REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL SUIT 243 OF 2008

SPANNERRIGHT AUTO LIMITED…….PLAINTIFF

VERSUS

SHELL & BP (MALINDI) KENYA LIMITED……DEFENDANT

RULING

1. The application before me is the Chamber Summons dated 13/06/08 brought under Ss 3, 3A, 63(c) and (e) of the Civil Procedure Act Cap 21, of the Laws of Kenya, Order 39 Rules 1,2 and 9 of the Civil Procedure Rules and all other enabling provisions of the law seeking **ORDERS**:-

(1) THAT this application be heard exparte in the first instance and be certified as urgent.

(2) THAT prayer 3 herein be granted exparte in the first instance pending the hearing and determination of this application.

(3) THAT the defendant whether by itself and/or through agents, servants/employees be and are hereby restrained by injunction from proclaiming, carting away, removing, destraining, selling and/or disposing off in any other manner and/or unlawfully evicting the plaintiff from Business Premises on LR No.2259/179 Karen pending the hearing and determination of this suit.

(4) THAT costs of this application be awarded to the plaintiff/applicant.

2. The application is premised on five (5) grounds on the face thereof:-

(1) The plaintiff hold lease (sic) of business premises on LR No.2259/179 Karen and operates a garage, workshop and services in a petrol station.

(2) That the Plaintiff has occasionally been paying rent to the defendant as at 30/04/2008 as per statement issued by the managing agent Kshs.168,200/= was in arrears.

(3) That on 05/06/2008 Galaxy Auctioneer proclaimed tools of trade of the plaintiff and customers vehicles valued over 20,000,000/= for an alleged rent arrears of Kshs.2,728,200 which the plaintiff does not owe.

(4) The plaintiff is a controlled tenant and distress for rent cannot issue without permission of Business Premises Tribunal.

(5) That the defendant and its agents are disguising as destraining for rent so as to evict the

plaintiff

and it is also supported by the sworn affidavit of **DEBORAH ALVIS** dated 13/06/08. The deponent says that she is a director of the plaintiff company which leased business premises from the defendant within LR No. 2259/179 Karen (the suit premises) with effect from 1/01/98 exclusively for carrying on business of garage, workshop and services from Kaluagu service station; that upon acquisition of the lease the plaintiff was licensed by Agip (K) Ltd. and continued paying rent of Kshs.140,000/= per month to the said Agip (K) Ltd. for operation of a petrol station on the suit premises; that the Defendant acquired the business of Agip (K) Ltd. in the year 2000 and on or about 19/01/2006, the plaintiff surrendered the petrol station but returned the garage, workshop and related services. In support of this new arrangement, the deponent has annexed to her affidavit annexture marked "***DA2***" which is a letter from the defendant dated 19/01/2006, written on a "***Without Prejudice***" basis accepting the plaintiff's offer "to surrender and vacate the said premises with effect from 1st January 2006 (now past) subject to the following requirements –

(i) All the rent due to 31st December 2005 is paid to the property management agents, M/s Lloyd Masika Limited, immediately and a rent clearance certificate signed up

(ii) Clear all personal effects from the premises, carry out a joint inspection with M/s Lloyd Masika Ltd and sign a hand-over certificate.

3. The deponent further says that on 29/05/07, M/s Lloyd Masika Ltd. offered a fresh lease to the plaintiff in respect of the suit premises though the lease is yet to be executed. There is a letter dated 29/05/07 annexed to the affidavit and marked "DA 3" by the firm of Lloyd Masika to the plaintiff in which they made an offer of a lease to the plaintiff for a period of six (6) years from 1/07/07 at the annual rent specified therein. Under clause 18 of the offer, the invitation was to remain open for acceptance until the close of business on 5/06/07. The deponent has already said that the said lease has yet to be executed, but that lack of execution notwithstanding the plaintiff has been paying rent and that as at 30/04/08, the rent in arrear was only Kshs.168,200/=. The deponent further says that the proclamation of the plaintiff's goods on 5/06/08 by Galaxy Auctioneers acting on instructions from Lloyd Masika had thus no basis since the plaintiff is not in rent arrear to the tune of Kshs.2,728,200/= as alleged by the defendant or at all. She also contends that the plaintiff is a controlled tenancy and therefore not subject to distress for rent without leave of the Business Premises Rent Tribunal.

