



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

CIVIL SUIT NO. 92 OF 2001

SAMIR MOHAMED ABDO.....PLAINTIF

VERSUS

SAID ALI ELMI

SULEIMAN MOHAMED ABDI

ABDIKADIR SHEIKH NUR T/a Miski Shopping Complex)..... DEFENDANTS

RULING

There are several applications on file, and the background goes back to the Complaint of 10th January, 2001. It is stated in that Complaint that there was a tenancy agreement in writing, dated 30th December, 1998, by which the Plaintiff let to the Defendants jointly and severally a building on L.R. No. 36/VII/288 at Eastleigh Section II, in Nairobi. The said building is popularly known as MISKI SHOPPING COMPLEX. Although the suit was filed over rent arrears, neither the application heard on 14th January, 2004 nor the submissions of counsel for the Plaintiff/Applicant on that occasion gave any impression that nonwww.

payment of rent was at all an issue any more. But it is on record that on 28th March, 2001 the Deputy Registrar entered interlocutory judgement in favour of the Plaintiff. The matter thereafter came up before the Honourable Mr. Justice Aganyanya, when the Plaintiff sought eviction orders. On 4th October, 2001 the learned Judge gave his judgement as follows:

“In view of the unchallenged evidence of the Plaintiff and [the fact that] the Defendants did not file appearance and/or Defence to the claim, I enter judgement against the Defendants for the re-possession of the building otherwise known as L.R. No. 36/VII/288, Eastleigh Section II, Nairobi and for costs of the suit.”

Apparently no further action was taken regarding this case, until 24th June, 2003 when Orders were made that: (i) the Defendants through themselves, their servants, agents or successors in title be evicted from L.R. No. 36/VII/288, at Eastleigh, Nairobi;

(ii) the OCS, Pangani Police Station do supervise compliance with the Order of eviction. These Orders were later extracted and served upon the Defendants. The Defendants responded through a Chamber Summons application of 31st July, 2003 praying for Orders:

(i) that the Court be pleased to stay the execution of the ex parte Orders issued on 9th July, 2003 pending the determination of the application; (ii) that the Court be pleased to set aside the ex parte judgement entered in favour of the Plaintiff on 4th October, 2001 together with all consequential Orders. The

Defendants' application came up for hearing before the Honourable Mr. Justice Hayanga, whose ruling was read by the Honourable Mr. Justice Nyamu on 7th November, 2003. The Honourable Mr. Justice Hayanga held that the interlocutory judgement entered in favour of the Plaintiff in 2001 had been given in error, as the required service upon the Defendants had not been effected prior to the date of hearing. The learned Judge set aside the interlocutory judgment, with all the consequential orders. This opened the way for the third Defendant to file a Statement of Defence on 18th November, 2003, which Defence was later replaced by an Amended Defence and Counterclaim filed on 20th November, 2003. It became clear from the two principal pleading documents that the Plaintiff and the third Defendant were relying on different facts regarding the operative contract of lease for L.R. No. 36/VII/288. According to the Plaintiff of 10th January, 2001 the lease was to run for 10 years from 1st December, 1998 at a monthly rental of Kshs.250,000/=. But in the Amended Statement of Defence and Counterclaim, it is asserted that the tenancy agreement of December 1998 was frustrated and/or terminated by the parties and there were subsequent agreements entered into on different terms, on 1st February, 2001 and 8th February, 2001. It is stated in the Defence and Counterclaim that there was a five-year tenancy agreement between the parties commencing on 8th February, 2001, and that the Plaintiff is not at the moment, entitled to possession of the suit premises. On 3rd November, 2003 the Defendants filed an ex parte Chamber Summons application in which they prayed for Orders: (i) that the Court do stay the execution of the ex parte Orders made on 24th June, 2003;

(ii) that the Court do order the Plaintiff and his agents, servants and/or representatives to open up the premises of Miski Shopping Complex or part of it closed on 3rd November, 2003 immediately. This application came up before the Honourable Mr. Justice Nyamu, who read out his Ruling on 7th November, 2003 alongside that of the Honourable Mr. Justice Hayanga. The Honourable Mr. Justice Nyamu's Ruling was essentially concerned with an objection to the delivery of

