



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 164 OF 2015

ABDULLA ABSHIR & 38 OTHERS.....PLAINTIFF

VERSUS

YASMIN FARAH MOHAMED.....DEFENDANTS

RULING

1. Before me is a Notice of Motion dated 28/4/15 brought, inter alia, under Order 40 Rules 1(a) 2(1) and 10(1) of the Civil Procedure Rules. The application sought an order to restrain the Respondent from evicting or blocking the Plaintiffs from entry into the premises known as New Garissa Lodge Shopping Complex and from demanding or collecting goodwill from the tenants pending the hearing and determination of the suit. The grounds upon which the application was grounded were set out in body of the Motion and in the Supporting Affidavit of Abdulla Abshir sworn on 28/4/15 and the Further Affidavit of Mohamed Hashi Abdi sworn on 11/05/15, respectively.

2. The grounds were that the Applicants are lessees of the premises known as Garissa Lodge Shopping Mall (hereafter "the Premises") for 10 years; that the Applicants had performed their part of the Lease Agreement and were not in any default; that they had paid good will of US\$4000/- per shop as a consideration for a term lease of 10 years, that on 01/04/15, the Respondent gave the Applicants an oral two (2) months notice to vacate the premises; that there was danger of imminent eviction.

3. The Applicants swore that the Lease Agreement between them and the Respondent was valid; that the Applicants had heavily invested in the shops and created goodwill as a result of the said leases; that the goodwill of US\$ 4000 per shop paid by each of the Applicants was used to construct the complex, that for the last four (4) years, the Applicants had religiously performed their obligations under the leases; that the Respondent had now put hooligans on standby to forcefully evict the Applicants from the premises and that the eviction is intended to allow the Respondent to lease the premises to other businessmen who have promised fresh goodwill and a higher rent.

4. The Motion was opposed on the basis of the Grounds of Opposition dated 4/5/15 and a Replying Affidavit of Yasmin Farah Mohammed sworn on 5/5/15. It was contended that the Applicants had not established a prima facie case as there was no lease agreement between the parties capable of being enforced; that the relationship between the Applicants and the Respondent was that of licensees and licensor; that the Applicant's interest was incapable of being protected by an injunction; that it had not been demonstrated that any loss to be suffered cannot be compensated by an award of damages; that the Applicants were guilty of material non disclosure and that in any event, the balance of convenience tilted against the Applicants.

5. The Respondent deposed that the suit property was a temporary structure consisting of two (2) floors made of timber and iron sheets and was occupied by the Applicants and 19 others. She denied the existence of any lease agreement with the Applicants as the entire premises was leased to one Mohamed Hashi Abdi for 5 years from 30th January, 2008 and that Mr. Hashi had consented to the aforesaid licences; that what the Applicants pay is only licence fee for the use of the premises and not rent; that the letters dated 1/3/10 relied on by the Applicants do not constitute leases but were mere licences.

6. It was further contended that due to heavy rains, the premises was badly leaking and was nearly collapsing and there was need to demolish the structure and construct the same afresh; that the Applicants had failed to come up with the plan on how to tackle the insecurity posed by Al Shabaab in Eastleigh area where the premises is situated. The Respondent concluded that there was no authority to bring the suit by the 2nd to the 39th Applicant and that some of the Applicants had yielded their stalls to third parties.

7. In answer to the averments in the Replying Affidavit; the Applicants responded through the Further Affidavit of Mohamed Hashi Abdi. The deponent denied that the suit premises was a temporary structure but swore that it was a solid structure with

over fifty shops; that the Respondent had promised to give each Applicant a registered lease for the respective shop but stated that since the process of registration takes long to be effected, the letters of lease would act as leases; that the practice in Eastleigh is that once goodwill is paid, the landlord is bound for the period agreed; he admitted having entered into a Tenancy Agreement with the Respondent for five (5) years in February, 2008, but averred that the same was terminated by consent in 2010 before the due date. That he thereafter, opted to take only two shops under the new arrangement in respect of which that the Applicants were paying rent of Kshs.6960/- per month for each shop. He denied that the premises was leaking and swore that, unless the orders sought are granted the Applicants will lose their initial investment of US\$280,000/= paid as goodwill as the premises may be demolished thereby subjecting the Applicants to irreparable loss and damage.

