



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 83 OF 2003

QUALITRON LIMITED PLAINTIFF

Versus

SHABAN SWEDI DEFENDANT

RULING

In its amended application dated 23rd January 2003 the plaintiff has sought two injunctive orders. One prohibitive and the other mandatory. The prohibitive order sought is to restrain the defendants, and especially the second defendant from letting altering or parting with possession to a third party of the tenancy premises comprised in the property known as Title No. Mombasa/Block XXXIII/30 (“the Premises”) until this suit is heard and determined. The mandatory one is to compel the defendants and especially the second defendant to reinstate the plaintiff into the tenancy premises pending the hearing and final determination of this suit. The application is supported by the affidavits of Rajen Savani a director of the plaintiff. It is averred in those affidavits that the plaintiff was a protected tenant in the premises of one Chunilal Savani the previous owner of the Premises. On the 31st January 2003 the Premises were sold in a public auction to the second defendant. It is further averred that on the 15th March 2003 the first defendant with the aid of hirelings and or his employees servants and or agents loaded all the plaintiff’s furniture and equipment from premises onto a truck and ferried them to the plaintiff’s premises at Ganjoni. Two days after that the premises was sold to the second defendant.

Mr. Mwakisha for the plaintiff submitted that having been a tenant in the Premises at the time of purchase the plaintiff had an overriding interest under section 30(g) of the Registered Land Act. Referring to the averments in the replying affidavit of the second defendant that the Premises have been let to third parties Mr. Mwakisha submitted that the agreements purporting to let the Premises to third parties were invalid as they are not registered as required by Section 4(vi) of the Registration of Documents Act Cap 285 of the Laws of Kenya. Mr. Mwakisha concluded that this is a fit case for an interlocutory mandatory injunction the plaintiff having forcibly been bundled out of the Premises.

Mr. Nyongesa for the Respondents was of a different view. He cast doubt on the authenticity of the agreement annexed to the supporting affidavit on the ground that the deponent is a son to the previous owner of the Premises. As far as the first defendant is concerned the Premises were occupied by M/S Sameh Textile Industries Ltd. of which the previous owner was a director. The person evicted therefore was M/S Sameh Textile Industries Ltd. Mr. Nyongesa further argued that the plaintiff’s claim is not genuine. The eviction was carried out on 15th March 2003 and it is not until the 24th April 2003 that this suit was filed. The Premises were on 17th April 2003 transferred to the second defendant who knew nothing about the previous occupants, the same having been transferred to her with vacant possession. The second Defendant has now let the premises to third parties whose interests will be adversely affected if a mandatory injunction is granted.

Regarding failure to register the three year leases said to have been granted by the second defendant to third parties Mr. Nyongesa submitted that they are nonetheless contracts under section 38(2) of the Registered Land Act. He concluded that as the plaintiffs were not in the Premises at the time of purchase by the second defendant the plaintiffs cannot claim an overriding interest in the premises. He cited the case of **Gusii Mwalimu Investment Co. Ltd. & others Vs Mwalimu Hotel Kisii Ltd. Civil Appeal No. 160 of 1995 (C.A.)** and urged me to dismiss the application as the plaintiff had not made out a special case for a mandatory injunction.

The main prayer in this application is for mandatory injunction. Before I consider the facts of the case I wish to state the law, as I understand it, on mandatory injunctions especially at interlocutory stage. Mandatory injunctions are issued in very special circumstances. The test that is to be applied is stated in 24 Halsbury's Laws of England (4th Edition) at para 948 thus:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the plaintiff ... a mandatory injunction will be granted on an interlocutory application”.

One of the cases cited in support of that passage is the decision of Megarry J. in **Shepard Homes Ltd. Vs Sandham (1970) 3 ALL ER 402 at 412, (1971) Ch. 340 at 351** where the learned Judge stated:-

“Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must inter alia feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction”.

In the case of **Canadian Pacific Railway Vs Gaud (1949) 2 KB 239**, Cohen L. J. put the matter beyond doubt when he stated at page 249 that:- **“... the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant, but it can be granted”.**

It is therefore clear that interlocutory mandatory injunctions are granted but in very exceptional cases. They have been granted in Kenya in several cases. The Court of Appeal granted one in **Kamau Mucuha Vs the Ripples Civil Application No. NAI 186 of 1992 (unreported)**. The special circumstances to be considered depends on the facts of each case. In **Belle Maison Ltd. Vs Yaya Towers Limited HCCC No. 2225 of 1992** Bosire J. (as he then was) stated that “special circumstances, however, depend on the facts and circumstances of each case and the good sense of the trial Judge”

Having stated the law applicable I now want to consider the facts and circumstances of this case to determine whether or not they are special to warrant the issue of a mandatory injunction.

As already stated the first defendant bought the Premises in a public auction. He then evicted the occupants who, according to him, were M/S Sameh

Textile Industries, a company of which the owner of the Premises was a director. Prior to eviction the plaintiff had written letters to that company demanding vacant possession without any response. The plaintiff says it received those letters but ignored them as they were addressed to a company which was not a tenant. Why did the plaintiff not reply and say that? After eviction the plaintiff stayed for almost one and half months before filing this suit and making this application. One would have expected a businessman who has been thrown out on to the streets to seek relief immediately. As they say equity aids the vigilant. Be that as it may, the plaintiff has not stated the nature of business which it was carrying on for the court to determine whether indeed it will suffer irreparable loss which cannot be compensated by an award of damages. It has not even exhibited a copy of the trade license to confirm that it was indeed carrying on business in the Premises or rent receipts for the rent paid over the years to the owner of the

Premises.

In such circumstances the court is left to wonder whether or not the agreement annexed to the supporting affidavit is genuine. Besides that agreement is not stamped and is therefore inadmissible by virtue of section 19 of the Stamp Duty Act. The same applies to the agreements annexed to the second defendant's affidavit sworn and filed on 9th March 2004.

Before the filing of this suit and application, the first defendant had sold and transferred the Premises to the second defendant. The second defendant says it bought the Premises with vacant possession. That has not been dislodged as the plaintiff has not shown that the second defendant knew of its previous occupation of the Premises. The second defendant did not have to make enquiries about overriding interests when the Premises was sold to her in vacant possession.

For these reasons I find that the plaintiff has not made out a special case for the grant of a mandatory injunction. For the same reasons the plaintiff has also not made out a prima facie case for the grant of a prohibitory injunction. The grant of the latter alone would in any case be an exercise in futility the Applicants being out of the Premises.

Accordingly I dismiss this application with costs.

DATED this 30th day of March 2004.

D.K. Maraga

Ag. JUDGE