



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 706 OF 2004**

**WALTER KIGERA WAIRERI..... PLAINTIFF**

**VERSUS**

**N.W. REALITE LIMITED..... 1ST DEFENDANT**

**KARUME INVESTMENTS LIMITED ..... 2ND DEFENDANT**

**RULING**

This Ruling is made in a Chamber Summons dated 29th June 2004 brought by the Plaintiff Applicants under Order XXXIX Rules 1, 2, 3 and 7 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. The same was previously reserved for the 1st of April 2005 which unfortunately fell during the Court's Easter vacation. The Court regrets the delay occasioned thereby and commends parties and their Counsel for their patience.

The applicant seeks injunctive orders against the Defendants/Respondents from evicting or threatening them with eviction from the premises known as L.R. 209/6240 – Parklands Shopping Centre or in any other way interfering with the applicant's quiet enjoyment thereof pending the hearing and determination of the matter. Applicants seek other or further orders as the Court would consider proper and expedient and that costs of the application be provided for. The grounds in support of the application as appearing in the application and the supporting affidavit of 29th June 2004 are that

- 1. There exists a Lease agreement between the Applicant and the Respondents for 5 years from 1st May 2002 expiring on 1st May 2007.**
- 2. That the Respondent has issued an illegal notice to vacate the premises by way of a circular requesting the Applicant to vacate on or before 30th June 2004.**
- 3. That the Applicant has not breached any conditions of the Lease.**
- 4. That the Applicant has a good case with high chances of success and that damages would not be an adequate remedy given the nature of the case.**

The Respondent's case as appearing in the Grounds of Objection dated 16th July 2004 is that:

- 1. The Plaintiff has not demonstrated a prima facie case**
- 2. The application is misconceived and vexatious in that the tenant/landlord relationship had expired and the subtenancy determined thereby creating a situation where no privity of estate exists between the parties.**

**3. Declaratory reliefs cannot be granted in an interlocutory application.**

**4. That the applicant is guilty of material non disclosure thereby becoming disentitled to the equitable relief sought.**

The Respondent's annexure "WWM 1" is a copy of a transfer of a sub-lease dated 29th December 1972 from James Njenga Karume to Karume Investments Limited which they claim to be the head-lease in respect of which the applicant's sub lease is founded. The Respondents have submitted that the said lease expired on 30th June 2004, the head lessor, Kenya Shell Limited having refused to renew the same.

To qualify for the injunctive orders sought, the application must be one whereby the Applicant has demonstrated a prima facie case with a probability of success in which he has shown that he has an equitable right in the suit premises in respect of which an injunction may issue. That the Applicant was a sub-tenant of the 2nd Defendant occupying a butchery on the ground floor and a two bedroomed flat on the 1st floor of the premises is not disputed. It is also not disputed that the Applicant was offered a renewal of his two sub-tenancies as per letters written to him by the 1st Respondent, annexed to the Supporting Affidavit as "WKW-1" and "WKW-2".

I have studied the two annexures and have noted that the two are mere letters of offer clearly expressed to be "subject to Lease Agreement". They both are intended to govern the relationship between the parties until the Lease Agreement is formally executed. Legally, it is the Lease document not a letter of offer which constitutes the contract between the parties. An offer made subject to contract is not binding since the matter remains in negotiation and there is no contract until a final contract, in this case the formal Lease is executed. Clearly there being no Lease to be enforced by an order for injunction, the applicant has failed to demonstrate a prima facie case. In view of the fact that the headlease has terminated in any event I find that an order for injunction would be of no effect even if the same was warranted since the Defendant would have no interest to assign the Plaintiff.

The other essential that the Applicant must fulfill is to show that he risks to suffer irreparable loss not capable of being compensated in damages. Other than saying that damages would be inadequate, the Applicant did not even address the Court on the issue in the submissions made before me. I note however that the plaint includes a prayer for damages which in my view would be adequate remedy. Having thus found I am left with no alternative but to disallow the application, having no doubt whatsoever that the Applicant is not entitled to an order for injunction in the circumstances. I agree with Counsel for the Respondents that the 1st Respondent, being a disclosed agent for a known principal ought not to have been sued.

Accordingly I find that the application has no merit and hereby dismiss the same with costs to the Respondents.

Dated and Delivered at Nairobi this 20th day of May, 2005

**M.G. Mugo**

**Judge**

**In the presence of:**

***Miss Mulinge for the Plaintiff/Applicant***

***Mr. Kinuthia and Mr. Gitonga for the Defendant/Respondent***