



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 156 OF 2001**

**VALENTINE INVESTMENTS CO. (MSA) LTD. .... PLAINTIFF**

**- VERSUS -**

**JOYCE MUMBUA MUTISYA t/a HOTEL ROCK PARADISE ..... DEFENDANT**

**RULING**

The applicant had entered into an oral Tenancy agreement with the Respondent Landlord in respect of the premises known as KWALE/UKUNDA 193 on which stands a Business premises on which the applicant is carrying on Business under the name of "Hotel Rock Paradise". The application by Notice of Motion dated 14.5.2001 is brought under the provisions of order 35 rules 1 and 2 and order 50 rule 1 of the Civil Procedure Rules. It is further supported by the Affidavit sworn on 15th May, 2001 by the applicants Director Monika Slinky and seeks orders for:

1. Recovery of plot of land comprised in the Title Kwale/Ukunda/193 and the buildings and structures erected thereupon comprising the "Hotel Rock Paradise" which is fully furnished.
2. The Defendant to forthwith quit, vacate and hand over vacant possession of the suit premises to the plaintiff.
3. The Defendant to pay the Rent in arrears in the sum of Kshs.318,000/= as pleaded in the plaint
4. The Defendant do pay the plaintiff manse profits at the rate of Kshs.66,000/= per month with effect from 1st March, 2001 until vacant possession of the entire suit premises is handed over.

The Defendant filed an appearance and defence and the plaintiff now seeks summary judgment. It was submitted for the plaintiff and not disputed by the Defendant that an oral Tenancy agreement existed between the two and rent was to be paid at the rate of Kshs.60,000/= upto 30.11.2000. Rent was paid upto 30.8.2000 when the Defendant defaulted necessitating the plaintiff to issue a notice terminating the Tenancy under Section 4(2) of The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act dated 20th December, 2000. The Defendant disputes having received the said Notice but an Affidavit of service annexed to the affidavit of Monika Solanki by one George Mgalla a Court Process server says the same was served upon the Defendant manager one Mr. Mulei. It has not been denied that Mr. Mulei was authorized to receive the said notice. Even assuming this was the case, a separate Notice was sent by the plaintiff's Advocate to the Defendants Advocate and the same acknowledge vide a letter by Messrs Gikandi & Co. Advocates dated 8th January, 2000. In the said letter it was clearly stated that the Defendant was proceeding to file a Reference to the Business Premises Rent Tribunal. I produce the same.

*“We acknowledge, with thanks, receipt of your Notice to our client dated 20 th December, 2000.*

*Our client states that she does not agree with the contents of the Notice and within the next 60 days will be filing through us. The appropriate Reference in the Business Rent Tribunal”*

No such reference was filed within the stipulated period and an application for leave to file the same out of time was dismissed. Therefore up to that stage, the Notice was effective. The Defendant filed a Defence on 19th April 2001 in which she denies the rent was indeed increased to Kshs.66,000/= per month. She further states that the current suit was overtaken by the filing of suit HCC.618/2000 in which she seeks compensation for improvements in the premises. The plaintiff however denies knowledge of the existence of the said suit and rightly so as upon perusal of the court file, I noted that the plaintiff has never been served with the Summons therein. The Defendant attempted on three occasions to obtain *ex parte* orders on 20/2/2000, 22nd December, 2000 and 28.6.2001 without success and left the matter at that. A party to suit cannot be said to be aware of its existence before summons are served.

In an application for summary judgement, the court need to be satisfied that there are no triable issues as between the parties. In this case the issue of the Tenancy having come to an end as from 1.3.2001 is clear and from that point onwards the plaintiff is entitled to mesne profits. The rate of Rent at the rate of 60,000/= is not in dispute. In view of what I have stated the plaintiff is entitled to judgement as follows:

1. Vacant possession of the suit premises
2. Rent in arrears for 3 months at the rate of Kshs.60,000/= which is Kshs.180,000/= covering the months of September, October and November, 2000.
3. Mesne profits at the undisputed rate of Kshs.60,000/= from 1.3.2001 until vacant possession.
4. Interest on 2 and 3

. The suit is however to proceed to hearing on the disputed increment in Rent to Kshs.66,000/= per month. I also do reserve the costs herein until determination of the suit.

