



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 841 OF 2003

OWINO OKEYO & COMPANYPLAINTIFF

VERSUS

KENYA NATIONAL ASSURANCE COMPANY

LIMITED 1ST DEFENDANT

C.M KAMANDE T/a CHAKA AGENCIES2ND DEFENDANT

RULING

In the plaint filed on 13.8.2003, the plaintiff, Owino Okeyo & Co. Advocates prayed for an order to,

“restrain the defendants from removing and carrying away the plaintiff’s proclaimed goods or any good belonging to the plaintiffs”. Costs of the suit were also prayed for.

The suit was based on tenancy between the plaintiff and Kenya National Assurance Company (in liquidation).

The plaintiff stated that on 17.7.2003, the 1st defendant acting by the 2nd defendant, ***“wrongly entered the said office premises and wrongly proclaimed goods or certain items of office equipment”***.

The records show that the plaintiff moved to court under a certificate of urgency for injunction order

“to stop the defendant from levying distress, attaching and otherwise removing and carrying away the plaintiffs goods until the suit is determined”.

The injunction order was granted ex parte by Rimita, J on 13.8.2003. The parties appeared before me for interparte hearing and subsequently filed their submissions.

The plaintiff claimed in their submissions that they are tenants on 7th floor of Town House, situated on L.R No. 209/2362, along Kaunda street, but the “tenancy has never been reduced into writing within the definition of a controlled tenancy”. There is only a letter of offer which has never been executed by the plaintiffs.

The plaintiff also challenged the 1st defendants as the landlords of Town House situated on L.R No.209/2362, stating that the proclamation was issued by the Kenya National Assurance Company 2001 Ltd, whereas the letter of offer of tenancy was issued by Kenya National Assurance Company Ltd (in liquidation). The plaintiff also challenged the order obtained in winding up Cause No. 18 of 1996, purporting to say that Kenya National Assurance Company was divided into 2 i.e. General Fund and Life Fund and that the General Fund has been liquidated whereas the Life Fund was transferred to a new

company known as Kenya National Assurance 2001 Ltd by a vesting order, annexed to the defendant's affidavit. The plaintiff complained that they were not served with application to discharge the official Receiver/Interim Liquidator in respect of General Fund of Kenya National Assurance Company Ltd. The plaintiff submitted that the vesting order was null and void as it was never served on them, and further, that the landlord is indebted to the plaintiff to the tune of Kshs.414,000/= a sum far above the landlord's claim of Kshs.131,505/= rent arrears.

The plaintiff prayed the court to restrain the defendant from recovering what they claim is owed to them is heard in full. Annexed to the supporting affidavit were various documents, including the letter of 20th August, 1999 signed by K.A Amayoti, property Manager of Mount Estate Ltd, which the plaintiff now says does not constitute the lease agreement but only a letter of offer.

Counsel for the defendants raised various questions as contained in their replying affidavit dated 20th November 2003, and submitted that the defendant became the new owner of the suit premises vide the vesting order aforesaid.

The 1st defendant also submitted that the tenancy herein

“is not controlled as the plaintiff executed and stamped the letter of offer of lease dated 20 th August 1999”.

Going by that document, the defendant submitted that the lease commenced on 2.9.99 and was to run for 6 years, so it is still subsisting. The 1st defendant maintained that it owns the building as shown by the documents filed in court.

According to the 1st defendant, the plaintiff is in arrears of rent to the tune of Kshs.131,505/= and has issued cheques which have bounced, and now “belatedly intends to have the outstanding rent offset from his legal fees owed by the Kenya National Assurance Company Ltd (in liquidation).

The defendant further submitted that the court should not entertain the claim of set-off, which is not even pleaded in the plaint, and by that claim, the defendant is actually admitting that there are rent arrears. According to the 1st defendant, the plaintiff has failed to show a prima facie case with a probability of success as in *GIELLA v CASSMAN BROWN & CO. LTD*, and the application for injunction should be dismissed with costs.

