



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVIL CASE NO. 11 OF 2011.

AMOS GIKURU MAIYO.....PLAINTIFF.

VERSUS

JACKSON MUTURI NJOROGE..... DEFENDANT.

R U L I N G.

1. The applicant filed this suit on 10th February, 2011 seeking a declaratory order that the tenancy between him and defendant is still in force. An order declaring the defendant's actions of locking the plaintiff's business premises was illegal and an order to compel the defendant to open the premises. Simultaneously with the filing of the suit, the plaintiff filed a notice of motion seeking for an order compelling the respondent to re-open the applicant's business premises that the applicant contends was illegally closed down. The applicant also sought for an order to restrain the respondent from interfering with the smooth running of his bar business pending the hearing and determination of the main suit.
2. This application is predicated on the grounds stated on the body of the application and the matters deposed to in the supporting affidavit sworn by the plaintiff on 10th February, 2011. According to the applicant, there was a tenancy agreement entered into between him and the respondent on 13th January, 2010. The respondent agreed to lease a section of his plot no. H/6 at Makutano Township at Ksh. 10,000/= per month to be paid in quarterly installments. The lease period was from 1st February, 2010 to 1st February, 2011. On 30th January, 2011 the respondent unilaterally entered the premises and started painting without giving the applicant any notice despite the fact that the applicant had the option to renew the lease.
3. The applicant filed a reference before the **Business Premises Rent Tribunal** in Eldoret on 3rd February, 2011 regarding the threats of eviction by the respondent. The respondent was served with the notification of the reference but on the same day the applicant complains that immediately the respondent was served with the notice, he closed the premises with the applicant's goods on trade which are perishable. According to counsel for the applicant, the respondent took law onto his hands although the respondent claims that the applicant handed over the premises there is no way that could have happened when the applicant's goods were still in the leased premises.

4. Counsel referred to several authorities especially the cases of; NDERU VS. KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY & ANOTHER . CC NO. 26 OF 2003. Where the Court of Appeal held that :-

“A party ought not to be allowed to retain a position of advantage that it entertained through a blatant unlawful act. The termination of the applicant’s membership was unprocedural. The applicant was entitled to the order sought.”

5. Also in the case of REUBEN MULI MUSYOKI AND WAYUA MUTISYA KINOTHYA & ANOTHER CA NO. 3 OF 2002, the Court of appeal held that:-

“The Act upon which the appellant places much reliance protects the tenant, such as the appellant, against violation of that basic tenet of the rule of law, namely, that no one shall be forcibly evicted from his property except under a due process of law. But, unfortunately, the appellant himself had abused and ignored the provisions of the law and was not deserving of any protection from either the Tribunal or the superior court. He disregarded the Notice and sat back on a flimsy excuse. His conduct displeased the learned judge who said:-

“This court did not believe the defendant any little bit when he denied service of this Notice. He was not only being cheeky but also sly.”

6. On the part of the respondent, he opposed this application; he relied on his own replying affidavit sworn on 16th February, 2011 as well as preliminary grounds of objection. The respondent contends that the tenancy agreement with the applicant expired on 1st February, 2011 and on 2nd February, 2011 the applicant gave the respondent possession. The respondent was allowed into the premises to repaint and renovate the premises for his own use while the applicant was preparing to remove his stock. According to the respondent, the applicant indicated verbally that he did not wish to renew the tenancy for bar business claiming that the new law on alcoholic drinks was not conducive for business.

7. The respondent claims that he was surprised to be served on 3rd February, 2011 with a notification vide **Business Premises Rent Tribunal, Tribunal Case No. 20 of 2011** at Eldoret. He claims that by the time he was served with the notice, the tenancy relationship with the applicant had ceased after the applicant voluntarily surrendered the premises on 1st February, 2011. The respondent argued that the present application is oppressive. It is based on false allegations. Moreover, there is a reference pending and the respondent claims that he will be prejudiced as he will be facing two suits before the High Court and the Tribunal over the same subject matter.

8. This application seeks a mandatory order of injunction that is an order to reinstate the applicant to the business premises. It is contended that the applicant was illegally removed from the suit premises before the expiration of his lease. The principles to guide the court on whether to grant a mandatory order of injunction are articulated in a long line of authorities by the Court of Appeal especially in the case of; Kenya Breweries Ltd. & Another vs. Washington Okeyo C.A. Civil Appeal No. 322 (Nairobi) (unreported at page 3) Their Lordships quoted with approval the Text Vol. 24 of Haslbury Laws of England 4th Edition paragraph 948 which reads as follows:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and

summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ...”

9. It is common ground that the parties entered into a tenancy agreement between 1st February, 2010 to 1st February, 2011. It is also common ground that on 3rd February, 2011 the applicant filed a reference being **Business Rent Tribunal No. 10 of 2011 at Eldoret** which was served upon the respondent on 3rd February, 2011. What is in dispute is whether the respondent surrendered the premises and allowed the applicant to repaint and renovate the premises while the applicant was preparing to remove his stock which remained locked up in the bar counter. Or whether the respondent took law in his hands and evicted the applicant before the expiration of the agreement. Another issue for determination is whether this court can engage in a parallel process to determine an application while the said subject matter is before the Business Premises Rent Tribunal.

10. The applicant claims to be a protected tenant and that is why he filed the reference to determine the tenancy. I have gone through the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Cap 301) especially section 12 (4) which provides:-

“In addition to any other powers specifically conferred on it by or under this Act. A tribunal may investigate any complaint relating to a controlled tenancy made of it by the landlord or the tenant, and may make such order thereon as it deems fit.”

11. In view of that provision, I am of the humble view that the Tribunal has sufficient jurisdiction to make any order including a conservatory order sought in this matter. However, it was urged that the tribunal was not sitting, and it is also a matter of general knowledge that the Tribunal does not sit all the time. Thus it was necessary for the applicant to seek protection before the High Court. That being the case, I will examine whether the applicant’s case meets the threshold for granting a mandatory order of injunction. The lease that is annexed and was signed by the applicant and the respondent was between 1st February, 2010 to 1st February, 2011.

12. The applicant claims the respondent closed the premises a few days before the expiry of the lease, while the respondent claims that the applicant willingly allowed him to enter the premises, repaint and renovate while the applicant was preparing to remove his stock in trade. However, the applicant rushed to file a reference and the respondent was surprised to be served with a notification on 3rd February, 2011 after the lease had expired and there was no landlord and tenant relationship. Given this scenario; the court is not able to make a finding as it is the applicant’s word against the respondent’s. Moreover, the lease itself is self explanatory, to compound matters further there was no prior notice by the applicant indicating his desire to exercise the option of renewal. The thin line on who among the applicant and the respondent is telling the truth can only be determined through trial. For now the application does not need the threshold of granting a mandatory order of injunction. The applicant is allowed to remove his stock in trade, otherwise this application is dismissed. Costs shall be in the cause.

Ruling read and signed this 4th day of March, 2011.

M. K. KOOME.

JUDGE.