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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 1127 of 2005

SUSAN WANJIRI MUCHOKI.....PLAINTIFF

VERSUS

- 1. KUKA INVESTMENT LTD**
- 2. ROY NJOROGE KINUTHIA**
- 3. ESTHER NJERI NJOROGE.....DEFENDANTS**

RULING

The Chamber Summons dated 14.9.05 is expressed to be brought under Order 39 rule 1 & 2 of the Civil Procedure rules and section 3A & 5 of the Civil Procedure Act. The Plaintiff/Applicant seeks the following prayers:

4. That the 1st Respondent by itself and its agents and employees G. M. Mburu Trading as Haki Traders, be restrained from selling by Public auction the applicants goods until this matter is heard and determined.
5. That the first respondent by itself and or its agents or employees be ordered to return the attached goods to the applicant.
6. That the 1st respondent by itself, its servants or agents be restrained from interfering with the plaintiffs quiet possession of the suit premises in any way till the suit is heard and determined
7. Costs of the application be provided for.

The grounds upon which the application is brought are found in the body of the application and the application is further supported by the affidavit of the applicant Susan Wanjiru Muchoki.

Stephen Kungu Kagiri, a director of the 1st defendants swore a replying affidavit in opposition, while the 2nd defendant Roy Njoroge Kinuthia swore an affidavit on his behalf and that of the 2nd defendant in reply.

It is the applicants' case that she was a tenant in Room No. A2 Luthuli House paying a rent of Kshs 5,000/= p.m. to both the 2nd and 3rd defendants who are head tenants in the said house. She entered into a sub lease with the 2nd and 3rd defendants who are head tenants in the said house. She entered into sub lease with the 2nd and 3rd defendants on 4.5.05 and paid one months rent in advance and has paid rent upto 9.9.05 but despite that, the 1st defendant had instructed the auctioneers to levy distress for rent arrears of 70,797/00 and they carried away her goods which were due to be sold by public auction. She denies owing any rent to the 1st defendant and has no tenancy agreement with the 1st defendant and that the distress is therefore unlawful and if not stopped, the applicant stands to suffer irreparably.

The 1st defendant, a registered company is the owner of the suit premises and entered into a written registered lease agreement with the 2nd defendant for a period of 61 months. The lease agreement was annexed-SKKI. Clause 2(h) of the said lease forbade the

2nd defendant from leasing the premises without written consent of the 1st defendant. It was further deepened that the 2nd defendant has persistently defaulted in payment of rent so that as of 30.7.03 the

2nd defendant owed Kshs 64,797.40 and it is on 2.8.05 that the

1st defendant instructed Haki Traders to levy distress against the

2nd defendant for rent arrears. As of 30.8.05 rent arrears had risen to 72,173/= and that the distress was therefore lawful and justified.

He denied knowledge of the applicant and that the sub tenancy is illegal and a breach of the tenancy agreement. The 1st defendant contends to have exercised his right of re-entry under the lease agreement due to breach.

The 2nd defendant in his replying affidavit, acknowledges that 2nd and 3rd defendants owe the sum of Kshs 70,797 and that he is making an effort to pay the 1st defendant and has since paid Kshs 9000/= to the auctioneers.

It is not in dispute that there exists a lease agreement between the 1st defendant and 2nd defendant. It was signed on 19.9.02. The 3rd defendant is not a party to the lease agreement nor is the plaintiff. The 2nd defendant does not deny that it is in respect of the premises known as A2, which is part of the 1st defendants; plot No. 209/697/23 (Luthuli House). The lease is for 61 months and therefore not a protected tenancy as it is for more than 5 years and has been reduced to writing.

The applicant claims to have entered into a lease agreement with the 2nd & 3rd defendants for lease of the premises subject to the lease agreement between 1st and 2nd defendant. The lease or sub lease is dated 5.9.05. The agreement was entered into when the applicants goods as well as those of the 2nd defendants had already been proclaimed and were removed from the premises on 1.9.05. The said agreement dated 5.9.05 even refers to the distress for rent and outstanding rents due to the 1st plaintiff. In my considered view, this agreement between the applicant and 2nd defendant was meant to defeat the distress by the 1st defendant as it was made after the distress. It does not seem to have been made in good faith. Further to the above, it is obvious that the 1st defendant was not a party to the said agreement. The question is whether the 2nd defendant had permission to sublet the premises. Clause 2(h) of the lease agreements

