REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 594 of 1999

METROPOLITAN CHEMISTS LTD.....PLAINTIFF

VERSUS

KABANSORA LTD.....DEFENDANT

R U L I N G

By a lease agreement dated 6th December, 1994, the plaintiff became the defendants tenant in premises on plot No. 209/427 mercantile House, Koinange Street, Nairobi.

The said lease was for a period of 5(five) years and one month. The expiry date was 31st January, 1999. By a letter dated 1st June, 1998, the plaintiff wrote to the defendant expressing its "wish to exercise our option for renewal of the lease to us which commenced on 1st January, 1994 for a further period of five years and one month after expiry" The last paragraph of the said letter stated that:

" As for the terms we trust the existing lease save for the rent is acceptable to all parties. Please prepare the necessary documents for our endorsement at your earliest.

In reply to the foregoing letter, the Executive Director of the defendant wrote as follows:

" I refer to your letter of 1st June, 1998 which we received on 15th June, 1998. We are happy to renew your lease. By a copy of this letter, we are requesting our agent to arrange for the renewal and forward the appropriate documents for your execution."

The foregoing letter was dated 23rd June, 1998. However, on 1st July, 1998, the managing agents for the defendants M/s Realty Mart Ltd wrote to the plaintiff on 1st July, 1998 on the subject of renewal of lease and said.

"We refer to the correspondence and particularly the letter of 23rd June, 1968 from Kabansora Limited to you. We regret to inform you that the landlord will require this space when your lease expires and will, therefore, be unable to extend the leases"

It is obvious that there is already a conflict between the Executive Director's letter dated 23rd June, 1998 and that of the Managing Agents dated 1st July, 1998.

On January, 1999 the defendant's managing agents M/s Realty Mart Limited wrote to the plaintiff in the following terms.

"We refer to our letter of 1st July, 1998. As you are aware, your tenancy expires on 31st January, 1999

and it will not be renewed. We expect you to vacate and hand over the premises to us on or before 31/1/99. We would like a joint inspection on 25/1/99 to assess the redecoration and any necessary internal repairs. Please confirm whether or not 2.30 p.m is convenient for you"

On the same day the plaintiff wrote to the defendants managing agents, M/s Realty Mart Limited (probably unaware of the letter the aid agents of even date) in the following terms:

" Please refer to our letter dated 1/6/68 relating to the above referenced subject matter and the Landlords rejoinder dated 23/6/98 (copy attached). We will appreciate if you forwarded the appropriate documents for our execution as requested by the landlord the soonest possible retaining the same conditions and terms."

This letter was copied to the Executive Director of the defendant among others. On 29th January 1999 the defendant through its Executive Director wrote to the plaintiff on the subject and said:

" I refer to your letter NO. MET/NRB 11 of 7th January 1999. Please note that the notice from our agents, informing you that we would not renew your lease stands. This notice was after my letter which you have referred to, and we had approved the notice given to you by our agents. You should therefore arrange to hand over the premises to our agents as earlier informed.

Following the above correspondence the advocates for the parties entered the arena and on 1st February, 1999 a day after the said lease had expired, these proceedings were filed.

Among the prayers sought in the plaint are that a permanent injunction be issued to restrain the defendant its servants and/or agents from interfering with the plaintiff peaceful and quiet enjoyment of the subject premises for the next five years and one month form 1st February, 1999 a declaration that the plaintiffs offer to renew the lease on 1st June, 1998 and the subsequent acceptance by the defendant on 23rd June, 1998 amounts to a landlord tenant agreement which forbids the defendant from evicting the plaintiff and that the conduct of the defendant and presentation of facts made the plaintiff believe that the lease dated 1st December, 1994 as renewed and therefore a declaration should be made accordingly and the defendant be stopped from evicting the plaintiff or terminating the lease notwithstanding that it is required to have a fresh registration.

