



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE 79 OF 2003

PAUL OJIGO OMANGA PLAINTIFF

VERSUS

JAPHET ANGILA DEFENDANT

RULING:

The applicant JAPHET ANGILA owns plot No.177 L.R. 1430 Homa-Bay Township and the building thereon. In 1999 the said property was leased to PAUL OJIGO OMANGA the Respondent for a monthly rent of sh.30,000/-. In the year 2000 the applicant threatened to distress for rent and the plaintiff/defendant filed this suit seeking the applicant/defendant to be restrained against levying distress, a declaration that the defendant/applicant owed him (Respondent) sums of money overpaid to him and lastly that their tenancy was a controlled one. The defendant filed a defence denying signing any agreement with the plaintiff. The suit was filed before Nairobi High court and plaintiff also filed a chamber summons seeking the defendant to be restrained from levying distress or interfering with the plaintiff's and user of the disputed premises. On 30th January 2001 the court sitting in Nairobi issued an order of status quo. On 6th March 2003 the suit was ordered transferred from Nairobi to this court.

The applicant's/defendant's present application is under order 39 rules 4 and 9 CPR and S.3A and 63E CPA. In it he seeks the court to vacate and/or discharge orders of status quo issued on 30th January 2001 and extended on 31st May 2001. It also seeks for an order of mandatory injunction directed against the plaintiff/respondent ordering him to deliver vacant possession of plot No.177 L.R 1430 Homa Bay Township to the applicant. It also seeks for orders that officer commanding Homa Bay police station or any other officer be empowered to evict the plaintiff from the premises if he fails to hand over vacant possession to the defendant/applicant.

Mr. Ogutu who argued the application for the applicant told court that the applicant and respondent entered into the lease agreement on 1st June 1999. The lease was for five years which ended on 1st June 2004. By the time the application was filed on 18th June 2004 the lease had therefore been determined. The orders of status quo issued were therefore not tenable and should be discharged. He said the applicant does not want to extend the lease as the Respondent has been in arrears of rent.

Further it was submitted that after the determination of the lease the Respondent failed to hand vacant possession of the premises to the applicant. He therefore sought for an order that the Respondent do deliver vacant possession to him. He has not made any payment of rent after determination of the lease.

Court was told that before the lease expired the respondent was served with a Notice to terminate the lease. He however made a reference to the Business Premises Rent Tribunal being No.43 of 2000 in Kisumu. The reference has not been determined. The application was opposed by Mr. Wanyama for the Respondent. He said the orders issued on 30th January 2001 and extended on 31st May 2001 in favour of

the plaintiff were by consent. Applicant did not tell court that there was fraud, mistake or misrepresentation in making those orders to warrant the court set them aside. The said orders should therefore not be vacated.

Further he said that a party can only seek for a mandatory injunction if he is an aggrieved party. The applicant is not aggrieved as the parties consented to the orders. Mr. Wanyama submitted further that orders issued on 30/1/01 and extended on 31/5/01 were vacated by Justice Wambilyangah (as then was) on 3rd July 2003. Fresh orders of stay were issued on 24th July 2003. The orders sought to be vacated therefore do not exist.

As for the prayer of mandatory injunction it was submitted that the applicant is relying on a lease agreement. However in his defence he had denied the existence of the said lease agreement, as he had not signed it. Further the applicant had at one time admitted that the High court has no jurisdiction to entertain issues of controlled tenancy. He cannot now ask the court to determine the matter. In his ruling justice Visram had ruled that the tenancy is a controlled one.

The defendant has not issued a notice to determine the tenancy. Court was told that this is the only way the applicant can determine the tenancy. There is still the reference pending before the Business Premises Rent Tribunal.

I have carefully evaluated the applicant's affidavits and submissions. The law is well settled on issue of consent orders or judgments. They can be only set aside if there is proof of mistake, fraud or misrepresentation or if there are other very good grounds. This was so held in the case of FLORA N. WASIKE –VS- DESTIMO WAMBOKE (1982-88) KLR 625. However the orders of status quo ordered by Justice Visram on 30th January 2001 was not by consent. The order was made after the court had made a ruling on a preliminary objection. The record does not show that it was by consent. What was by consent was the extension made on 31st May 2001.

The order can therefore be set aside even if there is no proof of fraud, mistake or misrepresentation so long as the applicant shows a good reason. I will make a finding if there is a good reason after examining other issues raised.

The other issue is whether this court has jurisdiction to determine the issue. This ties up with the issue of tenancy. The plaintiff in his plaint has relied on a tenancy agreement dated 1/6/99. This application relies on the same agreement. The applicant had denied the agreement in his defence but he has annexed the same to the affidavit. The plaintiff's position has not changed about the tenancy agreement. It was because of that agreement that Justice Visram found the tenancy was a controlled one and issued the order of status quo. That being so therefore I am satisfied that the tenancy was based on that agreement. It was for five years and that is why it was a controlled tenancy. Once a tenancy is controlled the High court has no jurisdiction to deal with it. However as held in the case of JITENDRA MATHURDAS KANABAR & 2 OTHERS –VS- FISH AND MEAT LIMITED COURT OF APPEAL C.A. NO. 267 of 1996 once a controlled tenancy is terminated then the parties can go to court. Cap0 301 provides how a controlled tenancy can come to an end. One way is by the landlord giving a Notice to the tenant who do not make a reference to the Tribunal. The other is when the agreed period expires. The term of the tenancy between the applicant and respondent ended on 1st June 2004. That is when the tenancy relationship ceased to exist. The landlord did not have to give the tenant a Notice to vacate as each party knew the agreed period. The applicant depones that he is not desirous to continue leasing the premises to the respondent who has not paid any rent for the year 2001. The tenant has not paid rent after the expiry of the period. Their tenancy is therefore over.

The tenant cannot hide under the guise of controlled tenancy as there is no tenancy in existence. The court has therefore jurisdiction to hear and determine any dispute between them after the expiry of the tenancy. The expiry of the tenancy is also a good reason to set aside the order of status quo ordered on 30th January 2001 and extended on 31/5/01 and on 27/4/03. Prayer 2 of the application is therefore well grounded.

The other issue is that of mandatory injunction to deliver vacant possession of the premises to the applicant. Courts have jurisdiction to issue such orders as held in the case of BELLE MAISCH LTD – VS- YAYA TOWERS LTD HCCC (NBI) No.2225 of 1995 as long as there are good grounds. However even without considering if there are good grounds in this case I am constrained to find that the way the applicant has sought that relief is not proper. As submitted parties are bound by their pleadings. The applicant/defendant had not in his pleadings sought for vacant possession of the suit premises.

In fact his prayer was that the plaintiff's suit be dismissed with costs. As submitted the only way he should seek for vacant possession is to file a plaint or amend his defence and makes a counterclaim seeking for vacant possession. It is only after that he can apply for vacant possession. Of course he could not have made that claim when he filed his defence as the court at that time had no jurisdiction to entertain such a claim as by then the tenancy was a controlled one. However once that situation changed he should have taken the necessary steps. The court cannot therefore grant him the order sought as that would be giving a relief not pleaded for.

From the foregoing therefore I allow and grant prayer 2 of the application to the extent that orders of status quo ordered by the court are hereby set aside. I however disallow the other prayers and dismiss them.

Costs in the cause.

Dated this 11th day of April 2005

KABURU BAUNI

JUDGE

N/A for Applicant.

Respondent present