



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 109 OF 2002

FREIGHT FORWARDERS (K) LTD PLAINTIFF

V E R S U S

MUMIAS SUGAR COMPANY LTD DEFENDANTS

JUDGEMENT

Plaintiff brought this claim by a plaint filed on 2rd March 2000 asking for payment of Kshs. 3,461,200/- and or for specific performance of the sublease and in the alternative general damages for breach of Tenancy agreement.

At the hearing of this case PWI FRANKLIN PEREIRA Executive Director of the Plaintiff Company said that they let a Goods – shed (storage space) to the defendant and they drew up a draft lease. The Defendant Chief Executive Officer Mr. E. D Johnson and the Company Secretary Mr. MJR GULO made written amendments to the sub-lease by a letter dated 12th May 1999 of which the plaintiff agreed to 13 proposals and rejected some but the Defendant Company by a letter dated 24th May 1999 agreed to 5 proposals by plaintiff and made 3 new suggestions.

The plaintiffs accepted these suggestions.

Thereupon the plaintiff’s advocate MS ASMINA H. AMARSHI wrote to the Defendant a faxed letter dated 26th May 1999 saying:

“Mumias Sugar Company Limited

Nairobi

Dear Sirs.

PEX. 4

Re:Sub-Lease for Goods Shed No. 5

I refer to your faxed letter dated 24th May 1999 and write to inform that your comments stated therein have been accepted by my client and the same have been incorporated in the above mentioned sub-lease.

Please confirm by return that I may now proceed to prepare the final engrossments of the sub-lease

and said the same to yourselves for execution.

AZMINA H. AMARSHI”

This faxed letter was followed by another dated PEX 5A dated 28th May 1999 addressed to Defendant company reading.

“Dear Sirs,

Re: Sub-lease for Goods- Shed No. 5 Near Nairobi Railway Station

I refer to the above matter and enclose herewith three engrossments of the sub-lease for executions by yourselves.

Please return the same to me after execution together with your cheque for Kshs. 3,391,200/- being quarterly rent in advance and one month’s deposit payable under the sub-lease made payable to my client and a cheque made payable to myself for Kshs. 312,096.80/- made up as follows:-

1. Stamp Duty Kshs. 226,280.00
2. Photocopying, binding courier charges Kshs. 3,980.00
3. Legal fees Kshs. 70,000.00
4. VAT @ 16% on items 2 & 5 Kshs. 11,830.00

TOTAL Kshs. 312,096.80

I shall send you an engrossment of the sub-lease after same has been stamped for your records:-

Yours faithfully

AZMINA H. AMARSHI”

The defendant never returned the lease in spite of many reminders but had already moved into the premises and on 19/7/1999. The advocate for the plaintiff wrote inter alia to the defendant saying:-

“Please note that if I do not receive the quarterly rent for the months of June, July and August together with one months Deposit as provided for in the sub -lease and the three engrossments of sub -lease duly executed by the defendant together with your cheque for costs and disbursements or alternatively if the MSCL wishes to terminate the said sub -lease six months notice in

writing within 10 days, my instructions are to proceed to institute legal proceedings against MSCL for recovery of the outstanding rent due and specific performance for execution for the sub -lease without any further notice by yo u

The Defendant denies liability to the plaintiff saying there was no sub-lease between the plaintiff and itself under Section 53A and Section 105 of the Transfer of property Act 1882 and that the said lease was not registered as required under Section 107 of the Transfer of Property Act 1882 and is further unenforceable under the Law of Contract Amendment Act No. 21 of 1990, but here the Defendant had already taken possession and was in occupation. He cannot turn back and disclaim the agreement. A court of Equity would not support that. It is a principle of Equity that agreement for lease is a lease. Commentaries on the Transfer of property Act 1882 by Haratio Hale Shephard commenting on Section 107 of the Indian Transfer of Property Act 1882 which is same as our Section 107 of T.P.A says:-

“Apparently it is to be understood that an agreement for a lease may be used as a lease and not only as a mere contract for it is clear that when it is a question of enforcing the contract only, failure to register the document is immaterial”

According to the Act it is the lease that is to say the transfer in our Section 105 that has to be made by a registered instrument and therefore an agreement for a lease will not satisfy the requirements of the Section.

Besides by taking possession and taking the key that is evidence of use and occupation. I have looked at the defence in this case and it is really a mere denial and does not plead any other material defence except the issue of Registration which I have dealt with above what are the remedies available?

The plaintiff asks for specific performance and an order for specific performance has the effect of ordering a contracting party to do what he has undertaken to do. It is equitable and is not available as of right but depends on the courts discretion. First is to consider whether damages would be adequate remedy, would the injured plaintiff be able to purchase a substitute performance if given damages. The injured party here could get another servant and seem to have even returned the subject property to the proprietor.

I accept the plaintiff's case as proved on balance of probability and grant prayer 1 of the plaint and direct that the Defendant do pay to the plaintiff the amount stated in the plaint. Together with interest and costs.

A.I. HAYANGA

JUDGE

Read to Miss Amashi for plaintiff

N/A for Defendant

A.I. HAYANGA

JUDGE

14.10.2002