



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1281 OF 2001

HASMUKH KHETSHI SHAH.....PLAINTIFF

VERSUS

TINGA TRADERS LIMITED.....DEFENDANT

RULING

This is the plaintiffs application for an order of injunction to restrain the defendants from interfering with plaintiffs quiet possession and occupation of a portion of premise situate on LR No.209/525/2 Latema Road Nairobi until the determination of the suit.

There are four grounds to support the application namely:

- (a) The Notice to vacate dated 22.5.2000 is invalid and ineffective
- (b) Plaintiff is a protected tenant under provisions of the Rent Restriction Act.
- (c) The change of user has been obtained without following the laid down procedure and is null and void
- (d) Defendant has failed to produce and furnish plaintiff with the several specified document relating to change of user.

I have perused the amended plaint. The relief's sought in the plaint include an order of injunction to restrain defendant from interfering with plaintiffs quiet possession; a declaration that plaintiff has a right to quiet possession until determination of the tenancy through the court or the Rent Restriction Tribunal; a declaration that the change of user is unlawful null and void and judgment for two sums of money – shs 352,220/= and shs 600,000/=.

I have read the supporting affidavit of Mr. Haskukh Khetshi Shah sworn on 31.7.2001. According to that affidavit defendant purchased the suit premises LR No. 209/525/21 in 1973. The suit premises comprise of seven shops on the ground floor and two residential flats on the first floor. Plaintiff occupies two shops on the ground floor and one of the two residential flats on the first floor. According to plaintiff, he has been occupying the flat on the first floor since 1974 and currently pays monthly rent of shs 2,400/=.

He deposes that he was given a notice dated 22.5.2001 requiring him to vacate the residential flat by 1.8.2001. He claims that he is a protected tenant and that the notice is ineffective.

Mr. Charles Onchonga Maina, Manager of the defendant, has sworn a replying affidavit. He deposes inter alia, that the leasehold interest granted to defendant by Government of Kenya expired on or about

30.4.95; that defendant applied for extension of leasehold interest, that leasehold interest was extended for 50 years; that one of the special conditions for the granting of the extension was that the suit premises "shall be used for shops and offices" and that the termination of the residential lease was necessitated by the Restricted users of the suit premises which was done by Government of Kenya without any application or request by defendant to charge the user of the premises. Mr. Charles Onchonga Maina further avers that any use of the premises in contravention of the specific conditions of the grant will lead to cancellation on revocation of the grant.

This dispute involves the one residential flat occupied by the plaintiff. The notice of termination of tenancy which gave rise to this suit is dated 22.5.2001. It required plaintiff to vacate the residential flat on or before 1.8.2001. Thus plaintiff was given a notice of not less than 2 months and one week to vacate the premises. The notice shows that it was issued under the Rent Restriction Act and that the reasons for termination of the Tenancy was because the building is a commercial building.

It is submitted by the plaintiffs counsel that the notice is not valid under the Rent Restriction Act or under the Landlord and Tenant shops Hotels and catering establishment Act)

By Section 14(1)(e) of the Rent Restriction Act, the Rent Restriction Tribunal cannot make an order for recovery of possession of any premises unless the dwelling house is reasonably required by the Landlord for occupation as a residence for himself or his wife and has given 12 months notice to the tenant to quit

By section 14(1)(h) of the same Act, the Rent Restriction Tribunal cannot order recovery of possession unless the owner of the dwelling house which he has previously occupied himself reasonably requires the house for occupation as a residence for himself or his wife and has complied with terms relating to the giving of notice contained in the lease or in the absence of such lease, has given tenant three months to quit.

Lastly by Section 14(1)(i), the Rent Restriction Tribunal cannot make an order of recovery of possession or for ejection of Tenant unless the Landlord requires possession of the premises to enable the reconstruction or rebuilding and has given the tenant not less than six months written notice of that requirement.

It is admitted that this was a controlled tenancy. The defendant's counsel has referred to letter dated 6.7.2001 by plaintiffs counsel annexed to plaintiff replying affidavit in answer to the notice of termination and specifically to Business Premises Rent Tribunal Case No. 194, 195, and 196 all of 1999. Plaintiff's counsel submitted that the notice is unlawful because it gave plaintiff 2 months notice instead of the six months notice.

The jurisdiction to deal with disputes involving controlled tenancies is given to the Rent Restriction Tribunal. There is no prescribed notice under the Rent Restriction Act. The circumstances stipulated in section 14(1)(e); 4(1) (a) and particularly section 14(1) (i) do not obtain in this case and if they obtain, then plaintiff should have invoked the jurisdiction of the Rent Restriction Tribunal.