4. The application is opposed. The Replying Affidavit is sworn by **PIUS KIKUYU**, the Defendant's Retail HSSE and Engineering Manager who says that the defendant was originally known as Agip Kenya Limited and that by an agreement dated 1/12/1997, the plaintiff leased from the defendant the suit premises (first lease) for a period of five years up to 31/12/2003 under the management of Lloyd Masika Limited; that in or about February 2000, the parties agreed on an extension of the lease for a further two years up to 31/12/2005; and that as at 31/12/2005 when the first lease came to an end, the plaintiff was in rent arrear of Kshs.518,200.00. He depones further that the rent arrears up to 31/12/2005 were carried over as the plaintiff continued to occupy the suit premises and that in 2006, the plaintiff reduced the arrears of rent to Kshs.168,200.00. It is contended that the plaintiff acknowledged this sum of Kshs.168,200.00 as being in arrear by its letter dated 31/12/2005. In that letter, which appears at page 4 of the defendants annextures marked "PK 1" the plaintiff wrote to M/s Lloyd Masika, and demanded payment by Lloyd Masika of some outstanding invoices totaling Kshs.39,800.00 in default the plaintiff requested to be allowed to deduct the same from some unspecified amount that the plaintiff might be owing the defendant. It seems to me therefore that the contention by the defendant that the plaintiff admitted being in rent arrear to the tune of Kshs.168,200.00 by this letter of 3/12/2005 cannot be correct.

5. The deponent further says that the plaintiff agreed to pay monthly rent of Kshs.90,000/= on the unexecuted lease a fact that is not denied by the plaintiff By its letter dated 26/06/2007, the plaintiff says that they have agreed to pay rent at Kshs.90,000/= p.m. subject to the terms stipulated in a letter by Lloyd Masika dated 28/05/2007. The letter of 28/05/2007 does not form part of the pleadings herein; but the deponent says that the plaintiff has always been aware of this sum of Kshs.168,2000.00. The deponent eccuses the plaintiff of material non-disclosure and urges the court to dismiss the plaintiff's application

with costs.

6. The instant application was filed contemporaneously with the plaint dated 13/06/2008 in which the plaintiff says at paragraph 8 thereof that as at 30/04/2008, the plaintiff was in rent arrears to the tune of Kshs.168,200.00 and that the plaintiff was a stranger to the claim for Kshs.2,728,200.00 by the defendant as rent arrears. The plaintiff therefore prays for the following reliefs:-

(a) A permanent injunction restraining the defendant whether by itself, agents, servants and/employees from proclaiming, carting away, removing, destraining, selling and disposing off in any other manner and/or unlawfully evicting the plaintiff from Business Premises on LR No.2259/179 Karen.

(b) Costs of this suit

(c) Interest on (b) above at court rates

(d) Any other relief deemed apt and fitting

7. Both counsel made detailed submissions at the hearing hereof. Mr. Ashimosi for the plaintiff contended that the only two issues for determination by the court are (i) whether there is a controlled tenancy between the landlord and the tenant and (ii) whether the landlord can levy distress for mesne profits. He argued that since the landlord's letter of offer was not accepted by the tenant, the relationships between the landlord and the tenant was a monthly tenancy that does not allow the landlord to levy distress for rent without the consent of the Business Premises Rent Tribunal.