Alongside the plaint, there was filed a Chamber Summons under order 39 Rules 1,2,3 and 9 of the Civil Procedure Rules and sections 3A and 63 of the Civil Procedure Act for the basic order that, pending hearing and disposal of this suit the defendant be restrained by itself, its servants or agents from interfering with the plaintiff's peaceful and quiet enjoyment from the space it is occupying on Land reference 209/427 Mercantile House, Koinange Street Nairobi. That application is the subject of this ruling.

Both learned counsel have addressed the court on the issues at hand. The principle are the same like all other cases of interim injunction orders. The plaintiff must show a prima facie case with a probability of success, that damages may not be adequate compensation for any damage that may be suffered and finally, if the court is in doubt it shall decide the matter on the balance of convenience. The courts have also held that a party may not be entitled to an order by way of an interim application if the said order is not likely to be granted at the full hearing.

Several authorities have been cited. I have read them all.

Act no. 21 of 1990. The Statute law (miscellaneous Amendments) (No2) Act, 1990 repeated section 3 subsection (3) of the law of Contract Act Cap. 23 and inserted the following sub-sections:-

" (3) NO suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing

(ii) is signed by all the parties thereto; and

(iii) incorporates all the terms which the parties have expressly agreed in one document; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

If I were to go by the above provisions and uphold the submissions of the learned counsel for the defendant I would hold that the plaintiff is not entitled to the interim order sought. a disposition in the context of the above provisions includes a lease. There is not a document that has been produced that is in writing and signed by both parties, includes all the terms which the parties have expressly agreed in one document and signatures of parties attested by a witness as provided by section 3(3) (b). this is the import of the decision of the court of appeal in Civil Appeal No. 112 of 1997 Machakos District Co-operative Union Limited -v- Philip Nzuki Kiilu.

It is true that there was no renewal clause in the lease which expired on 31st January, 1999. The plaintiff however, has placed a lot of weight on its letter dated 1st June, 1998 and the reply by the defendant's Executive Director dated 23rd June, 1998.

Before Section 3 (3) of the Law of Contract act Cap. 23 was amended it provided as follows:-

" 3 No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it provided that such a suit shall not be prevented by reason only of the absence of writing, when an intending purchaser or lessee who has performed or is willing to perform his part of a contract.

(i) has in part performance of the contract taken possession of the property or any part thereof; or

(ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

The Court of appeal in the cited appeal above addressed the previous provisions and said of a similar letter:-

"But under the new law, the letter was irrelevant....."

Both learned counsel did not address me on the impact of section 3 of Act No. 21 of 1990 aforesaid, which amended section 3(3) of the Law of Contract Act, Cap. 23 Laws of Kenya. The same provides as follows:-

"3 The amendments specified in the Schedule in relation to the Law of Contract act shall come into operation on such day as Attorney General may, by notice in the Gazette appoint."

To the best of my knowledge, and I stand corrected, the Attorney General has not published any notice in the Gazette to that effect. The amendments to the Law of Contract Act Cap. 23 Laws of Kenya and in particular those set out in the schedule to act No. 21 of 1990 are therefore not operational and the old law is still applicable.

With profound respect therefore, I am unable to go by the decision of the Court of Appeal cited above. This being the case the letter of acceptance dated 23rd June, 1998 addressed by the Executive Director of the defendant to the plaintiff is a note in writing signed by a party to be charged. I note that the plaintiff, from the correspondence, was always ready to perform its part of the contract. And so whereas no consideration has passed so far, in terms of rent, that alone should not deprive it of the

equitable remedy sought.

In view of the foregoing therefore, there is a very strong prima facie case with a probability of success. The order sought in the Chamber Summons dated 1st February, 1999 is therefore granted provided that the plaintiff pays the rent arrears to date within seven(7) days of today. The plaintiff shall also have the costs of the application.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of June, 1999.

A. MBOGHOLI MSAGHA

JUDGE

Mr Kihara for plaintiff/applicable

Mr Onyambu for defendant/respondent