Honourable Justice Hayanga's Ruling, raised by the Plaintiff. Justice Nyamu, in effect, confirmed the record in the ruling of Mr. Justice Hayanga, as the authoritative position to-date regarding the Plaintiff and the Defendants in the present case. As I am convinced myself that the Honourable Mr. Justice Hayanga's Ruling was given in the normal course of duty and that no objection to it had at any stage been raised by any party, I stand by the decision of the Honourable Mr. Justice Nyamu, and will treat Justice Hayanga's decision as laying the foundation for resolving the dispute between the parties. The more recent applications on file are as follows: (i) Chamber Summons application by the 3rd Defendant, dated 17th November, 2003 and filed on the same day, with the affidavit of Abdikadir Sheikh Nur sworn and filed on 17th November, 2003;

(ii) Chamber Summons application by the 3rd Defendant, dated 18th November, 2003 and filed on the same day, with an affidavit by Abdikadir Sheikh Nur, sworn and filed on 18th November, 2003;

(iii) Chamber Summons application by the 3rd Defendant, dated 19th November, 2003 and filed on 20th November, 2003, with an affidavit by Abdikadir Sheikh Nur sworn on 19th and filed on 20th November, 2003;

(iv) Chamber Summons application by the Plaintiff, dated 21st November 2003 and filed on the same date, with the supporting affidavit of Samir Mohamed Abdo sworn and filed on the same date;

(v) Chamber Summons application by the third Defendant, dated 11th December, 2003 and filed on the same day, with an affidavit sworn by Abdikadir Sheikh Nur, sworn and filed on the same day.

Insofar as these applications, and with respect to the claims of each of the parties, are for the most part repetitive, it has to be remarked that they have had the effect of taxing the Court's resources rather unnecessarily. The parties have appeared to be both impatient and extravagant by the copious applications they have been making on the same issues, without waiting for the earlier matters to be heard and determined. This practice is to be discouraged, and the responsibility will mainly fall on counsel to ensure that only essential applications are made, as only in this way will the Court's resources be best engaged; and only in this way can unnecessary costs for the parties be lessened. Having sounded this caution, I will consolidate all the applications by, firstly, setting out the real claims of each of the parties:

(1) The Plaintiff's case has always been that the Court do give full effect to the orders of eviction made on 9th July, 2003 in favour of the Plaintiffs and against the Defendants.

(2) The third Defendant's case has always been: (i) that the Court be pleased to issue a mandatory injunction requiring Mr. Samir Mohamed Abdo, the Plaintiff, to forthwith reinstate and restore full and unconditional possession and occupation of the suit premises, L.R. No. 36/VII/288, Eastleigh in Nairobi to the 3rd Defendant;

(ii) in the alternative, the third Defendant be placed at liberty to take up and assume full possession and occupation of the suit premises until the main suit is heard and determined;

(iii) that the costs of the Defendant be borne by the Plaintiff. Although this contractual matter must carry considerable economic risks to the parties, there has been no opportunity to hear the several applications in the best manner, and from time to time ex parte applications have resulted in temporary orders which, viewed as a whole, are not altogether consistent. To give examples:

(i) the Order of 4th October, 2001 gave possession of the suit premises to the Plaintiff;

(ii) the Order of 9th July, 2003 gave authority to evict the Defendants from the suit premises;

(iii) the Order of 4th August, 2003 stayed the Order of eviction issued on 9th July, 2003;

(iv) the Order of 7th August, 2003 further stayed the eviction orders of 9th July, 2003 for sixty days; (v) the Order of 3rd November, 2003 stayed execution of the ex parte Orders issued on 24th June, 2003; (vi) the Order of 7th November set aside the ex parte judgement of 4th October, 2001, together with all consequential orders including the Order of 24th June, 2003;

(vii) the Order of 20th November, 2003 gave an injunction restraining Mr. Shamir Mohamed Abdo and Mr. Abdullah Mohamed and their agents, servants or representatives from entering, occupying, locking and/or in any other way interfering with the Defendants' peaceful occupation and tenancy over the suit premises;

(viii) the Order of 21st November, 2003 stayed the orders of 20th November pending hearing interpartes ;

(ix) the Order of 4th December, 2003 gave consent for an alleged purchaser, one Ismael Mohamed Jibril, to be joined as an interested party to the proceedings.

These were all short-term orders, made on the basis mostly of ex parte applications. They left open the fundamental question which lies at the root of the several interlocutory applications, namely, have the Defendants a legal right to remain in possession of the suit premises, or is the lessor at liberty to evict them?