8. As to whether or not the landlord can levy distress, Mr. Ashimosi submitted that there were no rent arrears in respect of which the landlord could levy distress. He said that according to the landlord's own evidence, only Kshs.168,200/= was in arrears as at 30/04/2008; that the tenant has been paying rent consistently and that only difference between the claimed amount of Kshs.2,728,200/= and Kshs.168,200/= was mesne profits, and that indeed if there are any such mesne profits (which are denied by the tenant) then the landlord should file suit as provided for under Order 35 Rule 1(2) of the Civil Procedure Rules. Mr. Ashimosi also submitted that the tenant is ready and willing to deposit the undisputed figure into court. He also submitted that the landlord's ultimate aim is to evict the tenant from the suit premises.

9. Mr. Kimani Kiragu for the landlord vehemently opposed the application and contended that the second issue raised by counsel for the tenant is irrelevant in this case because mesne profits are payable by a trespasser, not a tenant. Mr. Kiragu says that the tenant in this case is not a trespasser, and says further that the real question for determination by this court is whether the amount in question is mesne profits or rent. In the case of **BP Nairobi Service Station Ltd. –vs- BP Kenya Ltd. [1989] KLR 112** decided by Muthoga Commissioner of Assize and cited to the court by Mr. Kimani, the plaintiff sued the defendant, seeking among other orders, an order of injunction to restrain the defendant from interfering with its quiet possession of the suit premises which it alleged had been leased to it. The plaintiff also sought damages and costs of the suit. The plaintiff's predecessors who were members of one family had entered into an operator's agreement with the defendant permitting them to operate a petrol station upon terms contained in the agreement, under which agreement, the defendant reserved the right to exercise control and possession over the petrol station and equipment so that the plaintiff's predecessors were not at liberty to open and close as they wished.

10. The plaintiff later became one of the members of the predecessor limited liability company and sought to continue operating the petrol station under the new entity. The defendant granted the request provided the consent did not prejudice the covenants and agreements with the plaintiff's predecessors. The defendants sought to terminate the agreement and evicted the plaintiff from the suit premises. The plaintiffs went to court claiming that they were protected tenants and could not be removed otherwise than as provided under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301. The plaintiff contended that it had exclusive possession of the suit premises and that it paid rent to

the defendant, although there was no evidence by the plaintiff as to how it had come to be in exclusive possession of the premises and the amount of rent agreed upon. It was held, inter alia, that

"***The nature of the relationship between the parties is to be determined on a full examination of the dealings between them in their entirety. It does not depend solely on the interpretation of any agreement between them, nor does it depend on the payment or otherwise of any rent or other consideration. It does not, it would appear, also depend merely on having or not having exclusive possession or as it is sometimes exclusive occupation by the user. It is no longer possible to say that because a person has exclusive possession of the premises for which he pays rent or other consideration he is "ipso facto" a tenant and conversely that if he does not have such exclusive possession or occupation he is by that reason alone to be regarded as a licensee. That Lord Justice Denning M.R calls ""old law" which is now gone in the case of Shell – Mex and B.P. Ltd. –vs- Manchester Garages Limited [1971]1 ALL ER 841".***

At page 843 of the **Shell-Mex**, Lord Justice Denning MR said the following:-

" ***I turn therefore to the point, was this transaction a licence or a tenancy? This does not depend on the label which is put on it. It depends on the nature of the transaction itself ---. Broadly speaking, we have to see whether it is a personal privilege given to a person, in which case it is a license, or whether it grants an interest in land, in which case it is a tenancy. At one time it used to be thought that exclusive possession was a decisive factor, but that is not so. It depends on broader considerations all together."***

11. In this judgment Muthoga, Commissioner of Assize, also referred to the case of **Errington -vs- Errington and Woods [1952]1 AII ER 149** in which Lord Justice Denning said the following at page 155 in distinguishing between a lease and a license:-

"***The result of all these cases is that, although a person let into exclusive possession is, prima facie, to be considered to be a tenant, nonetheless 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 circumstances or the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee"***

