



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 533 of 2004

BASHIR MUSE MOHAMED & ALI ISMAIL

**MWANGI T/A JITHADI SHOPPING
COMPLEX.....PLAINTIFFS**

VERSUS

**MARY GATHONI GATHEHI & 32
OTHERSDEFENDANTS**

RULING

Before me is an application by the Plaintiffs by way of Notice of Motion expressed to be brought under Order XXXIX Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Plaintiffs mainly seek that the orders of injunction granted to the Defendants on 2nd December, 2004 be discharged, varied or set aside on the grounds that the said order was obtained by material non-disclosure and or misrepresentation of material facts and for want of title or right to possession to the suit premises.

The application is supported by an affidavit sworn by Ali Ismail Mwangi the second Plaintiff.

The application is opposed and there are grounds of opposition filed by Counsel for the Defendants.

The application was canvassed before me on 17th December, 2004 by Mr. Njoge Learned Counsel for the Plaintiffs and Mr. Githinji Learned Counsel for the Defendants. Counsel for the Plaintiffs submitted that, the Defendants did not disclose that they do not have a counterclaim to qualify for the orders obtained on 2nd December, 2004. He also submitted that the relationship between the Plaintiffs and the Defendants came to an end on 30th November, 2004 which fact according to the Plaintiffs' Counsel was not disclosed by the Defendants at the time the said orders were obtained. For these alleged non-disclosures Counsel for the Plaintiffs prayed that the orders obtained on 2nd December, 2004 be discharged as the Defendants have abused the process of the Court.

Counsel for the Defendants in response to the submissions made on behalf of the Plaintiffs argued that under Order XXXIX Rule 1 of the Civil Procedure Rules the Defendants were entitled to come to Court notwithstanding that they have not raised a counterclaim.

Regarding the argument made in respect of expiry of the relationship between the Plaintiffs and the Defendants, Counsel for the Defendants submitted that this is an issue in the suit and is disclosed in the pleadings. There can therefore be no question of non-disclosure of a fact which is clear from the pleadings.

In his concluding remarks Counsel submitted that the Plaintiff's application is incompetent and bad in law as the same is supported by a defective affidavit. The supporting affidavit of Ali Ismail Mwangi aforesaid does not disclose the drawer thereof contrary to the provisions of sections 34 and 35 of the Advocates Act. It is therefore fatally defective. For this proposition counsel relied upon the case of Johann Distelberger –v- Joshua Kivinda Muindi and Another: Nairobi HC.MISC. Civil Application No. 1587 of 2003 (UR). In Counsel's view the defective affidavit cannot support any application. Counsel urged me to strike out the Plaintiff's application.

In a brief reply Counsel for the Plaintiff argued that the case of Johann Distelberger –v- Joshua Kivinda Muindi and another (supra) had been overruled. He however did not support this submission by the case that overruled the said decision. Instead counsel placed reliance on the case of Green hills Investments Limited –v- China National Complete Plant Export Corporation (2002) 1 KLR 384 in which Ringera J. as he then was held that there is no requirement in law that an affidavit should indicate by whom it is drawn and upon whom it is to be served.

I have now considered the application, the affidavit, the grounds of opposition the submissions of Counsel and the authorities cited. Having done so I take the following view of the matter. The Plaintiffs in their plaint filed on 1st October 2004 claim inter alia for declaration that the Defendants hold the suit premises as licencees and their possession of the premises did not imply a tenancy; that termination notices served upon the Defendants have taken effect; that the Defendants' right to possession and use of the suit premises determined in default of compliance with the said notices; that the tenancy agreement between the Plaintiffs and the Defendants did not express the common intention of the parties and that under the Indian Transfer of Property Act no leasehold interest exceeding one year having been intended no statutory tenancy was created.

In their defence the Defendants have averred inter alia that no notice was issued for vacant possession on or before 30th November, and further that the tenancy between them and the Plaintiffs was a controlled tenancy and the dispute is before the Business Premises Rent Tribunal.

The Defendants' complaints in their application dated 2nd December, 2004 are in respect of alleged actions by the Plaintiff to enforce the prayers they seek in the Plaint. Under these circumstances the Defendants were entitled to come to court in the manner they did despite the fact that they had not raised a counter-claim. In my view they need not have disclosed that they have no counterclaim.

It is also alleged that the relationship between the Plaintiffs and the Defendants expired on 30th November, 2004 by efflux ion of time and this fact was not disclosed to the Court. This is an issue raised in the pleadings as shown above. It has to be determined at the trial. I cannot see how the Defendants can be accused of non-disclosure of this fact.

On the whole on the material availed to me and on my own perusal of the record. I am unable to find that the Defendants are guilty of non-disclosure of any facts, let alone material facts.

In the result, the Plaintiffs' application dated 6th December 2004 is without merit and I dismiss it in its entirety with costs. I do not find it worthwhile to make any findings on the complaint raised by the Defendants regarding the supporting affidavit of Ali Ismail Mwangi aforesaid as I have already dismissed the Plaintiffs' application for different reasons.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-