The 1st defendant's General Manager filed a further replying affidavit in which he annexed the proceedings in the Winding Up Cause No.18 of 1996, Memo & Articles of Association of Kenya National Insurance Company (2001) Ltd. These documents, according to him, gave the 1st defendant authority to transfer the defunct company's life fund to the 1st defendant so as to continue running assets of the fund which constituted various premises, including the suit premises.....

A further affidavit was also sworn by Stephen Owino – Advocate for the plaintiff. He referred to the application he filed in that suit seeking to be furnished with

“the statement of affairs of Kenya National Assurance Company Ltd” and an order to restrain the official Receiver from selling assets of Kenya National Assurance, until the statement of affairs is furnished to him. Also annexed were various letters exchanged between Owino Okeyo & Co. Advocates, and the Official Receiver. He maintained that the plaintiffs deny executing the letter of Offer of lease dated 20 th August 1999, but states nevertheless that the plaintiffs were “currently on their rent payment by 21 st March 2003 ”.

I have found in the court file, a defence and counterclaim of the 1st and 2nd defendants dated 14th January 2004, filed in court the same day obviously this defence was not in the court file at the time of the hearing of the application. It must have been placed in the file subsequently.

Paragraph 4 thereof denies the contents of para 6 and 7 of the plaint but

“avers that the plaintiff was in material breach of covenants under the letter of offer date d 20th August 1999”.

Particulars of the breach were given in paras 4(a)(b)(c).

In the counterclaim, the 1st defendant repeats the contents of the letter of offer dated 20th August 1999, and states further that the

“leave of the court will be sought to refer to the said letter for its full meaning and purport”.

Having gone through the pleadings which include the various affidavits and their annexures I have come to the conclusion that in considering the application filed, the matter of the letter of 20th of August 1999 said to be the tenancy agreement and whether it was executed by both parties or not, is a crucial point. I say this because the plaintiff and the 1st defendant have exhibited different documents. The one annexed by Stephen Owino in his supporting affidavit has no names and no signature of anybody, whereas the one annexed to the replying affidavit of Julius Neuzou reads at page 4,

“I/We OWINO OKEYO & CO (inserted in black ink) confirm that the above terms and conditions are acceptable to us”.

The next line which reads

“Representative signature” has the stamp of Owino Okeyo Advocates and a date, 1.9.99.

Is this the Lease Agreement between the parties? If so, why are there 2 different documents? I would have expected, both parties to have annexed the same documents.

I think it is important to establish the correct document upon which the plaintiff’s have been paying rent because they deny having executed the document of 20th August 1999, and content that the ***‘tenancy has never been reduced into writing within a controlled tenancy, but only a letter of offer not executed by the plaintiffs’***. The plaintiff contend that the bounced cheque were all replaced. Is this so?

The 2nd point which needs to be resolved in my view, is the matter of change of ownership of the suit premises which occurred vide a court order in a suit which the plaintiffs say they were not made aware of, as they continue to claim that their relationship if any, was with the Kenya National Assurance Company, (in liquidation) not the current landlord Kenya National Assurance Company (2001) Ltd; and they have filed an application to challenge the vesting order which brought in the current landlord.

Though not specifically pleaded in the plaint and defence is the matter of “set-off” which the 1st defendant states the plaintiff is claiming illegally and using it to refuse to pay the rent arrears.

The 3 points I have enumerated above are important as they form the core of this suit. They need to be resolved before the 1st defendant can be allowed to execute for what it contends is ***“rent arrears”***. For this reason I find that the plaintiff has established a prima facie case warranting the exercise of this courts discretion and I proceed to grant the plaintiff an injunction prayed for vide his application dated 13th August 2003. I also award the plaintiff the costs of the application.

Further, I direct the plaintiffs to continue to pay the rent as they have been doing. As the pleadings in this case appear to have been closed by the filing of the defence by the 1st and 2nd defendants, I direct the parties herein to file agreed issues and proceed to conduct discovery and inspection of documents, if any, to enable the suit to be heard in full.

Dated at Nairobi this 26th day of February 2004.

JOYCE ALUOCH

JUDGE