



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 1205/2013

THE JUBILEE INSURANCE COMPANY OF KENYA LIMITED.....
PLAINTIFF

=VERSUS=

JOSEPH NDUGU KAREGA T/A LEATHER TOUCH FOOT CARE SPECIALISTS.....
DEFENDANT

RULING

By an application dated 7/10/2013, the Plaintiff prays for an order of mandatory injunction compelling the Defendant to surrender and/or hand over vacant possession over a shop described as “**Shop No. 13**” situate on the ground floor of Jubilee Insurance House on L.R. No. **209/3526, Wabera Street** held under a Grant registered at the Land

Titles Registry as I.R. No. 7440/1 pending the hearing and determination of the suit. The Plaintiff also prays that the Court directs the Officer Commanding Central Police Station to ensure compliance by the Respondent together with costs of the suit.

The application is premised on grounds that the Plaintiff is the registered owner of the building known as Jubilee House on L.R. No. 209/3526, I.R. No. 7440/1 Wabera Street which comprises office and shop space which the Plaintiff rents out. Plaintiff avers that it entered into a lease agreement with the Defendant in respect of a shop situate on the ground floor of the property (No. 13) for period of six (6) years from 1/10/2007 – 30/9/2013. The Plaintiff avers that despite the termination of the lease by efflux of time, the Defendant has refused to surrender or hand over vacant possession of the suit property. Thus the continued occupation of the suit premises by the Defendant without its consent amounts to breach of the terms of the lease agreement and trespass upon its property.

The continued occupation also constitutes a gross affront to the Plaintiff’s right to property as recognized under Article 40 of the Constitution. The Plaintiff contends that the Defendant’s action has denied it its right to use and draw benefit from the suit premises occasioning it loss and damage. The Plaintiff contends that it deserves an order of mandatory injunction as the issue for determination is clear cut, straight forward and which the Court can determine summarily.

Ivy Ngana, the Group Company Secretary and Head of Legal Affairs swore an Affidavit on 7/10/2013 in support of the application. The deponent referred the Court to an annexed copy of the Lease Agreement dated 13/3/2008 which terms were that the lease would be for 6 years commencing 1/10/2007

– 30/9/2013 and that the Defendant would yield up, at the expiration of the term, the suit premises to the Plaintiff with fixtures and fittings thereto in good tenable repair and condition subject to fair wear and tear.

The deponent states that the lease does not contain a “renewal of term” clause. She referred to two letters dated 3/4/2013 and 28/9/2013, annexed to the affidavit, from the Plaintiff addressed to and acknowledged by the Defendant notifying the later of its intention not to renew the lease upon its termination by efflux of time on 30/9/2013. It was her disposition that at the close of business on 30/9/2013, the lease terminated but that the Defendant has declined to give vacant possession of the premises. The deponent states that the continued occupation by the Defendant has occasioned the Plaintiff loss and damage for reasons that it has precluded the Plaintiff from letting out the suit premises to prospective tenants and it is further precluded from accepting rent from the Defendant.

The Group Secretary deposed that the Defendant has from 28/8/2013 – 1/10/2013 filed four suits against the Plaintiff, to wit, HCCC No. 350/2013 which was withdrawn; CMCC No. 5999/2013 which was withdrawn; BPRT Case No. 624/2013 which was withdrawn; and BPRT No. 648/2013 where the Plaintiff herein has filed an Preliminary Objection on jurisdiction of the tribunal. The deponent states that the three suits were withdrawn without being fully adjudicated upon and in respect to the existing suit, that Business Premises Rent Tribunal has no jurisdiction to adjudicate over this matter, hence the institution of this suit.

The deponent reiterated that the suit discloses a prima facie case with high chances of success as the eviction and vacant possession sought by the Plaintiff is due to the blatant refusal by the Defendant to abide by an express clause of the lease, that is, that the lease will terminate by the efflux of time on 30/9/2013. Further that the injury to be suffered to the Plaintiff if orders sought are not granted cannot be compensated by way of damages.

In response to the application, the Defendant filed a notice of Preliminary Objection and swore a Replying Affidavit, both dated 25/10/2013. In the affidavit, the Defendant admitted the contents of the Plaintiff’s application and affidavit. It was his disposition that the Plaintiff allowed him to pay rent on a monthly basis as opposed to quarterly basis and thus from 1/10/2013, his status a tenant changed as he became a protected tenant under Cap 301 of the Laws of Kenya. In that regard, he falls under the jurisdiction of the Business Rent Tribunal. The Defendant deposed that the Plaintiff has declined to extend the lease without offering any valid reasons whereas he has not defaulted in payment of rent. The Defendant deposed further that he has proceeded to pay rent with the knowledge of the Plaintiff despite the lapse of the lease on 30/9/2013. The Defendant stated that his business is well established along Kaunda Street with goodwill created over the last 11 ½ years and thus relocation of the business will mean that the business will be gravely affected and his employees will suffer. The Defendant stated that he stands to suffer irreparable loss and damage if he is evicted from the shop and thus it is in the interest of justice that the application be disallowed.

