



REPUBLIC OF KENYA

IN THE ENVIRONMENT OF LAND COURT OF KENYA AT ELDORET

MISC E&L 32 OF 2013

MAURAY ASEWE OUKO.....APPLICANT

VS

KERIO VALLEY DEVELOPMENT AUTHORITY.....RESPONDENT

(Application for injunction to restrain defendant from evicting the applicant from premises; need to show a landlord tenant relationship; applicant having taken over the premises from previous tenant; no consent by landlord for the assignment; whether the assignment can be protected; no landlord tenant relationship; application dismissed).

RULING

The applicant has filed this motion dated 2nd September 2013, seeking an order of injunction to restrain the respondent from evicting him from the premises described as Eldoret Municipality/Block 4/78 (KVDA Plaza), pending hearing and determination of Eldoret Tribunal Case No. 71 of 2013 between the applicant and the respondent (KVDA). The grounds upon which the application is founded inter alia include the reasons that the respondent has unlawfully locked up the applicant's bar and restaurant without proper reason, and that the eviction of the applicant is thus imminent. It has further been stated that the respondent has arbitrarily increased the quarterly rent from Kshs. 147,808/= to Kshs. 300,000/= without giving proper notice as required by law. The applicant has averred that he has filed a suit before the Business Premises Rent Tribunal and now wants the respondent prevented from evicting him pending hearing and determination of that suit.

The application is supported by the affidavit of the applicant. He has inter alia deponed that he is a tenant of the respondent having taken over the running of the bar and restaurant business known as ***The Ritz Restaurant*** from one Alice Keysie Murunga. A copy of the agreement between Ms. Murunga and KVDA is annexed. The applicant has also annexed a copy of an agreement between himself and Ms. Murunga. He has averred that KVDA had knowledge of his agreement with Ms. Murunga. He has stated that all previous rent arrears were to be settled by the said Ms. Murunga but that KVDA has been demanding that he settles the same. He has annexed a letter of demand for the said rent arrears. He has also deponed that out of the Kshs. 1,600,000/= that he was to pay Ms. Murunga for the business, he has paid Kshs. 1,200,000/= leaving a balance of Kshs. 400,000/= which he is withholding pending the resolution of the issue of rent arrears. He has further stated that he has been remitting the quarterly rent since taking over the premises but that the respondent has unlawfully locked up the premises because of the rent arrears owed by Ms. Murunga. He has alluded to the suit filed at the BPRT and has sought the injunction pending hearing of that suit.

KVDA responded to this application through the replying affidavit of David Onyango, its Chief Manager, Business Development and Investment Promotion. Mr. Onyango has deponed that KVDA does not know the applicant and has never dealt with him on the suit premises. He has averred that the premises was let

out to Ms. Murunga t/a Ritz Restaurant. He has pointed at the agreement and deponed that the same barred any assignment of the same except with the written consent of KVDA as landlord. No such consent was ever given. It has also been deponed that KVDA was never involved in the transaction between the applicant and Ms. Murunga. It has been averred that KVDA went to recover rent arrears on the premises and found that it had exchanged hands. It then exercised its powers to retake the premises. It has further been deponed that the lease that KVDA had with Ms. Murunga expired in June 2013 and there has been no application for renewal.

At the hearing of this application, only Mr. Obwatinya for the applicant appeared. Mr. Obwatinya urged me to allow the injunction as sought and relied on the supporting affidavit. He further argued that a landlord/tenant relationship does exist between the applicant and the respondent. He pointed to a bank deposit slip attached to the supporting affidavit of the applicant, as demonstrating payment of rent, and for that reason, KVDA is estopped from denying that the applicant is their tenant.

I have considered the depositions in the affidavit and the arguments of counsel. This being an application for injunction, the applicant must demonstrate that he has a prima facie case with a probability of success, and further demonstrate that he stands to suffer irreparable loss. The case of the applicant in my view, hinges entirely on whether he can demonstrate that he is a tenant of the respondent. It is not in dispute that there is no written tenancy agreement between the applicant and respondent. The case of the applicant is that he took over the premises from the previous tenant, one Ms. Murunga, who was running a bar and restaurant business. Ms. Murunga had a tenancy agreement running for a term of 5 years and 3 months from 2nd June 2008. It is apparent therefore that the tenancy expired on 2nd September 2013. This application was filed on the same day that the tenancy between Ms. Murunga and KVDA expired.

The agreement that the applicant had with Ms. Murunga involved the sale of the existing business as a going concern at a consideration of Kshs.1.6 million. It was executed on 23rd December 2011. It is stated in that agreement, that Ms. Murunga, has a lease for six years, that is due to expire on 31st December 2013 and that the purchaser (applicant), shall be deemed to have taken over all the rights and privileges arising out of the lease as between the vendor (Ms. Murunga) and the landlord. It is also stated in the agreement that the vendor shall introduce the purchaser to the landlord for purposes of a smooth transition of ownership and operation. The only problem with this arrangement is that the agreement that Ms. Murunga had with KVDA, at Clause 1 (L) explicitly barred her from assigning the lease, sub-letting or parting with possession of the premises the lease without the *written* consent of the landlord. No such written consent has been displayed by the applicant and I cannot assume that the landlord was aware of, or consented to, any take over of the premises by the applicant. The same clause also grants the landlord the right to re-enter the premises if there is a breach. Moreover, Ms. Murunga never had an agreement for 6 years that was due to expire on 31st December 2013.

I have seen the demand letter and what the applicant described as a "bunch of deposit slips" which the applicant has stated demonstrates a landlord/tenant relationship. The demand letter for rent is dated 22nd April 2013, and is addressed to Ritz Caterers. It is not addressed to the applicant. The "bunch of deposit slips" are nothing more than cheque book counterfoils. I am completely unable to authenticate them. No bank statements have been annexed to show that money flowed from the applicant to the respondent. Neither has any receipt been annexed to show that those cheques were receipted in favour of the applicant by the respondent. The documents therefore do not demonstrate any landlord/tenant relationship between the applicant and respondent.

My position is that there is no tenancy relationship between the applicant and respondent. If the applicant wants to run the premises, all he has to do is negotiate with the respondent for the premises and hope that the respondent will grant him permission to utilize the premises. I do not think that litigation is the way to go. However, it is up to the applicant to make up his choice, whether to pursue the matter at the tribunal or not. But for me, I am not convinced that he has shown, in the absence of demonstrating a landlord/tenancy relationship, any prima facie case with a probability of success.

The end effect is that I find this application to be wholly unmeritorious. It is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 4TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Miss J.C. Tarus holding brief for Mr. Mwetich of Ms Manani Lilan & Co for the Respondent.

N/A for M/s Obura Obwtinya & Co for the applicant