12. In this regard Mr. Kimani argues that the applicant has not demonstrated how it has become a protected tenant nor how the sum of Kshs.168,200/= has arisen but that it is through the replying affidavit sworn by **Pius Kimuyu** which shows how the amount came to be – that it was arrived at after five credits were given of Kshs.70,000/= to reduce the amount from Kshs.518,200/= to Kshs.168,200/= as outstanding rent on 31.05.2005 and that this is the same amount that was reflected in the respondents invoice as at 30.08.2007. The applicant in fact admits this amount at ground number 3 on the face of the application. Mr. Kimani therefore argues that the applicant's allegation that it is not in rent arrears has not been proved as required by section 80 of the Evidence Act Cap. 80 Laws of Kenya. He says that the respondent has consistently shown by documents annexed to both the supporting and supplementary affidavits how the sum of Kshs.168,200/= has arisen, and how the same remains outstanding todate.

13. The respondent also says that the applicant does not come out clearly to show that there were two lease terms, the first one expiring on 31.12.2005 and the second one commencing on 1.01.2006. Mr. Kimani contends that even though the new lease, which offered the applicant a new 6 - year term at the monthly rent of Kshs.90,000/= was not executed, it could still be inferred from the exchange of letters that a contract of lease existed, and that what the applicant calls *mesne profits* as rents in arrear due to the respondent. In any event, Mr. Kimani contends, the applicant has produced no evidence whatsoever, to show what payments of rent, if any, it has made to the respondent since 1.01.2006, and that this being the position the applicant has not shown that it has a *prima facie* case with a probability of success.

14. The second issue is whether or not the relationship between the applicant and the respondent is a controlled tenancy. In Mr. Kimani's view, this issue is completely irrelevant and that the right to levy

distress for rent is not governed by Cap. 301. He says that the following facts are not in dispute –

(a) that no rent has been paid since 1.01.2006;

(b) that the sum of Kshs.168,200/= was owing and outstanding from the applicant to the respondent as at 31.12.2005.

(c) That the applicant has continued to occupy the suit premises todate.

15. Mr. Kimani contends that the mere fact that the applicant wants an account to show how the said sum of Kshs.168,200/= was arrived at is no reason for the court to injunct the respondent. Would the respondent need leave of the BRRT to levy distress? Mr. Kimani submits that no such leave is required and that in the circumstances and based on Rule 8 of the Schedule to Cap 301 and also on the strength of the case of **Urban Oasis Ltd – vs – Upper Hill Medical Centre & Others – Nairobi HCCC No. 114 of 2004 [2004] eKLR**, in which the court held that even though the tenancy in that case was a controlled tenancy, there is no prohibition in the Distress for Rent Act, forbidding distress in the case of a controlled tenancy and that "***the permission of the tribunal is not a condition precedent to distress being levied for rent due in respect of a controlled tenancy***." A similar view was taken by Oguk, J (as he then was) in **Meru H.C.C.A No. 34 of 1989 – Festus Riungu – vs – J. S. Riungu** (unreported) when he said in part –

"***Nothing in the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act 1965 prohibits a landlord whose tenant is in arrears of rent from levying distress upon the properties of such tenant …… the mere fact that the Tribunal is empowered under Section 12(h) (sic) of the Act to permit the levying of distress for Rent does not thereby render any distress carried out by the landlord under the Distress for Rent Act (Cap. 293) illegal provided that the tenant is in arrears of rent*".**

(see the Lawyer Magazine – September 2000 at page 16)

16. In his further submissions Mr. Kimani contends that the applicant has not put forward any evidence to show that the respondent is trying to take possession of the suit premises; that all that the respondent has done is to demand payment of the rent in arrears. He submits further that since the applicant has failed to make full disclosure of the circumstances surrounding this case before obtaining the ex parte order, it is not entitled to the order of injunction it now seeks against the respondent. Mr. Kimani cited the following cases to support his arguments –

(i) Owners of the Motor Vessel 'Lillian S' – vs – Caltex Oil (Kenya) Ltd [1989] KLR 5 in which it was held, *inter alia*, that

"it is axiomatic that in exparte proceedings there should be full and frank disclosure to the court of facts known to the applicant.

