



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 987 of 2004

ABDIKADIR SHEIKH NUR PLAINTIFF

VERSUS

SAMIR MOHAMED ABDO1ST DEFENDANT

JAMAL MOHAMED ABDO2ND DEFENDANT

MARIAM MOHAMED ABDO 3RD DEFENDANT

MAHAT AHMED ABDI 4TH DEFENDANT

RULING

The Applicant by his Chamber Summons of the 20th September, 2004 seeks a number of orders. Of the orders sought only that in prayer 2 can be granted. This asks for following orders: -

THAT this honorable Court be pleased to grant and issue an interim injunction restraining the Defendants and particularly the 4th Defendant; their agents, successors and assigns and all those deriving title from the 4th Defendant from selling, charging, disposing of,

transferring, mortgaging or in any manner whatsoever, evicting the Plaintiff from the suit premises or dealing with title to L.R No 36/VII/288 in any manner inconsistent with the rights of the Plaintiff or interfering with the Plaintiff's lawful tenancy of the suit premises or removing him therefrom until the hearing and determination of this suit or of this application inter partes or further Orders herein.

The orders sought in paragraphs 3, 4,5,6,7, and 9 can only be granted after a hearing of this case on its merits.

The Application is based on the extensive grounds set out in the Application and is supported by the affidavit of the Applicant himself.

The Applicant claims to be a tenant of plot Number 36/VII/288 by virtue of an unregistered Tenancy Agreement of the 8.2.2001 between the second Defendant and the Applicant. The tenancy is expressed to be for a period of five years at the rent of Kshs.90, 000/= per month reserved therein.

The title to the suit premises is registered in the names of Ahmed Mohamed Abdi, Jamal Mohamed Abdo and Ghafoor Mohamed Abdi as tenants in common in equal shares.

A lot of the Supporting Affidavit relates to the removal of a caveat placed on the title to the suit premises by the Applicant. None of these matters are relevant to this application.

So far as the tenancy agreement is concerned it does not state when the term is to commence but applying rules of construction it will commence from the date of the Agreement namely the 8th February, 2001 and will therefore expire on the 7th February, 2006 subject to either party giving three months notice. It is not for me to construe the meaning of clause (f) of the Agreement but prima facie a tenancy exists until the 7th February 2006.

On the face of the Agreement the words “**one third (1/3) of this share to**” has been written on to the typed words in (1) of the Agreement.

It appears that the 2nd Respondent is the only one of the registered owners still alive.

A great deal was said about a transfer of the suit premises to the 4th Respondent. At this stage it is not for me to determine whether this transfer was fraudulent or not. The conveyance to the 4th Respondent registered against the title is still in place.

It is not clear from the tenancy agreement as to whether the Kshs.90, 000/= per month is for the whole of the suit premises or just one third. The Applicant is in possession of the whole of the suit premises and the only rent he has paid is Kshs.90, 000/= per month.

Mr. Gathaara for the first second and third Respondents maintained that the dispute was mainly between the Applicants and the 4th Respondent. This is because the first three Respondents or their representatives no longer have any ostensible interest in the suit premises.

Mr. Ahmednasir for the 4th Respondent opposed the application as set out on the Grounds of Opposition and the Replying Affidavit of the 4th Respondent.

It was his submission that the Tenancy Agreement was invalid, firstly, as it was illegal offending the provision of the Government Lands Act, and was inadmissible in evidence. This later point of inadmissibility was predicated on the lack of stamping of the Tenancy Agreement, however, it appears that it was stamped and this point does not arise.

Secondly, under Section 100 of the Government Land Act no evidence can be given of a lease unless it is effected by an instrument in writing registered under part X of that Act.

With regard to illegality it is correct that under the Government Land Act an unregistered lease is invalid. However, under the Landlord & Tenant (Shops Hotels & Catering Establishments) Act a tenancy for a period not exceeding five years is protected and the tenant cannot be evicted without an order of the Tribunal.

The 4th Respondent in his affidavit states he has not received any rent and the Applicant is not his tenant.

In paragraph 16 of his affidavit he states that he is a purchaser for value of the suit premises. He does not state however, that he is a purchaser for value without notice. It is not disputed that the Applicant is in possession of the suit premises and as such the 4th Respondent must have had notice of this fact.

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

In his plaint he seeks a prayer similar to that sought in this Application.

I cannot see that at the most the Applicant has any other right to remain on the suit premises until the expiration of the Tenancy Agreement or its sooner termination.

If Mr. Ahmednasir is correct and the Tenancy Agreement is for five years, on a proper construction, then it is void for lack of registration and not admissible in evidence. If however, on a proper contract the Tenancy Agreement is not for five years and falls within the definition of controlled Tenancy in the Landlord Tenant (Shops Hotels & Catering Establishment) Act, the Applicant would be a controlled tenant.

There is no evidence that the tenancy of the Applicant has been terminated in which event he is entitled to stay in the premises until such time as the Tenancy expires whether by notice or effusion of time.

I would add that a person who is in possession of land is entitled to remain there until an order of a competent court is given evicting him there from.

So far as rent is concerned this is payable to the owner of the suit premises and if not paid to the owner or to a wrong person then the owner has his remedies.

In the result I grant an injunction not in terms of prayer 2 but restricting the owner from evicting the Applicant prior to the termination of his tenancy.

Costs will be in the cause.

Dated and delivered at Nairobi this 3rd day of October 2005

P.J. RANSLEY

JUDGE