



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 602 of 2005

SIMON NGATUNYI CHABI.....PLAINTIFF

VERSUS

SOLOMON KIRAGU THANDE.....DEFENDANT

RULING

By a Lease Agreement dated 31st January 2002 Soloon Kiragu Thande whom I will refer to herein as the Landlord agreed to lease the suit premises known as LR NO.2327/238 to Simon Ngatunyi Chabi whom I will refer to herein as the tenant for a period of 5 years and 3 months commencing on 2nd February 2002 until 2nd June 2006. The monthly rent was Shs.40,000/= payable in advance.

Subsequently on or about 15th July 2003 the land lord/defendant offered to sell to the plaintiff and the plaintiff agreed to buy the suit premises at an agreed purchase price of Shs.2 million of which the plaintiff paid Shs.750,000/= and the balance was to be paid on completion.

The Agreement provided that the sale was subject to the Law Society Conditions of Sale 1989 edition in so far as they are not inconsistent with the conditions contained in the Agreement. The Sale Agreement gave the completion date as 15th October 2003. On 13th October 2003 the defendant through his advocate wrote the plaintiff informing him of the completion date. The letter read as follows:-

SIMON NGATUNYI

NAIROBI

Dear Sir,

RE: SALE OF LR 2327/238 KAREN

We act for **SOLOMON KIRAGU THANDE**, the transferor in the above named transaction.

This is to confirm that, our client has sent us a letter, with a copy of the Sale Agreement executed between you and our client regarding the above named sale contents of which are self-explanatory and a copy of which is copied to you for ease of reference. As per the terms of the executed Agreement for Sale the completion date will be on 15th October 2003.

In terms of the letter in reference, we confirm that we have instructions to receive from you, on behalf of our client, the balance of the purchase price in the sum of Shs.1,253,000/=.

Kindly let us have a Bankers cheque for the amount to enable us draw a transfer for execution by our client to facilitate transfer in your favour.

Our instructions are that time is of essence in this transaction and therefore you are obliged to pay the balance of the purchase price by the completion date.

Kindly oblige

Thank you.

For Ngatia Kamau & Co Advocates

Ngatia Kamau Advocates

c.c:

SOLOMON KIRAGU THANDE

4954 MARTINS FARM DR

POWDER SPRINGS GA 30127-0211

The defendant's advocate, by their letter dated 18th November 2003 decided to rescind the Sale Agreement. The plaintiff did not accept the rescission and continued in possession as purchaser pending completion.

Again by their letter dated 16th June 2004, the defendant's advocate reiterated the defendants' intention to rescind the contract and treat the deposit paid together with interest as rent.

The plaintiff rejected the rescission demand and continued in possession awaiting the defendant to avail the title documents to enable his Advocate prepare the transfer in his favour so that he could pay the balance of the purchase price as per the Sale Agreement.

But on 5th April 2005 the defendant dispatched some Auctioneers to the suit premises to levy distress for rent against the plaintiff to recover some arrears of rent and they proclaimed the plaintiff's hotel equipment which they removed and took away.

The plaintiff filed this suit against the defendant seeking the following orders:

- (a) Specific performance of the Sale Agreement and transfer of LR NO. 2327/238 to the plaintiff. Alternatively rescission of the Sale Agreement and damages for breach of agreement and malicious attachment.
- (b) A permanent injunction restraining the defendant, his agents and servants from levying distress for rent against the plaintiff or otherwise interfering with the plaintiff's user and possession of the suit premises.
- (c) Costs.

Simultaneously with the plaint the plaintiff filed this Chamber Summons under Certificate of Urgency in which he sought:-

- (1)

(2)

(3) That pending the hearing and determination of this suit the defendant, his agents and servants be restrained by way of a permanent injunction from levying distress for rent against the plaintiff, entering into or in any manner whatsoever interfering with the plaintiff's quiet possession and use of LR NO.2317/238 KAREN NAIROBI.

(4) That further, pending the hearing and determination of this suit the court do issue a compelling mandatory order directed to the defendant and his agents MUMBO AUCTIONEERS. Services to forthwith restitute the plaintiff of his properties wrongfully attached by them on 5th April 2005.

(5) That costs of this application be provided for.

Prayers 1 and 2 had been dealt with earlier.

The application is premised on the following grounds:

- (1) That the plaintiff is not a tenant of the defendant but rather a purchaser in possession pending completion.
- (2) That the plaintiff is not in arrears of any rent to the defendant and the purported attachment is illegal wrongful and malicious
- (3) That even if the sale were to be treated as rescinded which is not admitted in any event, and the deposit paid towards purchase price were to be converted into rent, the plaintiff would not even be in any arrears of rent.

The application is supported by a sworn affidavit of the plaintiff in which he has deponed to the facts mainly as contained in the plaint and further that he had carried out a search and discovered that the defendant was not the registered owner of the property and could not let or sell for want of proprietorship and he had no proprietary interest in the property as he had mortgaged the same to co-operative Bank of Kenya.