At the hearing of 14th January, 2004 Mr. Mailani for the Plaintiff raised the issue of the Interested Party as one that ought to be served before hearing could take place. The Honourable Lady Justice Aluoch, on the occasion of hearing an application by the Plaintiff on 4th December, 2003 had ordered that Ismael Mohamed Jibril be joined as an interested party in the proceedings, and that the third Defendant's Chamber Summons application of 19th November, 2003 be served on the interested party. Mr. Mailani now stated that service had not yet been effected, on account of Mr. Jibril's many travels and consequent unavailability, and pleaded that more time be allowed for service to be effected.

Mr. Ogola for the third Defendant, however, submitted that the relevance of an interested party to the matter in hand was highly questionable, and it was desirable to hear the application on the merits without further delay. He stated that no interested party had made an application to be joined in the suit, and that following the Order made by the Honourable Lady Justice Aluoch on 4th December, 2003 counsel for the third Defendant had indeed been able to effect service on the said Mr. Ismael Mohamed Jibril. Mr. Ogola observed that although the question of the interested party has repeatedly been cited by counsel for the

Plaintiff, the said Mr. Ismael Mohamed Jibril was not a client of counsel for the Plaintiff, and hence the position of the interested party was being invoked in vain.

It became clear at this stage that a ruling was necessary on whether or not the hearing of the application may continue. In my view counsel for the Plaintiff had not done all that was possible to effect service on the interested party in accordance with the Court's Orders of 4th December, 2003 and 7th January, 2004; but apart from this, it was clear that the said interested party was aware of the third Defendant's application then pending before the Court. The Court's decision in the circumstances was that the hearing of the application should continue. Counsel for the third Defendant presented his case for prohibitory and mandatory injunctions against the Plaintiff, in relation to the third

Defendant's possession and occupation, under a current lease, of the suit property, L.R. No. 36/VIII/288 at Eastleigh Section II, in Nairobi. He stated that all rent payable by the third Defendant was duly paid up, at the time the Plaintiff evicted the third Defendant from the suit premises on 3rd July, 2003; the lease was current and running; and that this is the reason why the eviction Order was set aside by the Order of Mr. Justice Nyamu made on 20th November, 2003. Counsel stated that the lease in question was a five-year lease, running from 8th February, 2001 and would remain valid until 9th February, 2006, and thus still had more than two years to run.

As already noted, the nature and duration of the lease between the Plaintiff and the Defendants is in contention, as may be seen from the primary pleadings in the Plaintiff and the Defence. For the purpose of the present application, it is not appropriate to address that question; it must be left to the main suit, to be established by evidence adduced at a full hearing. It should be considered, for the purpose of the current application, that there was a valid, running lease between the Plaintiff and the Defendants, for even if one went by the alleged lease of 1998, then there would be in place a ten-year lease running right up to 2008. www.kenyalawreports.or.ke 12 Counsel for the third Defendant submitted that the eviction enforced by the Plaintiff against the third Defendant on 7th November, 2003 was unlawful, as there was in place a Court Order staying implementation of eviction. Eviction had been stayed on several occasions: by the Honourable Lady Justice Aluoch on 4th August, 2003; by the Honourable Mr. Justice Hayanga in his ruling read on 7th November, 2003; by the Honourable Mr. Justice Nyamu on 20th November, 2003. The language of the Court is, virtually throughout, quite consistent: the third Defendant be left unhindered in the enjoyment of tenancy rights under an existing lease agreement. This position was more than confirmed by the Ruling of the Honourable Mr. Justice Hayanga, in which he set aside the interlocutory judgement of 4th October, 2001, under which, over time, the Plaintiff had secured some Orders allowing the eviction of the third Defendant. The Ruling made it quite clear that the interlocutory judgement was set aside with all Orders such as may have been made under it. Since I have confirmed the Ruling as the valid basis of the claims of the parties at this moment, I will rule that not one single Order made since then will now be allowed to stand; and this Ruling will define the position of the parties, within the framework of the applications on file.