8. At the hearing of the application, Ms Asli appeared for the Applicants while Mr. Muragara appeared for the Respondent. Ms Asli reiterated what the Applicants had deponed to in the Affidavits and further submitted that the Applicants' interest is contractual; that though the lease was not registered, it was binding between the parties and that the remainder of the five (5) years of the lease need to be safeguarded. She urged the court to refer to the bundle of authorities the Applicants had filed in support of the application. On his part, Mr. Muragara also reiterated his client's averments and submitted that the suit was incompetent as the 1st Applicant did not have the authority of the rest of the Applicants to file the suit. That what the Applicants were terming as leases were mere letters of offer, and do not constitute a lease. They were mere licenses. That the Applicants had failed to establish a prima facie case with any probability of success and no irreparable loss had been demonstrated. That in any event, the Applicants cannot be evicted without a court order. Counsel urged that the application be dismissed. In rejoinder, Ms Asli admitted that no authority by the 2nd to the 39th Applicants had been filed but submitted that the 1st Plaintiff had deponed in the Verifying Affidavit that he had been authorized by the others to swear the Affidavit on their behalf.

9. Before considering the application on merit, I think it is important to deal with the issue of lack of authority in filing the current suit is capable of disposing off the matter. Mr. Muragara, Learned Counsel for the Respondent submitted that the 1st Applicant having no authority of the other 38 Applicants to bring the current suit in the suit and the application are incompetent and the application should be dismissed on that ground alone. Ms Asli submitted that although no authority had been executed by the other Applicants, the 1st Applicant had sworn in the Verifying Affidavit that he had the authority of the other 38 Applicants to swear the Verifying Affidavit on their behalf.

10. Order 1 Rule 13 of the Civil Procedure Rules provides:-

“13. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.” (Emphasize added)

11. In **Chalicha Farmers Co-operative Society Ltd Vs George Odhiambo & 9 others (1987)** eKLR, the Court of Appeal observed on representative suit thus:-

“This suit raises some points to be considered in law. The first is that when the summonses were served, only four entered appearances and filed defences. At the time of the hearing two of those who filed joint defences attended and participated in the hearing. One of those who neither entered appearance nor filed defence attended and participated in cross-examining the Plaintiff's witnesses. Others never entered appearances or filed defences or attended the hearing. Their claim is that they had appointed the first Respondent, George Odhiambo, as their spokesman. The question is, is that the proper procedure? If George Odhiambo was to represent them then, either Order 1 Rule 8 or Rule 12 of the Civil Procedure Rules should have been followed. It was not proper in that respect and the trial judge should not have allowed George Odhiambo to represent and proceed with the suit as he did. The Trial judge in allowing the suit to proceed as a representative suit caused miscarriage of justice in that the suit should have proceeded on formal proof and judgment entered for the plaintiff against those who did not enter appearance and/or filed defences, and against those who did not attend at the trial.

George Odhiambo could not have been allowed to represent other defendants without written authority. This caused miscarriage of justice.”

12. From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is so authorized to do so in writing and the authority is filed in such a proceeding. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority, properly signed by the party giving the authority, must be filed in the proceeding.

13. From the **Chalicha Farmers case** it would seem that lack of such an authority does not necessarily void the proceedings, what it does is to incapacitate the person purporting to represent his co-parties from so doing. The case by his co-parties remain unprosecuted. They have to appear themselves and prosecute the matter.

14. In the present case, it is not in dispute that the 1st Applicant did not get any authority from the 2nd to the 38th Applicant to represent, appear, act or plead on their behalf. There is no written authority signed by them and filed in court. . Order 1 Rule 1(2) and (3) of the Civil Procedure Rules provides that:-

“(2) The Plaintiff shall be accompanied by an Affidavit sworn by the Plaintiff verifying the correctness of the averments contained in Rule 1(1) (f) above.

(3) Where there are several plaintiffs, one of them, with written authority filed with the Verifying Affidavit, may swear the Verifying Affidavit on behalf of the others” (Emphasis mine)

15. From the foregoing, it is quite clear that a Plaintiff must or should be accompanied by a Verifying Affidavit. In this regard, the Plaintiff in this case as relates to the 2nd to the 39th Applicants is incompetent having been filed without authority. The Plaintiff in respect to their claim was never accompanied with any Verifying Affidavit. That incompetence however is not fatal. See **Agricultural Finance Corporation & Another Vs Drive-In Estate Development Ltd (2006) eKLR**. The lack of a proper, valid or any Verifying Affidavit does not render a Plaintiff void, it only renders it voidable. This is so by virtue of Rule 1 (6) of Order 4 which provides that a Plaintiff that does not comply with, inter alia, sub-rules (3) and (4) may be struck out by the Court on its own motion or on application by any party. Since the 2nd to 39th Plaintiff can regularize the position by filing compliant Verifying Affidavits, and there being no application before me to strike out the Plaintiff, I will leave it intact and make no comment on it as regards the affected Plaintiffs.

16. Does the defectiveness of the Plaintiff as aforesaid, make the application incurably defective or incompetent. I do not think so while it may well be that the application as related the 38 affected Applicants is defective. It does not affect the position of the 1st and 5th Applicants. To that extent, I hold that the application as relates the 1st and 5th applicants competent as they properly swore the Affidavit in support thereof. The two are hereinafter referred to as **“the applicants”**.

