



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 45 of 2004

AMIR SULEMAN.....PLAINTIFF

VERSUS

ABERDARE SAFARI LODGES LTD.....DEFENDANT

RULING

The Applicant by his Chamber Summons of the 22nd January 2004 applies for an interim injunction in the following terms:

2. THAT orders of injunction do issue to restrain the Defendant and/or its employees and/or assigns and/or anybody whosoever from evicting and/or inhibiting and/or interfering with the Plaintiff together with his employees in their status as sub lessees, and in the conduct of their business at all those sub leased shops christened Tree Tops Hotel Gift Shop situated at Tree Tops Hotel title Number Nyeri Municipality/Block 1 Nyeri district and Outspan Golf and Country Club Gift Shop situated at Outspan Club, Title Number Nyeri Municipality Block 1/633, Nyeri District together with the sub-leased accommodation premises save in so far as regards the rights it has as landlords pending the hearing and determination of the case.

The Applicant relied on the Supporting Affidavit of the Plaintiff and his Further Affidavit and further supporting Affidavit.

The Plaintiff was in possession of a shop situated within the Outspan Hotel at Nyeri in respect of which a draft lease was prepared between Wildlife Lodges and the Plaintiff. The proposed lease was to be for a term of 7 years from 1/1/2002 at a monthly rent of Kshs 21,644. The proposals for the lease were set out earlier on in a letter written by Block Hotels to the Plaintiff. Wildlife Lodges Limited was a subsidiary of Block Hotels Limited. Block Hotels Limited was put into receivership.

The Defendants had by a letter of the 4/8/1999 leased the Outspan Hotel and Tree Tops to Wildlife Lodges Limited.

The Receiver of Block Hotels Ltd surrendered the hotels to the Defendants.

It is the Defendant's contention that the draft lease is null and void and that when the Receiver handed back the Hotels, the sub-tenancy between the Plaintiff and Wildlife Lodges automatically terminated.

The Applicant annexed to his Supporting Affidavit a letter dated the 5/1/2004 the two paragraphs state as follows:

“This follows our November 2003 meeting Aberdare Safari Hotel Ltd (ASHL) allowed you to

continue occupying the shop premises on the condition that (a) rent is payable effective October 18th 2003 and (b) your occupation was not to extend beyond the period ending January 8th 2004 without formal agreement. I can confirm now that the ASHL Board has [1] agreed to extend your period up to January 31st 2004 and [2] decided not to lease out the said premises to a 3rd party thereafter. You are therefore required to vacate the premises latest by close of business 31st January 2003 as ASHL will take over the premises effective 1st February 2004”

Two questions arise for decision in due course:

1. Does the sub tenancy granted to the Plaintiff continue despite the handing over of the Hotels and by implication surrender of this lease between the Defendant and Wildlife Lodges Limited?
2. Was a separate tenancy created between the Defendant and the Plaintiff after the Hotels were handed back?

In order to succeed the Applicant must show that he has a prima facie case with a probability of success.

Mr. Katwa submitted that someone in occupation of premises cannot be evicted without a court order. He relied on the case of **Gusii Mwalimu Investments Co Ltd & Other Vs Mwalimu Hotel Kisii Ltd C.A 160 OF 1995** and Shah JA’s comments at pages 10 and 11.

However there is no evidence here that the Defendants intend to act unlawfully. In the letter of the 5/1/2004 written by the Defendant to the Plaintiff they informed the Plaintiff that he was required to vacate the premises earliest by the close of business 31st January 2004 as the Defendant would take over the premises effective 1st February 2004.

Mr. Katwa referred to paragraphs 455 and 454 appearing in the **Laws of England Halsbury 3rd Edition Volume 15** in which it is stated at paragraph 455:

“**Estoppel binds lessor and lessee.** The relationship of landlord and tenant may be brought into being even though the landlord has no title to the land of which he has purported to create a tenancy. If a landlord, who has no title to do so grants a lease under seal, the tenant, being a party to the deed, is estopped from disputing the lessor’s title. The doctrine of estoppel between landlord and tenant is not however, confined to leases by deed.”

This narrative applies only to the relationship between the Landlord and tenant; it does not estop the real owner of property from asserting its rights if the landlord has granted a lease in breach of a lease between himself and the head lessor. There is at present no evidence that the Defendant had knowledge of or acquiesced on the tenancy in favor of the Plaintiff such as to give rise to an estoppel against it. The case of **Hughes Vs The Metropolitan Railway Company the Law Times Report of 25/8/1877** relied on by Mr. Katwa was in respect of an agreement between a Lessor and Lessee and no question of the rights of any superior Lessor arose in that case.

Mr. Katwa submitted that the annexure JW1 to JW3 of the Defendant’s affidavit sworn by James Waihushi were not properly attested. He relied on two High Court cases namely; **Diamond Trust Bank (K) Ltd Vs Garex (K) Ltd HCCC NO. 1474 OF 2001** and **West Kenya Sugar Co. Ltd Vs Pananchand Jivraj shah & 2 others HCCC No 907 of 1999.**

Rule 9 of rules made under Section 6 of the Oaths and Statutory Declarations Act Chapter 15 Laws of Kenya states as follows:

“All exhibits to Affidavit shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification.”

In this case the exhibits are affixed securely to the affidavit and have separate sheets on which the commissioner has affixed his seal. In my view this complies with the rule. I would refer to my remarks in the case of **Mungai Ngaruiya & another Vs Rapahel Njua & 6 Others HCCC NO 1311 OF 2004** in which I found that the exhibits had been securely sealed to the Affidavit.

If we are to follow the words of the rule literally all or probably all affidavits containing exhibits which are filed in court are defective as the seal referred to in the Rule is a wax seal in which is embodied the Commissioner's seal. This was always the practice a number of years ago but now in practice no wax seal is now used. If indeed Mr. Katwa's submission is correct then his affidavit should also be struck out.

Mr. Katwa relied on the letter of the 5/1/2004 from the Defendant to the Plaintiff as showing that independent of any lease between the Plaintiff and Wildlife Lodges Ltd the parties had by a course of conduct created a tenancy between themselves. This was created by the Defendant allowing the Plaintiff to continue in possession of the suit premises and charging a rent.

Mr. Kihanya in reply submitted that the Plaintiff's occupation of the suit premises amounted to a license to occupy only and not a lease. In this respect he relied on a number of authorities.

I am inclined to the view without deciding it that the lease between Wildlife Lodges Ltd and the Plaintiff created no tenancy between the Plaintiff and the Defendant.

So far as the subsequent dealing between the parties it appears that the Defendant allowed the Plaintiff to continue in possession of the suit premises paying a rent therefore.

Whether this created a tenancy or a mere license is not a matter for me to determine on an application for an injunction. If the Defendant seeks possession from the Plaintiff by way of a counterclaim in this suit then it would be a proper matter for decision on an application for summary judgment.

Indeed the Defendant can only obtain possession by obtaining a court order to that effect and as such until such an order is obtained the Defendant cannot get possession. In the result I grant the prayers sought for but order costs to be in the cause.

DATED and DELIVERED at NAIROBI on 15th April 2005

P.J RANSLEY

JUDGE