



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 914 of 2004

PEARL HOLDINGS LTD.....PLAINTIFF

VERSUS

ELI ALON.....DEFENDANT

JUDGMENT

The plaintiff is a limited liability company incorporated in Kenya under the Companies Act Cap 486 Laws of Kenya.

Its directors are- Ambassador M G O and Professor A P Ok who are husband and wife. It is alleged in the pleadings that at all material times the plaintiff was the registered proprietor of the suit premises LR NO.209/8763/2 which was mortgaged to Savings & Loans (K) Ltd. and the defendant entered and took possession in January 1998. It is alleged that entry by the defendant and occupation of the suit land was wrongful and unlawful or in the alternative that the defendant's entry and tenancy was by virtue of an invalid or void lease agreement and therefore the defendant has been and occupying the suit premises as a trespasser.

The plaintiff prays for delivery up of possession of the suit premises by the defendant and for mesne profits.

PW1 Prof. A P O in her evidence told the court that she is a co-director of the plaintiff company. The other co-director is her husband Ambassador M G O. They purchased the suit premises as their matrimonial home. Sometimes in 1998 she left the country for New York USA where she has been working. While she was away her husband leased the suit premises to the defendant without her consent and without a resolution by the Board of Directors who happen to be only two and who are husband and wife. When she returned to the country and went to her matrimonial home the suit premises, she was denied access by the defendant who informed her that the only landlord he knew was Ambassador M G O and that he had instructions not to allow her in. She contacted her husband, but his reaction was dismissive as did the tenant who told her that he did not know her. She was dismayed by this conduct being denied access to her matrimonial home and she decided to see a lawyer and instructed him to file this suit seeking an order that the defendant vacates and deliver up vacant possession of the suit premises to the plaintiff failing which he be ejected therefrom. Payment of mesne profits and costs of the suit.

The defendant had after being served with summons entered appearance and filed a defence which was later struck out on application by the plaintiff. This ought not have been done the defendant ought not to have been shut out of this suit.

He ought to have been given an opportunity to be heard and explain how he came into possession and

whether or not he has been paying rent and to whom. I came into this matter a bit too late. Even if there was a defect in his defence, it ought to have been cured by amendment. The position in my view, is that if a suit is capable of being breached into by amendment, it ought to be done provided the defendant's legal rights are not unduly compromised.

It is the duty of the court to strive to do justice between the parties undeterred by technical procedural rules. The object of amendments of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on a false hypothesis of the facts already pleaded for the belief of the remedy already claimed but rather on the basis of a true state of facts or the relief or remedy which the parties really intend to rely on or to claim.

The powers of amendment are intended to make more effective the function of the court to determine the true substantive merits of the case to have more regard to substance than to form and thus to free the parties and the court from technicalities or formalities of procedure.

It came out through cross examination that the co-director of the plaintiff M G O who allowed the defendant to take possession of the suit property and that he was receiving rent from the defendant some of which he utilized to service the mortgage with the Savings & Loans Ltd. Seemingly the company was incorporated for the purpose of purchasing the suit premises and its and the only shareholders are Ambassador M G O and Prof. A P O who are husband and wife and as well as co-directors. PW1 admitted that she knew that there was a tenant in the house but that since he did not have express authority by both directors he was unlawfully occupying the premises of the company.

As I have stated earlier, the plaintiff company is owned by the 2 directors who are husband and wife. Ambassador M G O also doubled as the Secretary of the Company. As I have stated above the defendant took the tenancy while the co-director Prof. A P O was living in New York working and living there. The question which arises is whether Ambassador M G O who is a co-director and secretary to the plaintiff company could enter into a valid contract with any private persons.

The provisions of Section 34(b) is very clear at paragraph (b). It reads:-

“34” (b) A contract which is made between private persons would by law be valid although made by oral only and not reduced into writing, may be made by oral on behalf of the company by any person acting under its authority, express or implied.”

From cross examination of PW1 Prof. A P O, it came out clearly that her co-director Ambassador M G O had allowed the defendant to take the tenancy of the suit premises but according to her such tenancy was unlawful since it did not have her express consent as the co-director. It is unfortunate that the defendant was sent shut and the co-director was not allowed to give evidence into clarity, whether or not he received the rent from the defendant.

But since it has come out clearly through cross examination that the defendant's tenancy was with the blessing of Ambassador M G O the co-director of the plaintiff company and who doubles up as the secretary of the plaintiff he had both express and implied authority to enter into a contract oral and or reduced into writing on behalf of the company and such a contract is binding on the company. If the defendant had paid the rent as agreed and there was no arrears, he should be left alone and more so since, he has given vacant possession.

This is a suit which draws a lot of sympathy. It involves a husband and wife between whom there is no feeling for each other. They also happen to be the only shareholders of the company and they are co-directors. When the wife was away in New York USA, the husband thought it wise to place a tenant in the company suit premises to enable the company to get rent to service the loan. When the wife came back from New York USA and she finds a tenant in her what she terms matrimonial home she says no way and more so when she is denied access by a stranger who is occupying the company premises. She files a suit and he is evicted and she files this suit for damages from a stranger who had taken the possession of the company premises without her express consent.

Seemingly the husband did not seek her consent before he rented out the company premises. The husband did not seek her express consent to lease out the premises. But if the principle is applied, she should also have sought the express consent from her co-director who as I have said happens to be her husband to bring this suit on behalf of the company, which she did not. She should also have sought express consent from her co-director to convert the company premises into a matrimonial home.

As I have said earlier, the husband had authority to make decisions beneficial to the company while the co-director was away and I think the decision he made on behalf of the company to put a tenant in the company premises to generate income to service the mortgage cannot be said to be unwise. Equally I would say that the treatment of the co-director when she came back from USA was undesirable and lacked courtesy and more so when she was refused access to the company premises owned by her and her husband by a stranger.

This lacked what I may term average wisdom expected of any normal human being.

In conclusion I hold that the defendant was not a trespasser in the company premises. He had express permission of the co-director and had no means to know of the internal differences between the co-directors.

The plaintiff therefore is not entitled to prayers sought in the plaint. The plaintiff's suit is dismissed. Each party to pay his own costs.

Delivered and dated at Nairobi this 13th day of July 2005.

J.L.A. OSIEMO

JUDGE