Preliminary Objection

The grounds of the Preliminary Objection filed by the Defendant are that there already is pending a suit instituted by him against the Plaintiff in respect of the same subject matter at the Business Premises Rent Tribunal No. 648/2014 and that the matter was scheduled for hearing of the Plaintiff’s Preliminary Objection on 17/12/2013.

Submissions

The application was canvassed by way of written submissions. Daly & Figgis, advocate for the Plaintiff filed submissions dated 24/11/2013 whereby counsel reiterated the contents of the Plaintiff’s application and supporting affidavit. Pertaining to the Preliminary Objection raised by the Defendant, counsel submitted that the objection is misconceived as the Business Premises Rent Tribunal (BPRT) has no jurisdiction to adjudicate over the issues in dispute herein. Counsel referred the Court to the provision of Cap 301 submitting that the BPRT is vested with the power to adjudicate over controlled tenancies

which under Section 2 is defined as a shop, hotel or catering establishment whether or not reduced into writing and is for a period not exceeding five years.

It was counsel's submission that the landlord-tenant relationship between the Plaintiff and Defendant cannot be termed as "**controlled**" in view of its term period of six years. Counsel submitted that the Defendant's argument that the matter ought to be determined by the BPRT because he has remained in occupation post expiry of the lease is not tenable for reasons that the termination of the lease is not in contention and further that it arose during the pendency of the lease by efflux of time and not after the expiration of the lease. Counsel contended that the Defendant is not a protected tenant as alleged. Counsel cited the case of **Dubai Bank Kenya Limited v Insurance Company of East Africa Limited (2013) eKLR** where the Court (Havelock J.) held,

"...This was not a controlled tenancy and, as such, the said provisions of the act as relied upon by the Plaintiff are inapplicable in this instance. The Defendant through its appointed agents, issued a notice informing the Plaintiff of its intention to terminate the lease upon expiration of the twenty year term thereof. It was therefore well within its rights so to terminate the same."

Counsel submitted the subject matter herein not being within the jurisdiction of the BPRT, the Court should dismiss the Defendant's Preliminary Objection.

As regards the Plaintiff's application, counsel referred the Court to authority of **Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901** where the Court of Appeal laid down the principle governing the grant of mandatory injunction, as follows:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction."

It was counsel's submission that the Plaintiff had met the threshold necessitating the grant of a mandatory interlocutory injunction. Counsel submitted that the Plaintiff had established a prima facie case as the suit is that of an eviction order on grounds of breach of an express term of the lease agreement, which has been acknowledged by the Defendant. Counsel submitted that the injury occasioned to the Plaintiff cannot be adequately compensated by way of damages, for reasons that the Plaintiff's right to property under Article 40 of the Constitution is being violated. Further, the premise is located on the Central Business District where there is scarcity of office space. Thus, the deprivation of the Plaintiff of the premises constitutes a deprivation that cannot be adequately compensated. Counsel also submitted that the Plaintiff had demonstrated that it has a straight forward clear case which ought to be determined summarily.

Counsel further submitted that the Defendant's action of filing suits prior to the termination of the lease, and later withdrawing them and filing the pending suit at the BPRT amounts to an attempt to steal a march on the Plaintiff. Counsel submitted that the intentions of filing the numerous suits are to deprive the Plaintiff of the suit premises.

In response to the Defendant's claim that since the expiry of the lease he has been paying rent with the knowledge of the Plaintiff, counsel submitted that the deposit of monies into the Plaintiff's bank account of without its consent cannot be considered as remittance of rent to the Plaintiff. Counsel distinguished the authorities relied on by the Defendant stating that the dispute was a result of controlled tenancies unlike in the present suit. Counsel referred the Court to the decision by H.P.G. Waweru J. in one of the suits (**HCCC No. 350/2013**) filed by the Defendant whereby the Court declined to grant an injunction to compel the Plaintiff to renew the lease as it had come to an end and it did not contain a

renewal clause. Counsel prayed that the Plaintiff's application be allowed with costs.

Kihara Ndiba, advocates for the Defendant filed submissions dated 21/11/2013 whereby counsel reiterated the contents of the Defendant's response to the application. Counsel submitted that the Plaintiff has never released the Defendant's rent deposit of Kshs. 403,213/- even after the expiry of the lease. Counsel submitted that in determining this application, the Court should bring its attention to whether the Defendant is a controlled tenant as provided under Cap 301 Laws of Kenya and whether the Court has jurisdiction to hear this matter. It was Counsel's submission that upon expiration of the Defendant on 1/10/2013 continued occupation of the premises and paying rent and thus the tenancy became periodic of monthly basis hence the Defendant became a controlled tenant. Counsel submitted that this court has no jurisdiction to as at the time of filing the suit on 8/10/2013, the Defendant was already a controlled tenant falling under the jurisdiction of the BPRT. Counsel relied on the authorities of **Manuver N. Alibhai T/A Diani Boutique v South Coast Fitness & Sports Centre Limited C.A. No. 203/1994** where the Court of Appeal found that both the Magistrate and the Judge had no jurisdiction on a matter in respect of a matter of controlled tenancy and **Ann Mwaura & Others v David Waguta Gitau & Others Civil Appeal No. 171/2008** where the court restrained the Landlord from evicting the protected tenants.

