



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Suit 834 of 1996**

**WHITEROSE DRY CLEANERS LTD.....PLAINTIFF**

**VERSUS**

**PAGENT HOLDINGS LTD.....1ST DEFENDANT**

**KAMAL PROPERTIES LTD.....2ND DEFENDANT**

**RULING**

There are two applications before me, first dated the 30/8/2001 in which the Plaintiff seeks to strike out the defence of the 1st Defendant on the ground that it consists of general denials contrary to OVI r 9. The application also seeks interlocutory judgment pursuant to O VI rule 13. I will deal with the latter application later.

The general complaint of the Plaintiff in the Plaintiff is that it was unlawfully evicted from the suit premises. The plaintiff was a tenant in the suit premises protected by the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act in respect of which the 1st Defendant obtained an order from the Business Premises Tribunal for possession which was subsequently upset in a judicial review application. At the time of the alleged wrongful eviction of the Plaintiff the decision of the tribunal had not been reversed.

A great deal of the Plaintiff is couched in emotive terms and much should be ignored, however the allegations to support the prayers are included in the plaintiff. The nature of the plaintiff makes it to some extent difficult to plead to in the Defence (which is sought to be struck out). With regard to the allegation in the Plaintiff that the Plaintiff was wrongfully evicted from the suit premises, the Defendant in paragraphs 9 and 11 denied any wrongdoing or that it wrongfully evicted the Plaintiff or that the Plaintiff had suffered any loss or damage.

It further contains the allegation that the 1st Defendant had not wrongfully sold the suit premises to the 2nd Defendant by saying it was perfectly within its right to do so.

In the case of **D.T Dobie Company (Kenya) Ltd Vs Joseph Mwaura Macharia & Leah Wanjiku Mbugua CA No. 37 of 1978** Madan JA (as he then was) cited with approval a passage from the case of **Wenlock Vs Halogen & Another (1965) 1 WLR p 1238** in which Sellers LJ stated as follows :

“That the summary jurisdiction of the court to strike out pleadings was never intended to be exercised by a minute and protracted examination of documents and the facts of the case.....To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way.”

In this case it appears that the allegation of wrongful dispossession of the Plaintiff from the suit premises has been denied and it is averred that the same was lawful. The onus of proving that falls on the 1st Defendant but in my view, it raises a sufficient defence for this matter to go to trial.

If I had struck out the 1st Defendant's defence I would not have entered interlocutory judgment as prayed, in this respect see my ruling in **State of Israel Vs Michael Lewis Somen & 2 others HCCC No 2237 of 2001**.

The other application dated the 4/10/2001 by the 2nd Defendant is to strike out the Plaintiff. The Application is said to be brought under O VI r 13 1 (a) (b) (c) and (d) and it is supported by an affidavit. It has been held in a number of cases that where it is alleged that there is no reasonable cause of action there can be no affidavit filed in support thereof. I therefore strike out the affidavit in support with costs to the Respondent. I will proceed with the matter on the basis that there is no reasonable cause of action against the 2nd Defendant. The first mention of the 2nd Defendant in the Plaintiff is in paragraph 43 where it states the plot on which the suit premises was situated was sold to the 2nd defendant.

In paragraph 46, there is an allegation of conspiracy that the 1st and 2nd Defendants conspired with each other to defeat the ends of justice. It is claimed the transaction for the sale was bogus and done to frustrate the Plaintiff in its claim for restitution of the suit premises.

A mandatory injunction is sought against the 1st and 2nd Defendants for possession as well as a permanent injunction restraining the Defendants from disposing of the assets, shares and selling the plot or mortgaging or parting with the possession of the same. It also claims general damages against the Defendants.

The allegation of conspiracy is an allegation of a tortious act and constitutes a reasonable cause of action against the 2nd Defendant. It is not the duty of this court now to go into the facts to see if a conspiracy can be maintained.

That is a matter for the court hearing the case.

In my view there is a sufficient cause of action alleged to sustain the suit against the 2nd Defendant and I therefore dismiss the application with costs to the Plaintiff.

I notice that this is an old matter and I order that the same be set down for hearing on priority basis.

**DATED and DELIVERED at Nairobi on 4th February 2005**

**P.J RANSLEY**

**JUDGE**