Dated and Delivered this 31st day of May, 2002.

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**

**VALENTINE INVESTMENTS CO. (MSA) LTD. .... PLAINTIFF**

**- VERSUS -**

**JOYCE MUMBUA MUTISYA t/a  
HOTEL ROCK PARADISE ..... DEFENDANT**

**R U L I N G**

The Defendant seeks an order staying the execution of the orders delivered on 31st May, 2002 pending an appeal. The application is brought under the Provisions of order 41 rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

On the 12th June, 2002, the Defendant came to court *ex parte* and sought Interim orders of stay pending the hearing of the application interparties. This was granted for a period of 14 days and the application set down for hearing on 20.6.02 at 12.00 p.m. the Defendant executed the court orders of the 31.5.02 causing

the eviction of the Defendant and attachment of the assets. Mr. Gikandi for the Defendant asked the court to immediately order the setting aside of the said execution as it was in complete disregard of the stay orders. However M/s Osino referred the court to the Affidavit sworn by Mr. Karanja Kanyi, Advocate in which he depones that neither his Firm nor the plaintiffs were aware of the existence of any stay orders until the 19.6.02 at 4.00 p.m. This fact has not been discounted and therefore the plaintiff cannot be held responsible for the failure to serve the order by the Defendant.

On 20.6.02 when the matter came up for hearing, Mr. Gikandi called upon the court in exercise of its inherent powers to allow the Defendant use of the premises until 21.6.02 when Alternative arrangements would be made. The orders were lifted on 21.6.02 by consent of both parties. On 24.6.02 at the inter partes hearing, the court ordered for the maintenance of the status quo as at that date which is that the plaintiff remains in possession and attached assets remain so attached pending the ruling herein. Mr. Gikandi has reminded the court that in cases of this nature, the court should try and maintain a balance as an eviction would if appeal succeeds render the same nugatory. He relied on the Ruling in HCA 63 of 1995, ABDALLA HAIMAN AL-AMRY –VS- SWALEH BAWAZIR – MSA (UR). In this case however eviction had not been carried out and the Court ordered a stay and prosecution of the Appeal within a period of 6 months. He also referred to another Ruling by J. Waki in DVJI LALJI & 4 OTHERS –VS- ABDULAZIZ JUMA OMAR C.A. 35/97 – MSA (UR). In which the dispute arose as regards the amount of rent payable. The Court granted a stay but on condition that Rent continues to be paid at the agreed rate.

In cases of this nature, the court need to balance the interests of both parties. There is no dispute that there is Rent due to the plaintiffs from September, 2000. Yet the Defendant wants to continue occupying the premises without paying Rent on the grounds that she has a pending claim against the landlord. As observed in my earlier ruling on 31.5.02, these summons have never been served on the present case, there is no counterclaim filed. As stated, eviction has been completed and as to whether the execution therein was proper or not is not for me to consider at this point. Therefore the damage that may have been prevented has already been suffered. The landlord too has been kept out of his profits from his own premises since September, 2000. In the circumstances I will grant a stay upon the following Terms:-

- (1) Payment into a joint fixed account of all the Rent in arrears and mesne profits upto 30.5.01 in the names of the Advocates on record within a period of 21 days.
- (2) The assets under attachment so to remain attached until compliance with No.1.
- (3) The Defendant to continue paying the mesne profits into the fixed joint Account through the Plaintiff's Advocates until determination of the intended appeal.
- (4) The appeal to be filed and prosecuted within 6 months.
- (4) In default of compliance in number 1,2, and 3 the stay orders herein to lapse.

The costs of the application to the plaintiff.

Dated and Delivered at Mombasa this 3rd day of July, 2002.

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**