The circumstances of this case are totally different. When plaintiff became a tenant defendant owned the leasehold interest which permitted the use of the flat in dispute as a residential premises. It appears that defendant's title allowed defendant to use the premises as commercial cum residential. Plaintiff entered into a lease agreement with defendant under the terms and conditions of the defendant's title as it existed at the time.

That leasehold interest expired on or about 30.4.95 Defendant applied for extension of the leasehold interest and the Government extended it for 50 years on the special condition that the leasehold property should only be used for shops and offices. Defendant was granted a leasehold interest by the Government.

The title shows that the provisions of the Government Lands Act do apply. This is not a case of change of user of premises by the landlord during the currency of the leasehold interest and the currency of the

tenancy. This is a case of the expiry of the leasehold interest owned by the defendant and the extension of the leasehold interest on terms set by the Government. In my view the tenancy of the suit premises as residential premises was terminated by the expiry of the defendant's leasehold interest by operation of the law.

All the agreement between the plaintiff and the defendant regarding the tenancy including the disputed agreement dated 1.10.74 which required defendant to give plaintiff a 12 months notice before terminating the lease were extinguished or frustrated by expiry of the defendant's title.

Upon expiry of the defendant's title the Government agreed to make another grant to defendant on the conditions that it unilaterally set.

There is no mystery about the change of the user of the premises to strictly commercial. I take Judicial notice that upon expiry of a leasehold interest, the Government grants a new lease on terms and conditions that it sets. It can even change the zoning of the area where the premises are located. The defendant has denied that it played any role in setting the terms and conditions under which a new leasehold interest would be granted.

The defendant has given plaintiff notice to vacate in order to comply with the conditions in the new grant which does not authorize the use of the premises for residential purposes. In the circumstances of this case defendant has not breached any terms of the agreement in giving notice to terminate the tenancy.

The remedy sought is equitable. Equity follows the law. The law now allows the use of the premises for commercial purposes only.

Defendants would be in breach of the conditions of the lease if it was to use the premises partly for residential purposes and the lease would be liable to forfeiture.

Plaintiff purports to challenge the defendant's title in its present form. He is estopped by Section 121 of the Evidence Act from challenging the defendant's title. In any case, it is the Government which sets the conditions as to use and not the defendant. Plaintiff has not joined the Government as a party to this suit.

An order of injunction in the circumstances of this case will contravene the law and make the defendant flout the law. It is not just and equitable to grant an order of injunction.

For those reasons, I dismiss the application with costs.

E. M. Githinji

Judge

5.11.2002

Mr. Sharma present

Mr. Kilukumi present

Mr Sharma

I apply for leave to appeal. I also apply for stay for 6 months to enable tenant look for alternative and suitable accommodation in view of the fact that tenant has an aged mother aged 80 years suffering certain ailments

Order: Further hearing oral application 6.11.2002 at 11 a.m.

E. M. Githinji

Judge

6.11.2002

Coram: Githinji J.

Mr. Sharma present

Mr. Kilukumi present

Mr. Sharma

I pray for leave to appeal. Plaintiff has been in possession for 28 years. He is unmarried His mother is a heart patient. This is the Doctors report. He requires time to look for alternative and suitable accommodation nearer to his working place in view of his mothers pathetic condition. Plaintiff has been paying rent regularly in the circumstances I ask for 6 months stay and order made on 31.7.2001 be extended accordingly.

E. M. Githinji

Judge

Mr. Kilukumi

Application lacks merit order 42 Rule 1(1)(X) order 42 Rule 1(1)(X) CP Rules – right of appeal as of right appeal as of right leave is not required stay is always granted to facilitate filing appeal. Here stay is sought to look for alternative accommodation.

The dismissal order is incapable of being executed. United Insurance Co. ltd versus Musyoka Wambua – HCCC No. 1427/2000 page 3 – S. 38 of Civil Procedure Act sets out various methods used for execution. None of them apply for dismissal order. What my learned friend should have asked for is an injunction. There are so many vacant available place. Defendant is willing to offer plaintiff alternative residential accommodation at Pangani.

Dismiss the application.

E. M. Githinji

Judge

Mr. Sharma

They have threatened to take possession by force. It is in that sense that I ask for stay and extension of court order of 31.7.2001. I have instructions to appeal. They have never denied threatening forcible eviction.

E. M. Githinji

Judge

Order: Ruling on 14.11.2002. Status quo to be maintained until 14.11.2002

E. M. Githinji

Judge