The defendant filed a replying affidavit in which he deponed that he is the legal owner of the suit premises LR NO. 2327/238 KAREN which he had charged to Co-operative Bank of Kenya Limited for a sum of Shs.2,949,000/= which amounts became subject of a case HCCC NO. 1218 OF 2001 which is still pending, that at the time of distress for rent the outstanding arrears was Shs.422,245/= by the end of May 2005 that on 7th February 2005 he demanded the rent arrears from the applicant who still refused to pay, he instructed an auctioneer to levy distress for rent to recover the outstanding arrears of rent.

Tenancy Agreement is not denied. The Lease Agreement was entered into for 5 years and 3 months commencing from 1st February 2002 until 2nd June 2006 at the rent of Shs.40,000/= monthly payable in advance. At some point on or about 15th June 2003 before the lease had expired the defendant offered to sell the suit premises. The plaintiff at the request of the defendant agreed to purchase it. On 15th June 2003 they entered into a Sale Agreement where they agreed at the purchase price of Shs.2 million. The plaintiff paid Shs.750,000/= deposit and it was agreed that the balance was payable on completion of the Sale Agreement.

At that time and point the plaintiff ceased to be a normal

tenant and became a tenant with an option to purchase. This meant that since the deposit had been paid and received, any rent payable up to the completion of the sale shall be taken into account as part of the purchase price. **SEE CIVIL APPEAL NO. 27 OF 1999, THE GOVERNMENT OF USA VS. JOSEPH MUIRURI GITHONGO UNREPORTED AKIWUMI JA.** It is also not denied that when

the Sale Agreement was entered into, the defendant was not and could not complete the sale since the suit premises was already charged to the Cooperative Bank of Kenya. So that the Sale Agreement which was entered into between the plaintiff and the defendant was a mere fiction for the purpose of obtaining money as the defendant knew from the word go that since the suit property was charged to the Co-operative Bank he could not execute the sale. The question that arises is whether or not the defendant could levy distress for rent after the sale agreement was entered into and deposit paid and received.

As I have stated earlier after the Sale Agreement was entered into the plaintiff became a tenant with the option to purchase and any rents paid after that would be taken into account as part of the purchase price. The defendant was not entitled to levy distress for rent before the Sale Agreement was rescinded. Secondly as I have stated earlier the rent arrears allegedly due was Shs.422,245/= while the deposit paid was Shs.750,000/=.

Even assuming the Sale Agreement was rescinded and the deposit paid was treated as rent the defendant had a balance of Shs.327,775/= due to the plaintiff so that the issue of levy for distress for rent was neither here nor there.

The attachment of the plaintiff's goods and their removal from the suit premises and the closure of his businesses was unlawful and tainted with malice. Mr. Meenye submitted that since the defendant had no property rights over the suit property he could not purport to levy distress for rent and urged the court to order a mandatory injunction. The applicant is seeking for a mandatory injunction.

I would point out that the principles governing grant of mandatory orders as enunciated in the celebrated case of **Giella V. Cassman Brown & Co Ltd** must be satisfied before an injunction can be granted. They are existence of probability of success, likelihood of irreparable harm which would not be adequately compensated for by damages and balance of convenience. Save that a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases.

In the instant case the plaintiff was a tenant and was paying his monthly rent regularly. The defendant got into financial problems and approached the plaintiff if he could purchase the suit premises. The plaintiff obliged and looked for the money.

They entered into a Sale Agreement and paid Shs.750,000/= after the signing of the agreement and it was agreed in the terms of the Sale Agreement that the balance of the purchase price of Shs.1,253,000/= would be paid on completion of the sale. After payment of the deposit for the purchase of the suit premises, the plaintiff became a tenant with option to purchase. Before completion of the sale and without rescinding the contract, the defendant through his advocate issued a 7 days notice for the payment of the balance of the purchase price. This was before the defendant had availed the title to the property and other relevant documents required to effect the transfer. After the expiry of the 7 days notice, the defendant made a demand for the payment of rent which allegedly was in arrears. This was before the Sale Agreement was rescinded. The rent in arrears was said to be Shs.422,245/=. Despite the fact that the defendant had received the plaintiffs deposit of Shs.750,000/= even assuming there was rent due to the defendant could leave a balance of Shs.327,775/=. The defendant still went ahead and instructed an auctioneer to levy distress for rent and attached the plaintiff's goods and removed them from the suit premises and the plaintiff's business was closed.

From the aforesaid facts it is clear that since the defendant had charged the title to the Co-operative Bank, the sale could not be executed. The sale agreement was therefore a mere fiction for the purpose of obtaining easy money.

This is a clearest of cases which attracts issuance of a mandatory injunction.

The plaintiff's application is therefore allowed in terms of prayer 3 and 4 of the Chamber Summons dated 16th May 2005. The plaintiff is also entitled to the costs of this application.

Dated this 23rd day of July 2005.

J.L.A. OSIEMO

JUDGE