang’awa J.

Tenant has a right to come to court for protection

3. New application and subject matter of ruling by landlady defendant dated notice of motion 31 May 07.
 - a. Certificate of urgency seeking to discharge injunction orders under order 39 r 4 Civil Procedure Rules
 - b. Reasons

Suit premises already sold and transferred. Orders therefore are enforceable.

- c. The plaintiff/respondent should sue new owners and not defendant

4. Held:

1. The defendant/applicant transferred and registered suit premises whilst case was pending
2. Under the Indian Transfer of Property 1882 no transfer of property is permitted during the pending of a suit.

3. The application for injunction to discharge the injunction under order XXXIX r 4 Civil Procedure Rules be and is hereby dismissed.

5. Case law

1. Karen Insurance Brokers v Anastasius H. Kamau

Hccc60/2007, Ruling 1 Ang'awa,J.

2. Kenya Hostels Ltd v Kenya Commercial Bank & Another

(Ibrahim J) (2004) I KLR 80

3. Belgo Holding v John Astrong Njogu & Others. Hccc266/05.

Ruling No.2, (Ang'awa J)

Text book

a) Mulla on the Transfer of Property Act 1882 5th edition 1966

5. Advocates

L.M. Mbaabu for L.M Mbaabu & Co. Advocates for the plaintiff

N. Kabaru for Kabaru & Co. Advocates for the defendant

KAREN INSURANCE BROKERS LIMITED PLAINTIFF

VERSUS

ANASTASIUS H. KAMAUDEFENDANT

RULING NO.2

I: BACKGROUND OF APPLICATION

NOTICE OF MOTION 31 May 07

1. The application of notice of motion of 31 May 07 seeks orders under order XXXIX r 4 Civil Procedure Rules to discharge orders of injunction issued to plaintiff/respondent restraining the defendant/applicant from interfering with the plaintiff peaceful occupation, possession of land known as LR 0198/4 subdivide Bogani road Langata pending arbitration to the Business Premises Rent Tribunal.

2. The relationship between the plaintiff/respondent Karen Insurance Brokers Ltd and the defendant/applicant Anastasius H. Kamau is that of tenant/landlord respectively. By a certificate of urgency the plaintiff/respondent came to court on 25 April 2007 seeking this court orders to restrain the defendant/landlord from interfering with their quite possession of land LR101198/4. They had set up a Bar and restaurant business and held a two year lease with the defendant/applicant. This business was renovated at a cost of Ksh. 3.6 million. The plaintiff/respondent had been in occupation since 1 January 2004.

3. Fearing that the defendant/landlord/applicant would sell the premises with the intention of evicting them out they came to seek the courts protection on 25 March 07. The duty judge (Kariuki J) advised that they serve the defendant. When they did this, the defendant filed no reply to the application but did enter appearance through M/s Kaburu & Co. advocates on 2 May 2007. During the inter parties parties hearing

of that application of 2 May 2007 this court heard the application with an advocate holding brief for M/s Kaburu & Co. Advocates. A ruling of 3 May 2007 by this court held that the tenant was entitled to be protected. An injunction was duly granted.

4. The defendant filed a fresh application by way of notice of motion dated 31 May 2007 being the subject matter of this ruling. Another advocate filed the said application and not M/s Kaburu & Co. Advocates.

II Application notice of motion 31 May 07

5. This application was filed under a certificate of urgency. It sought prayers to discharge the injunction order under order XXXIX r 4 Civil Procedure Rules on the grounds the injunction was granted to the plaintiff/respondent on disclosure of non material facts. Basically, that by 30 April 2008 the property in question had been actually transferred to new owners. Not wishing to be cited for contempt by court for failure to obey the court orders on the restraining orders, the defendant/applicant landlord filed the said notice of motion to discharge the courts orders.

6. The plaintiff/respondent was as surprised as the defendant/applicant had been served and knew of the existence of this suit. The said applicant ought to have notified the plaintiffs advocate on 8 December 2006 when a transfer is purported to have been executed. He was aware of letters written to him on 4,7,26 of April 2007. He was served with court proceeding on 26 April 2007 which included the chamber summons for injunction on 27,28 & 30 of April 2007 and 1 May 2007 she had the court papers. In fact on 2 and 3 May 2007 when the application was heard and ruling delivered an advocate was in attendance.

7. Indeed from the file records M/s Kaburu & Co. advocate applied for proceeding to file an appeal

8. Should the injunction be discharged?

III Findings

9. The plaintiff/respondent had been under an apprehension and from that the suit property would be sold and or leased to a third party whilst they had already been in possession and spent 3.6 million in improvement of the premises. They sought an injunction and this court recognizing that a party who has an apprehension or fear that a certain action would occur was permitted to come to court for redress and protection. I based my finding on the decision of:-

Kenya Hotels Ltd V Kenya Commercial Bank and Another

Ibrahim, J.

Whereby the conduct of the Landlord was taken into account when issuing an injunction. In the said case the land lord had given the plaintiff/tenant an apprehension that the tenants business would normally be interrupted when the lease is said to come to an end.

10. When the defendant/applicant/land lord was served herein with the court papers, he registered the transfer to the new owners knowingly that there was a matter in court touching upon the said suit premises. He sold the premises whilst the plaintiff/respondent were in possession.

11. Under the Indian Transfer of Property Act 1882, Section 52 (24) reads:

Transfer . . . have been held to include such transaction as . . . a contract of sale.

They also apply to any collusive decree or comprise by which the title of a party is affected during the pending of a suit, for the principle under lying the section is that a litigating party is exempt from taking notice of a title acquired during the litigation.

12. The effect of this section 52 simply means that whilst a suit is pending in court touching on a land matter, any transfer of that land and its subsequent registration is null and void. I held as such in the case of Belgo Holding Ltd v John Anstory Njogu Hccc266/05 consolidated ruling No.2.

Whereby during the pending of a suit and during interlocutory proceeding where injunctions had been issued one of the defendants went and transferred the property to himself and sold the same. This court held that the said transfer was null and void. The transfer was duly reversed by the court.

13. This suit before me is of similar nature where there exists a court case no transfer of property was to be registered or take place. The defendant was aware of this and to counter act this suit, registered a transfer then seeks to undo her deeds by applying to discharge the said court orders. I decline to do so and to aid an illegality.

14. I note that the new advocate filed no notice of change of advocate when he filed this new application by way of certificate of urgency. The application would ordinarily be struck out. If per chance the notice had not reached the court file (of change of advocates) order III r 6 and 7 Civil Procedure Rules with – namely that the former advocates and all parties concerned must be served with the notice of change of advocate. If he has not done so, the former advocates remains on record.

15. I accordingly dismiss this application with costs to the plaintiff/ respondent.

Dated this 12th Day of June 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

L.M. Mbaabu for L.M. Mbaabu & Co. Advocates for the plaintiff

N. Kabaru for Kabaru & Co. Advocates for the defendant