(ii) **Nairobi HCCC No. 2382 of 1999 (Milimani) John Muritu Kigwe & Another – vs – Agip (Kenya) Limited** in which it was held that the court has a discretion notwithstanding proof of material nondisclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order or to make a new order on terms:

"**when the whole of the facts, including that of the original non-disclosure, are before (the court, it) may well grant …… a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed, per Glidewell LJ in Lloyds Bowmaker Ltd – vs – Britannia Arrow Holdings Plc. ante, pp 1343H – 1344A."**

(iii) **Court of Appeal at Nairobi – Civil Application No. Nai 140 of 1995 (UR. 62/95)** where it was held that "it must be clearly understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the relevant materials, including even material which is against his interest. The basis of this requirement is obvious: it is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties an opportunity to be

heard."

17. Mr. Kimani distinguished the **Jacaranda Hotel Ltd** case from the present case on the grounds that in the Jacaranda case, the landlord attempted to take possession through distress for rent even when rent arrears had been tendered and refused by the landlord's agent. He further submits that if the applicant herein pays the rent arrears, the respondent will have no complaint against it.

18. Having set out the legal framework within which to handle the instant dispute between the applicant and the respondent, and also having set out the facts of the case from both the pleadings and the affidavits, I do not think that the applicant is entitled to the order of injunction. There is no dispute that the applicant is in rent arrears. There is also no dispute that since 1.01.2006, the applicant has not paid any rent to the respondent be it the rent due on the first lease amounting to Kshs.168,200/= or the rent due on the second lease. It is further not disputed that the applicant has not put before this court evidence to confirm that it has paid any rent to the respondent since 1.01.2006.

19. I also find and hold that the applicant herein is not a controlled tenant, and even if it were so, the law does not require the respondent to obtain the leave of the Business Premises Tribunal before levying distress as long as the respondent can show that there is rent in arrears. The respondent has shown that the applicant is in arrears both under the first lease and under the second lease, all totaling Kshs.2,700,000/=. In any event, looking at the whole transaction between the parties herein it is clear that there is a lease between the two parties under which the applicant agreed to pay the sum of Kshs.90,000/= per month in rent. The applicant has not paid such moneys since 1.01.2006.

20. If I am wrong on the above findings I will now consider whether the applicant has fulfilled the conditions for the granting of an injunction as set out in the case of **Giella – vs – Cassman Brown & Co. Ltd [1973] EA 358**. In my view the applicant has not fulfilled these conditions. It has not proved that it has a prima facie case with the probability of success. The applicant is admittedly in rent arrears. The respondent is entitled to levy for distress and the applicant has neither paid the arrears nor made any offers to do so. Secondly, the applicant has not shown that it will suffer irreparable loss if the order of injunction is not granted. The party that would suffer prejudice in this case would be the respondent if the order of injunction issues against it. The applicant who is in occupation of the respondents premises has not paid and shows no indication of the desire to pay. Finally, the balance of convenience does in my view tilt in favour of the respondent. The applicant has not come to court with clean hands. Having obtained the exparte order, it has not now demonstrated why that ex parte order should be confirmed by this court.

21. In the result the applicant's application dated 13.06.2008 and filed in court on the same day is hereby dismissed with costs to the respondent. The ex parte order granted to the applicant on 13.06.08 be and is hereby discharged.

22. It is so ordered.

Dated and delivered at Nairobi this 2nd day of October 2008.

R. N. SITATI

JUDGE

Delivered in the presence of:

Mr. Ashimosi (present) For the Plaintiff

Miss Mwema holding brief for Mr. Kimani For the Defendant