



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 1030 OF 2003

JOHN N. M. KABENA.....PLAINTIFF

VERSUS

MARY WAHITO.....DEFENDANT

RULING

The Plaintiff/Applicant applied by Chamber Summons, under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules, seeking orders as follows: -

- (a) that the Defendant/Respondent, by herself, her agents and/or servants be restrained from interfering with the Plaintiff's shop at L.R. 209/138/44, Pundamilia House, in any manner whatsoever pending the hearing and determination of the suit;
- (b) that the costs of the application be provided for.

The application was supported by the Affidavit sworn by the Applicant, the main elements of which were as follows: -

- (i) The Applicant is a month-to-month tenant of Pundamilia Farmers Co-operative Society Ltd. at their building known as Pundamilia House, at a monthly rent of Kshs.4,000/-
- (ii) the Applicant had been a tenant of the Society for more than 33 years; and this tenancy, being unwritten and monthly, is a protected tenancy under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301, Laws of Kenya);
- (iii) no dispute over occupancy had arisen between the Applicant as a Tenant and the Landlords;
- (iv) the Defendant/Respondent has also been a tenant at the same block owned by Pundamilia Farmers Cooperative Society Ltd., occupying a separate shop on this block;
- (v) in 1995, the Defendant/Respondent had purported to purchase the whole block, through a public auction conducted in execution of a judgement of the Resident Magistrates Court (RMCC No.723 of 1994) against Pundamilia Farmers Co-operative Society Ltd.;
- (vi) Pundamilia Farmers Co-operative Society Ltd. did challenge the Magistrate's Court judgement, and the matter was taken up in a High Court case (HCCA No. 234 of 1996);

(vii) On 12th March, 1997, the High Court set aside the judgement of the Resident Magistrate's Court, and ordered the cancellation of the Defendant's registration as owner, and the reinstatement of the property to the ownership of Pundamilia Farmers Co-operative Society Ltd;

(viii) The Defendant then filed appeals, C.A. No. 6 of 1998, and No. 37 of 2001, but both these appeals were struck out; and now the Defendant has filed C.A. No. 49 of 2003, out of time and without leave of the Court; and in the meantime the High Court decision of March 1997 states the authoritative position regarding title for the suit premises;

(ix) Soon after Defendant's purported purchase of the suit premises in 1995, the Defendant purported to evict tenants, including the Plaintiff/Applicant; and the tenants, including the Plaintiff/Applicant, filed H.C.Misc. Application No. 813 of 1996, in which the Court ordered reinstatement of the tenants; the Court treated all these tenants as protected tenant, at the very least.

(x) On 30th September, 2003 the Defendant/Respondent interfered with the Applicant's employees at the suit premises and threatened breaches of the peace, and caused apprehension among the tenants that she would be a constant threat to peaceful occupancy of the suit premises.

Mr. Mutiso for the Applicant submitted that there was no privity of contract between the Plaintiff/Applicant and the Defendant/Respondent, and thus the Defendant/Respondent must not interfere with his legal rights at the suit property. He argued that the Defendant's second appeal does not operate to confer upon the Defendant any legal rights that can affect the status of the Plaintiff/Applicant at the suit premises. He cited Order XLI, Rule 4, which specifies that no appeal operates as a stay on orders in force. Counsel argued that, in the light of Rule 82 of the Civil Procedure Rules, there exists no appeal on the basis of which the High Court judgement could possibly be regarded as suspended – as the appeal in question was filed out of time and no leave in that regard has been granted.

Counsel for the applicant has argued that shortcomings in the Defendant/Respondent's position are not cured by the Replying Affidavit, which shows no document of tenancy between the Defendant/Respondent and the Plaintiff/Applicant, nor any evidence of privity of contract. Counsel argues that the Defendant is merely claiming ownership of the suit premises, but has no legal authority to back up that claim. Although the Defendant/Respondent maintains that, at a certain point in time, she was the owner, the vesting orders were cancelled by the Court. Orders of stay which the Defendant/Respondent had secured also lapsed and are inoperative. All through, the Plaintiff/Applicant's rent payments have been to Pundamilia Farmers Co-operative Society Ltd., and the Plaintiff/Applicant is happy to continue rent-payment on that basis. Counsel urged that even had the Defendant/Respondent been the owner of the property, the Plaintiff/Applicant, as a protected tenant, would still have been entitled to quiet enjoyment of the suit premises.

Counsel for the Defendant/Respondent relied on the Defendant's Replying Affidavit sworn and filed on 21st October, 2003. Counsel also argued that the question whether the further appeal lodged by the Defendant/Respondent, in effect created some colour of right to the suit premises for the Defendant/Respondent, was subject only to the Rules of the Court of Appeal and could not be judged upon by the High Court. The tenor and effect of this argument, clearly, was intended to be that, just because the Defendant/Respondent had filed an appeal at the Registry of the Court of Appeal, this created a sort of ownership over the suit premises, and therefore, the Defendant/Respondent would be justified in interfering with those such as the Applicant, the legality of whose occupancy was dependent on the decisions of the High Court, which occupies a lower hierarchical position.

This is a tenuous argument the juridical quality of which appears suspect, especially since a clear High Court decision will doubtless confer identifiable rights, whereas a mere attempt by a party to seek a new right in the Court of appeal, so long as the jurisdiction of the Court of Appeal has not yet been exercised in the conferment of such a right, cannot possibly vest an enforceable right upon a right-seeking litigant.

If, as of the time of hearing this application, the Defendant/Respondent has no identifiable legal right to the suit premises, then it will follow that the Defendant/Respondent cannot take away the rights of others

who are lawfully on the suit premises, such as tenants in the position of the Plaintiff/Applicant. Therefore, the statement made by counsel for the Defendant/Respondent, to the effect that the Defendant/Respondent has no inclination to interfere with the Plaintiff/Applicant so long as the Plaintiff/Applicant does not part with possession of the premises, is not justified in law, as the Plaintiff/Applicant's legal relationship is defined with reference to Pundamilia Farmers Co-operative Society, rather than with reference to the Defendant/Respondent.

Counsel for the Defendant/Respondent rightly observed that the High Court Decree of 12th March 1997, which stated: -

“That the vesting orders issued by the Resident Magistrate's Court...on 21st December 1995 to the Second Respondent and any other entry in the Title relating to L.R. 209/138/44 be and is hereby cancelled and the property reverts to the appellant,”

also commanded that “the second Respondent be refunded the purchase price for the property L.R. 209/138/44 forthwith.” How was this second limb of the Decree to be executed? Who was responsible for the execution? It must be assumed that the payment in the transaction was made to the auctioneer. Responsibility for execution must have fallen in the first place on the second Respondent, the Defendant/Respondent in this matter. She should have taken the first steps to secure that refund; and if she failed to do so, this would not make her the owner of the suit premises, and, to-date, she in the circumstances, has not become the legal owner of the suit premises.

This leads to the conclusion, in this ruling, that the Defendant/Respondent has no legal rights to interrupt the Plaintiff/Applicant's quiet possession of his shop in the suit premises.

Accordingly, I find in favour of the Plaintiff/Applicant, and duly order as follows: -

1. The Defendant/Respondent, by herself, her agents and/or servants are restrained from interfering with the Plaintiff's shop at L.R. 209/138/44, Pundamilia House, in any manner whatsoever, pending the hearing and determination of the suit.
2. The costs of the Plaintiff/Applicant in this application shall be borne by the Defendant/Respondent.

DATED and DELIVERED at Nairobi this 28th day of November, 2003.

J. B. OJWANG

Ag. JUDGE