17. On the other hand in paragraph 1 of the Supporting Affidavit the 1st Applicant states that he is authorized by the rest of the Applicants to swear the Affidavit on their behalf. Whilst there is no requirement in applications that authority to swear Affidavits be in writing or be filed, I think that there having been no original authority signed and filed as relates the suit, that averment is not adequate and is of no consequence. It cannot save the position of the rest of the 37 Applicants who never swore any Affidavit in support of the application. Accordingly, their application is hereby struck out.

18. The next issue is the failure by the Applicants to give an undertaking as to security. I have seen the case of **Gati Vs Barclays Bank (K) Ltd (2001) KLR 525**, relied on by the Respondent. My view of the matter is that an undertaking as to damages is in the discretion of the court. If the court feels it necessary it can order for the same to be provided. Failure to offer an undertaking before it is ordered for by the court in my view, cannot be a basis of refusing an injunction.

19. Let me now turn to the main application. This is an injunction application and the principles applicable were well settled in the **Giella Vs Cassman Brown (1973) EA 378**. These are that the Applicant must establish a prima facie case with a probability of success, that in the event the injunction is not granted, the Applicant will suffer damage that cannot be compensated by an award of damages and that if the court is in doubt, it will determine the matter on a balance of convenience.

20. Prima facie case was defined as a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party that require a rebuttal (See **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) KLR 125**.) Has there been any right of the Plaintiffs that has been infringed that require a rebuttal. The Applicants allege that they have leases over the suit property for 10 years for which they are paying monthly rent of Ksh.6,960/-. The that consideration for the 10 years period was payment of goodwill of US \$4000 each which went towards the construction of the suit premises. The Applicants produced letters dated 1st March, 2010. These letters were similar to all the Applicants. The letter addressed to each of the Applicants reads: -

RE: NEW GARISSA SHOPPING COMPLEX

I write to you as the registered owner of the above property.

I confirm that I have received the sum of US\$ 4,000 towards the key payment for shop No. G-32.

As you are aware, this is a standard requirement within the Eastleigh business community and is meant to facilitate the use of the shop premises. This payment covers a period of 10 years during which you can negotiate directly with the agent on the other terms for the use of the shop including the monthly rent.

This payment does not entitle you to any special favour with the agent and you will be required to comply with all the terms set by the agent for the use of the shop.

I wish to thank you for your co-operation and wish you success as you carry on your business at the New Garissa Shopping complex.

YASMIN MOHAMMED”

21. The Applicants also produced evidence of receipts for payment of US\$4000. Those receipts which were produced as exhibit **“AA02”** showed that the money was being paid for the various shops in the suit premises. There are also receipts produced as **“AA03”**. They are shown to be before rent and VAT for the respective shops in the suit premises.

22. **Blacks Law Dictionary 9th Edn, 2009** defines a lease at page 970 as: -

“1. A contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration usu. rent.....”

5. A contract by which the rightful possessor of personal property conveys the right to use the property in exchange for consideration.”

On the other hand, the same text defines a licence as: -

“A permission, usu. revocable, to commit some act that would otherwise be unlawful; esp. an agreement (not amounting to a lease or profit aprendre) that it is lawful for the licensee to enter the licensor’s land to do some act that would otherwise be illegal such as hunting game.

A licence is an authority to do a particular act or series of acts, upon another’s land, without possessing any estate therein. It is founded in personal confidence, and is not assignable nor within the statute of frauds.”

23. From exhibit “No. 1” the Applicant paid a sum of US \$4000. The sum was **“towards the key payment of shop Nos. G.32 33 G10 and G11”**. The payment covered a period of 10 years during which the Applicants were to negotiate directly with the agent on the other terms for the use of the shops including monthly rent. The rent seems to have been negotiated at Kshs.6,960/- per shop, per month. It is deposed that the Applicants have since been paying the monthly rent. Can this be said to be a mere licence which is revocable at will? Mr. Muragara relied on the text **The Law of Real Property by Wade 5th Edn 1984** wherein at page 802 the Learned Writers observe that: -

“At common Law, a licence, unless coupled with an interest, was always revocable, for the licensee had no estate or interest in the land that would entitle him to remain there. But this simple position has been modified in important respects.”