Counsel for the third Defendant argued that when, on 7th November, 2003 the Plaintiff proceeded to evict the third Defendant there was no Order in place to support the eviction measure, and the eviction was illegal. Counsel submitted that the Plaintiff, without a judgement or Order in his favour, was wrong in law in still proceeding to station armed guards at the suit premises, to keep out the third Defendant. When, on 20th November, 2003 an interim injunction was made in favour of the Plaintiff, the Plaintiff secured an Order of stay the following day; but both have now lapsed – and in any case have been superseded by the decisions contained in this ruling. Counsel for the third Defendant referred the Court to Cheshire, Fifoot and Furmston's Law of Contract, 13th ed. (1996) at page 646: "Another way in which the performance of a contract in specie may be enforced is by grant of an injunction. An injunction is either prohibitory or mandatory. So far as concerns the law of contract, a prohibitory injunction is granted only in the case of a negative promise..."

"A mandatory injunction, on the other hand, is restorative in its effect, not merely preventive. It directs the Defendant to take positive steps to undo what he has already done in breach of the contract." Counsel also referred the Court to Mulla on the Transfer of Property Act, 1882, 8th ed. (Bombay, 1995), page 927: "[The] lessor can resume possession only in a manner known to, or recognised by, law. A lessor with the

best of title [has] no right to resume possession extrajudicially by the use of force from the lessee even after the expiry [or] earlier termination of the lease by...forfeiture or otherwise.”

Counsel submitted that the Plaintiff as lessor has no right to resume possession of the suit premises at the moment. He further cited the case of *BELLE MAISON LTD. v. YAYA TOWERS LTD.*, Civil Case No. 2225 of 1992 (Nairobi High Court), in which it was held that an unlawful eviction does not create a basis of any claim of right to a lessor, and that should a lessor in such a position purport to install a new tenant in place of the one evicted, such new tenant cannot benefit from the illegality. But counsel observed that in the instant case the suit premises remain vacant to-date. Counsel further drew the Court’s attention to the case *KAMAU MUCUHA v. THE RIPPLES LTD.*, Civil Application No. Nai 186 of 1992, in which it was held that a tenant illegally evicted was entitled to reinstatement and to a restoration of the status quo ante – and this referred to the lawful condition prevailing before the commission of the illegality.

One claim appearing in affidavits in favour of the Plaintiff is that the suit premises have been sold to one Ismael Mohamed Jibril and that this would have a relevance to the Plaintiff’s eviction of the third Defendant. Counsel for the third Defendant submitted that there exists no valid sale case made out of conviction. He submitted that no authentic sale documents of authority had ever been shown by the Plaintiff, and he expressed concern that what is shown as a sale agreement is dated 4th November, 2003, exactly one day after the Court had made orders prohibiting the eviction of the third Defendant. The said Agreement is neither stamped nor registered; and in any case it could not have been registered as the third Defendant, who has a caveat registered against the suit premises, has not been called upon to remove the caveat. No evidential document has been attached to any of the said affidavits showing the passage of any consideration in respect of the alleged sale.

To the submissions by counsel for the third Defendant, Mr. Mailani for the Plaintiff/Respondent stated that he founded the Plaintiff’s case on the position that the third Defendant/Applicant had already been lawfully evicted and was, in effect, an outsider and to be regarded as such. He submitted that the Applicant had been removed from the suit premises on 3rd November, 2003 by virtue of a Court Order of 9th July, 2003. He argued that at the time of eviction, the eviction Order was still in force and was only set aside on 7th November, 2003.

He argued that in the circumstances, should the Applicant be aggrieved, then the avenue of redress was the main suit rather than this application. He challenged the affidavits sworn by the Applicant, stating that in the affidavit of 19th November, 2003 the third Defendant admits that eviction had taken place on 3rd November, 2003; but that in the affidavit of 11th December, 2003 the Applicant says she was still in the suit premises; and in the affidavit of 19th December, 2003 she says she had not returned to the suit premises. Counsel stated that he considered the third Defendant to be not truthful. He argued that the eviction preceded the Orders made by the Honourable Mr. Justice Nyamu and hence the action was not unlawful. At this stage counsel opened a new assertion regarding unpaid rent arrears. This was not a proper matter to be brought in during the application, since it is an issue belonging to the contract of lease, and as stated earlier, the parties appear to have different notions on the governing contract of lease, and so this, clearly, is a matter for the main suit which I expect the Plaintiff to responsibly prosecute, as the basis for any rights that he would claim against the third Defendant.

