



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 302 OF 2001

KENINDIA ASSURANCE COMPANY LIMITED.....PLAINTIFF

V E R S U S

NJENGA MUCHIRI T/a

NJENGA MUCHIRU & COMPANY ADVOCATES..... DEFENDANT

R U L I N G

This is a Notice of Motion dated 15.3.2002 by the Plaintiff/Applicant made under Order 35 Rule 2, 3(1) b of the Civil Procedure Rules for the orders that defence and counterclaim filed herein be struck out and that judgement be entered for Plaintiff as prayed. Grounds suggested are that they disclose no triable issue, they are a sham and spurious and meant to delay. Supporting affidavit of PRAFUL DAMJI sworn on 15.3.2002 says that Plaintiff let office space to Defendant on 18.12.95 for 5 years and that same expired on 15.7.2000 but that Defendant is in arrears of rent in the tune of Kshs.107,475.60 as at date of expiry. Notwithstanding the Defendant continues to occupy the same and that the defence and counterclaim are a sham.

In reply, the Defendant did not dispute these facts but sought to show through argument of counsel Mr. Nyanyuki on what he claimed was issue of law namely that Respondent is a protected tenant under Cap 301 in that lease having expired on 15.7.2001, the tenancy did not exist so tenant became protected by the time eviction proceedings was instituted on 22.2.2001. That the Court had no jurisdiction and thirdly that the counterclaim be heard, that distress was illegal and Defendant has admitted in his paragraph 6 of the Defence.

The Plaintiff filed on 22.1.2001 seeks eviction of the Defendant from the suit premises and mesne profits, the Defence claims that the Tenant/Defendant is protected tenant after expiry of the lease and that there was illegal distress for which the Defendant claims damages.

The Plaintiff is asking for summary judgment under Order 35 Rule 2. The Rule says that Plaintiff can apply for summary judgment for

1(b)..recovery of land with or without a claim for rent or mesne profit, by a landlord from a tenant whose term has expired or been determined by a notice to quit or been forfeited for none payment of rent or for breach of covenant or against persons claiming under such tenant or again a trespasser.”

A Defendant who wishes to defend can do so by affidavit or oral evidence or otherwise that he should have leave to defend. Here the Defendant decided to give no evidence and no affidavit, hence, the facts are not disputed but he raised legal and technical objection which means that if he succeeds in them the Court would dismiss the application or give unconditional leave to defend or leave to amend plaint.

The Court exercises its jurisdiction of summary judgement in cases where there is no reasonable doubt that the Plaintiff is entitled to judgement and where the defence is only for purposes of delay but where a Defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a mere probability that he has a bonafide defence he ought to have leave to defend. The Court looks to see if there is a real substantial issue for trial that there is no dispute as to facts or law which raises a reasonable doubt that the Plaintiff is entitled to judgement.

Here the Defendant concedes that his tenancy has expired. If that be so, the law as I understand it is that a tenant whose interest is determined legally like expiry of the lease then his holding becomes wrongful and is in law trespass for which damages may be recovered in respect of mesne profits.

Mr. Nyanyuki says that suit for forfeiture or eviction was brought after the expiry of the lease but I do not see when else it could have been brought. In fact, the tenant ought to have restored the possession to the landlord unless the landlord did something like accepting rent etc. showing that tenancy continued.

The law is as was held in the case of HENDERSON vs. SQUIRE (1869) LR 4 QB 170 that at the expiry of a lease, determining the term, the tenant in the absence of any covenant or express stipulation is under an implied contract to restore possession to the landlord.

The other point of law is that the Defendant has raised a counterclaim the law about this is that raising of a counterclaim perse does not entitle him to leave to defend but the counterclaim must be bonafide arising out of the subject matter of the action and relevant to defence. Where counterclaim is on distinct facts and grounds, it should be tried on its own.

Here, the counterclaim is based on illegal distress, but I do not see how distress can be illegal where rent is due. However, having looked at the statement of defence and heard counsels arguments, I do find on balance of probabilities that rent is due and that lease has expired and the Defendant is trespassing and ought to give possession of the suit premises to the landlord.

As for counterclaim, since remedy for illegal distress lies in damages, I direct that same can be prosecuted separately. Leave to defend refused. Application succeeds and judgement to the Plaintiff as prayed in the plaint but Defendant to have liberty to prosecute counterclaim.

Costs of the plaint, to Plaintiff and half of cost of the application.

DATED this 11th day of July 2003

A.I. HAYANGA

JUDGE

Read to Mr. Kuria for Plaintiff

No appearance for Defendant

A.I. HAYANGA

JUDGE