24. To my mind although there was no lease that was executed between the parties with specific terms, a tenancy was clearly created between the parties. The Applicants were not merely being allowed to enter the premises and **“do some act which would otherwise have been illegal therein.”** The Applicants were being given the right to use the premises in exchange for a consideration. A licence does not seem to have a consideration. They were to use the shops for business for a period of 10 years, having paid the initial consideration of US \$4000/-. The continued use was dependent on their continued payment of monthly by rent of Ksh.6,960/=. To my mind, the letter dated 1st March, 2010 coupled with the conduct of the parties, i.e. giving possession of the shops at a monthly rent of Kshs.6,960/=-, created an agreement that was valid between the parties in terms of Sections 106 and 107 of the **Transfer of Property Act**, (now repealed). See the Case of Bachelors **Bakery Ltd Vs Westlands Securities Ltd (1982) KLR 366.**

25. If this was not a tenancy but a license as contended by the Defendant, which is not, then it is a license which creates an interest capable of being protected by an injunction in the event of a wrongful revocation. A licence that is coupled with an interest is capable of being protected by an interest. In **Errington Vs Errington (1952) 1 All ER 149** at page 155 Denning LJ – held thus: -

“The result of all these cases is that, although a person who is let into exclusive possession is prima facie, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted personal privilege with no interest in the land, he will be held only to be a licensee.At Common Law a licence was always revocable at will notwithstanding a contract to the contrary: The remedy for breach of contract was only in damages. That was the view generally held until a few years ago. The rule has however, been altered owing to the inter position of equity. Law and Equity have been fused for nearly eighty years and since 1948, it has become clear that as a result of the fusion, a licensor will not be permitted to eject a licensee in breach of a contract to allow him to remain, Nor in breach of a promise on which the licensee has acted even though he gave no value for it,” (Underlining mine).

26. In **Millenium Production Ltd Vs Winter Garden Theatre (London) Ltd (1946) 1 All ER 678** at pages 684 and 685, Lord Greene MR held: -

“It may well be that, in the old days, that would only have given rise to a right to sue for damages. The licence would have been stood revoked, but after the expiration of what was the appropriate period of grace the licensees would have been trespassers and could have been expelled and their right would have been to sue for damages for breach of contract, as was said in Kerrison Vs Smith (3). But the matter requires to be considered further, because the power of equity to grant an injunction to restrain a breach of contract is of course, a power exercisable in any courts. The general rule is that, before equity will grant such an injunction, there must be, on the construction of the contract, a negative clause express or implied. In the present case it seems to me that the grant of an option which, if I am right, is an irrevocable option, must imply a negative undertaking by the licensor not to revoke it. That being so, in my opinion, such a contract could be enforced in equity by an injunction. Then the question would arise, at what time can equity interfere? If the licensor were threatening to revoke, is equity then to say: “We are now powerless. We cannot stop you from doing anything to carry into effect your wrongful revocation” I apprehend not. I apprehend equity would say: “You have revoked and the licensee had no opportunity of stopping you doing so by an injunction; but what the Court of

Equity can do is prevent you from carrying that revocation into effect and restrain you from doing anything under it." In the present case, nothing has been done. The Appellants are still there. I can see no reason at all why, on general principles, equity should not interfere to restrain the licensors from acting upon the purported revocation, that revocation being, as I consider, a breach of contract." (Emphasis added)

27. In the present case, there was a contract between the Applicants and the Respondent for the Applicants to occupy the subject shops in the suit premises of a period of 10 years. The consideration was US \$4000/. The Applicants had acted on the promise to occupy the shops for that period if only they continued to pay the rent agreed with the agent. They have deponed, which is not denied, that pursuant to exhibit "AA D1" and the payment of the US \$ 4000, they entered the shops, occupied the same and have continued to religiously pay the monthly rent of Ksh.6,960/-. My opinion is that, the Applicants have established a prima facie case with a probability of success. The Respondent has received and used the Applicants money, US \$4000/- from each one of them and constructed the premises on the promise of the Respondent making use of the shops thereof for 10 years and now after the premises is completed the Respondent turned around to claim that it was a mere licence. Equity will not suffer a wrong without a remedy. The remedy here in my view, is an injunction.

28. On the allegation that the premises is in bad shape and requires to be repaired, I think there are proper legal channels of gaining entry to the premises and carrying thereon repairs or renovations without necessarily having to evict the occupants therein.

29. As regards the second limb of **Giella Vs Cassman Brown**, notwithstanding the averments in paragraph 17 of the further affidavit of Mohamed Hashi Abdi, which the Respondent termed pecuniary and compensable, I am satisfied that the Applicants will suffer loss and damage that cannot be compensated by an award of damages. This is so because, considering that the Applicants have been in occupation of the shops for a considerable long time carrying business thereon, they have created a business goodwill on the shops they occupy which in the event they are evicted therefrom, it will take a long time to create and which, in any event, is difficult to measure in monetary terms. In any event, there is no guarantee that they would get such premises at the same locality for their business. The balance of convenience therefore tilts in favour of maintaining the status quo by granting an injunction pending trial.

30. According, I allow prayer No's 3 and 4 of the application and award the costs of the 1st and 5th Applicants in any event.

It is so ordered.

Dated and Delivered at Nairobi this 10th day of July, 2015.

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A. MABEYA

JUDGE