Counsel for the Plaintiff reverted to the authorities cited by counsel for the Applicant, submitting, in relation to the passage from Mulla, that his client as lessor had evicted the Applicant while there was a valid Court Order giving leave to do so; he sought to distinguish the case of *Belle Maison* on the basis that the eviction had taken place while there was a valid Court Order in place. Counsel argued there was no prima facie case to support the grant of injunctions as sought by the Applicant; that the Applicant had made no case that she would suffer irreparable loss which could not be compensated by damages if she is not restored in possession of the suit premises; that the balance of convenience did not favour the Applicant being restored in possession. Some of these submissions were re-visited by counsel for the Applicant, who stated that the application to set aside the eviction Orders had been heard on two different days, 27th August 2003 and 29th August, 2003 when counsel for the Plaintiff very well knew of past Orders, of 9th July 2003 and the one by Hayanga J., of 29th August, 2003 (which required that the status quo be maintained pending the reading of the ruling). (At this point it emerged that the record of

proceedings before the Honourable Mr. Justice Hayanga cannot be traced. It is desirable that the Court's Executive Officer should follow up on this matter). Counsel also disputed the claim that the third Defendant had complied entirely with the eviction measures, showing charge sheets indicating that as at 7th November, 2003 the Plaintiff was securing arrests at the suit premises of persons working with the Applicant. He submitted that, with the Applicant's lease running for five years from 8th February, 2001, the balance of convenience made a strong case in favour of injunctions against the Plaintiff and in favour of the third Defendant. He submitted that there was a valid lease running; there was full payment of rent; there were as many as 70 tenants all being evicted. He submitted that the balance of convenience heavily weighed in favour of the Applicant, rather than at the lessor. He submitted that the possibility of winning damages in the main suit did not, in law, debar the Applicant from grant of injunctions against the lessor.

It is clear that the Plaintiff's case rests entirely on eviction Orders which were made on 9th July, 2003 on the basis of the interlocutory judgement of 4th October, 2001. This interlocutory judgement was improperly entered and was subsequently set aside, with all Orders that had been made within its ambit. By the time of eviction of the third Defendant/Applicant by the Plaintiff from the suit premises, there was a valid Court Order made by the Honourable Mr. Justice Hayanga, on 29th August, 2003 and which was well known to the Plaintiff's counsel and requiring that the status quo be maintained up to the date of reading the Ruling. I take the position that there is a contract currently granting the third Defendant rights of occupation and possession over the suit premises. Any differing position can only be established in a full hearing of the main suit which I consider it desirable the Plaintiff should seriously prosecute as the basis for his remedies. I do not, however, consider it right or just, that the Plaintiff should be so ready to evict a large number of honest business persons conducting their affairs at the suit premises. A heavy burden of compliance with the law is placed on the Plaintiff as lessor, in these circumstances, before he can resume possession of the suit premises. From the facts emerging in the several applications on file, I perceive a tendency on the part of the Plaintiff to cavalierly overlook the rights and genuine claims of the many business persons and workers who came to occupy the suit premises in an entirely lawful manner. To allow such a state of affairs to persist would be to undermine the very foundations of justice in the daily affairs of men and women in the society. The balance of convenience lies squarely in favour of the third Defendant resuming possession and occupation of the suit premises.

Accordingly I make the following Orders: 1. An injunction is hereby issued restraining Mr. Samir Mohamed Abdo, Mr. Abdallah Mohamed, their agents, servants and representatives singly or jointly, from entering, occupying, locking and/or in any other way interfering with the Defendants' peaceful occupation and/or tenancy over the suit premises until the hearing and determination of the main suit.

2. A mandatory injunction is hereby issued requiring the Plaintiff, Samir Mohamed Abdo, to forthwith reinstate and restore full and unconditional possession and occupation of the suit premises, L.R. No. 36/VII/288, Eastleigh, Nairobi to the third Defendant.

3. The third Defendant is hereby set at liberty to take up and assume full possession and occupation of the suit premises until the main suit is heard and determined. www.kenyalawreports.or.ke 21 4. The Officer Commanding the Pangani Police Station is directed to supervise due compliance with these Orders. 5. The costs of this application shall be borne by the Plaintiff.

DATED and DELIVERED at Nairobi this 6th day of February, 2004.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

For the 3rd Defendant/Applicant: Mr. Ogola, instructed by M/s Ogembo Ogola & Co. Advocates

For the Plaintiff/Respondent, Mr. Mailani, instructed by M/s S.G. Mbaabu & Co. Advocates.