signed by 1st & 2nd defendant prohibited the 2nd defendant from assigning, subletting or parting with possession of any part of the premises without prior consent of the landlord. There is no evidence that 2nd defendant ever sought the 1st defendant's consent to sublet the premises. 2nd defendant has not even alluded to have had such consent to sublet. The lease agreement between that applicant and the 2nd defendant if any, was unlawful and did not confer any rights to the applicant as a tenant in the premises. Besides the lease agreement of 5.9.05 was made with 2nd and 3rd defendant. 3rd defendant is not a party to the lease agreement between the 1st and 2nd defendant hence no privity of contract between 3rd defendant and the 1st defendant and she could not have had the capacity to sublet the suit premises even if there had been consent of the landlord to Sublet.

Can the applicant be protected under the circumstances? As rightly submitted by 1st Respondents counsel, it would have been expected that applicant would check whether or not the 2nd and 3rd defendants were owners of the premises or not. The lease was registered and it would not have been difficult to check. Had she acted with due care and some diligence she would have found out the correct position and the court wonders whether she can be assisted by this court which is being asked to declare an illegality as legal.

Having found that the 2nd defendant was the 1st defendant's tenant the question is whether the 1st defendant had a right to distress for rent. The 2nd defendant does acknowledge that as of the time of distress, the rent claimed of over Kshs 70,000/= was due and owing.

He has even offered payment by installments. The 1st defendant has demonstrated and which is not denied that the 2nd defendant was a persistent defaulter in payment of rent. Under section 3 of distress for rent Act, the landlord has a right of distress once some rent was due or was in arrears and in the circumstances, the 1st defendant had a right of distress. Since the applicant was unlawfully on the premises, what the 1st defendant was distressing were the goods found in the premises irrespective of whether or not they are the applicants. It was presumed and correctly so, that what was on the premises was the 2nd defendant's goods.

Curiously, after the goods were proclaimed, the applicants never took any action to try and avert the distress of her goods by filing an objection. It is not until after the goods were carried away that she filed this application and even entered a lease agreement. The remedy sought is an equitable one and equity will not normally assist the indolent and who ever comes to equity must come with clean hands. The applicant has not.

For the orders sought by the applicant must to be granted, the applicant must demonstrate that she has a prima facie case with probability of success; that there is a likelihood of her suffering irreparable loss which can not be compensated by way of damages if the order is not granted and if the court is in doubt, it should decide on balance of convenience.

Though the Applicants prayer is that the respondent be restrained from interfering with her quiet possession, yet the applicants is already out of the premises. She did concede that it is unlikely that she will be reinstated. She had only sublet part of the premises at a rent of 5000/=. The rent for the whole space let to 2nd defendant was over Kshs 11,000/=. In the event that the 2nd defendant is not reinstated, the question is whether the applicant would be able to pay the full rent of 11,000/=. The applicant did not address that issue.

Besides, under clause 2(h) of the lease agreement the

1st defendant has a right to re-enter and take possession of the premises once there was breach. There was non-payment of rent by 2nd defendant as well as subletting and under the lease agreement the 1st defendant has a remedy to re-enter and take possession. The plaintiff would have no chance of reinstatement. She does not have a better right to the premises than the owner. In fact the applicant has no

right. She has failed to demonstrate that she has a prima facie case with probability of success.

Will the applicant suffer irreparable loss? The appellants goods are said to be worth about Kshs 150,000/= whereas the

1st defendant owns that whole of Luthuli House that room that was leased to 2nd defendant alone raised 11,000/= per month. The applicants' goods were ascertainable and in my view she cannot suffer irreparable loss. She can as well be compensated in damages if it is found that she was legally in the premises and the distress was unlawful.

If the order of injunction is granted, the 1st defendant stands to loose more than the applicant and in my view the balance of convenience is against the grant of the order. The applicant did not offer any Security.

The applicant paid her monies to the 2nd and 3rd defendants. They did not remit it to the landlord.

There is no privity of contract between the applicant and

1st defendant. The persons that the applicant should pursue is the

2nd and 3rd defendants.

Accordingly the orders sought are refused. Application dated 14.9.05 is dismissed with costs being in the cause.

Delivered and Dated at Nairobi this 21st day of December 2005.

R. WENDOH

JUDGE

Delivered in presence of;

Mr. Gitau - holding brief for Mr. Kingoo Wanjau for plaintiff/applicant

Mr. Kamau for 1st defendant/respondant.

2nd and 3rd defendants present in person.

R. WENDOH

Judge

21/12/2005