



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 116 OF 2004

KABUNDU HOLDINGS LTD.....APPELLANT

-VERUS

ALI K. AHMED t/a SKY CLUB RESTAURANT.....RESPONDENT

R U L I N G

Application dated 18/5/04 is brought under Order 41 CPC rule 4 and under Section 3A Civil Procedure Act seeking orders for stay.

The Notice of Motion is supported by Affidavit of Ali K. Mohamed annexing orders as “A1”. Notice of Appeal is also exhibited as “A2”.

The orders of 30/4/04 were granted ex-parte. On same date orders were final and declaratory that the tenancy is not protected under Cap.301, Laws of Kenya. It was also declared that notice issued by tenant seeking to reduce the rent from Kshs.112,000/- per month to Kshs.40,000/- per month was null and void without hearing the Tenant/Applicant. Proposed appeal is meritorious submitted counsel, with high chances of success. After expiry of the original written agreement the parties continued to be bound under the agreement evidenced in the document of the previous lease on the same terms, save for increased rent of Kshs.112,000/= per month. This agreement was contained in the document of previous lease. It is to be noted that the agreement stipulated that the tenant would exercise his option to take a fresh tenancy in these terms. He never did so although the landlord asked him about it. However, the Tenant/Applicant continued in the premises after first tenancy expired and continued to pay the agreed new rent of Kshs.112,000/= without complaining until when the landlord sought to levy distress for arrears of rent in the year 2003. That was the start of these proceedings in the lower court.

It can be argued that the Applicant is now estopped from denying the agreement of a further tenancy for a period of 5 years and one month which then is beyond the control of Cap.301. In the course of these proceedings between the parties the Applicant did deposit funds which has now been paid out to the landlord amounting to Kshs.389,500/-, the goods distrained were returned to the tenant and that the distress accruing from last year arrears has been settled.

At the same time these proceedings under Civil Appeal No.48 of 2004 the landlord filed a Plaint in High Court being 116 of 2004 claiming:-

- a) Vacant possession of the premises
- b) Payment of arrears found due

c) And injunction against the reduction of rent to Kshs.40,000/= per month.

It is in this background that the dispute between the two parties exist the tenant continues to trade in the premises and rent is continuing to accrue.

Counsel for tenant states that because the tenancy was never in writing renewed the landlord has been overcharging the tenant and there should be refund of large sums of money, difference between 80,000/- and 112,000/-. That is the landlord has been over-paid over the years and no more rent should now be paid until a refund has been made.

I have considered the very complex arguments from both sides. I agree that the tenant has a right of appeal which he intends to pursue.

I also appreciate that he continues to occupy the landlord's premises under terms of Landlord and Tenant which demands that rent be paid monthly.

I have also come to the decision (which is under proposed appeal) that there is no agreement covered under the Cap.301, meaning that the parties have contracted out of that Act.

The only aspect I am not satisfied with is that there is sufficient reason to grant stay as prayed for.

I find the tenant stands to lose nothing as he continues to occupy and trade. The money which was held by court has already been released to the landlord. His distrained goods were released to him.

I find that if there was any refund to be paid the same can be calculated in money to be refunded and the landlord is not said to be unable to repay the same after determination of the proposed appeal.

For these reasons I reject the tenants application for stay with no order as to costs.

Dated this 20th day of July, 2004.

JOYCE KHAMINWA

J U D G E

Ruling read in presence of:

Mr. Malombo and

Mr. Kabundu

In Open Court.

JOYCE KHAMINWA, J.