Determination

The Jurisdiction of the Court

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The words of his lordship Nyarangi J A in **Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd (1989) 1KLR**

The Defendant avers that he is a protected tenant as provided under Cap 301 Laws of Kenya and by virtue of the provisions of the said Act, the matter herein is in the purview of the Business Premises Rent Tribunal and not this Court. It is the Defendant's submission that on expiration of the lease, he continued occupation and payment of rent, thus he became a protected tenant and his relationship with that of the Plaintiff became a controlled tenancy. The Plaintiff refutes this claim and avers that it entered into a lease agreement with the Defendant with express terms of the duration of the lease. The Plaintiff contended that the agreement specifically provided on the commencement date being 1/10/2007 for a period of 6 years and that the same would terminate by efflux of time.

The Plaintiff maintained that it the lease agreement did contain an extension clause. It was the Plaintiff's submission that by virtue of the term of the lease being 6 years, its relationship with the Defendant cannot be categorized as controlled tenancy and therefore cannot be subject to the provisions of Cap 301. The Plaintiff also submitted that the Defendant's action of depositing monies into its accounts upon expiration of the lease was done without its consent and authority and thus the Court should not find that the same amounted to payment of rent.

I have perused the lease agreement annexed by the Plaintiff, which the Defendant acknowledges entering into. Indeed the duration of the lease is expressly provided as 6 years commencing 1/10/2007. The lease also provides that its term shall determine by efflux of time. The term of the lease agreement in itself removes this landlord – tenant relationship from the ambit of controlled tenancy under Cap 301 Laws of Kenya. A distinct characteristic is the duration of the tenancy which at Section 2 thereof defines controlled tenancy as having a period not exceeding 5 years. With respect to the Defendant's averments on his actions of continuing occupation and making deposits in the Plaintiff's bank accounts at the expiration of the lease.

I have perused the two letters annexed to the Plaintiff's documents and it is evident that the Defendant was issued with notice to vacate the premises on 3/4/2013 and a follow-up on 28/8/2013.

Subsequent to the expiration of the lease and in view of the Defendant's continued the Plaintiff promptly instituted this suit so as to obtain vacant possession. The prompt institution of this suit on 8/10/2013, a week after the expiration of the lease agreement is a clear indication that the Plaintiff had no intention of continuing with the tenancy relationship with the Defendant. I have perused the authorities annexed by the Defendant and taken note that the same are in respect of protected tenants and therefore not useful to the Plaintiff's case. It is my finding that this is not a controlled tenancy and therefore, this Court has jurisdiction to adjudicate over this matter. Consequently, the Defendant's preliminary objection is dismissed.

Whether the Applicant has met the threshold for the grant of interlocutory mandatory injunction

The Plaintiff maintains that it has met the threshold of grant of injunction enunciated in the **Giella v Cassman Brown case** in that it established a prima facie case with chances of success and that it has demonstrated that it will suffer irreparable loss if the injunction sought is not granted. The Plaintiff further contends that the suit herein is a clear, straightforward case of an order of eviction on grounds of a blatant breach of the term of the lease on the part of the Defendant.

The Defendant on his part admits to the execution of the lease agreement and that its expiration was by efflux of time. The Defendant submits that his business will suffer in the event that the Court grants eviction orders as he has been on the premises for well over 11 years now. It is his submission that he has heavily invested in his business and has continued to faithfully pay rent to the Plaintiff over the years. Having found that the Plaintiff is not a protected tenant, the more than 3 month notice issued to the Defendant to vacate the premises upon expiration of the lease was sufficient. Further, unlike in controlled tenancies, the landlord need not give reasons for issuing notice to terminate or declining to grant extension of a lease period. The Defendant ought to have made arrangements to relocate its business. It was well within the Plaintiff's right to issue notice of termination upon expiration of the lease and incumbent upon the Defendant to give vacant possession upon expiration pursuant to clause 3 (aaa).

In the circumstances, I find that the Plaintiff has established a prima facie case to warrant the grant of injunction orders. Similarly, the case is clear and straightforward and can be determined summarily. Scheduling this matter to proceed to trial would be unnecessary as the evidence adduced would not be of any significant value. I find that this is a clear, straightforward case that ought to be determined at once. Therefore, the Plaintiff's application is allowed as follows:

- 1. The Defendant shall be given 30 days from the date of this ruling to vacate the premises voluntarily. In default, the Defendant be evicted from the premises with the aid of the Officer Commanding Central Police Station.***
- 2. The Plaintiff shall refund the Defendant the deposit of Kshs. 403,213/- on the date the Defendant shall vacate the premises.***
- 3. The Plaintiff shall treat the rent paid by the Defendant during the occupancy of the suit after the expiration of the lease as mesne profit for the said period.***
- 4. Costs of the application and the suit be borne by the Defendant***
- 5. Interest of the costs shall be at court's rates from the date of the judgment until payment in full.***

Dated, signed and delivered this 6th day of March 2014.

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiffs

.....For the Defendant

.....Court Clerk

L.N. GACHERU

JUDGE