



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 3679 OF 1992

KABUNDI APPLICANT

VERSUS

TRUST BANK LTD..... DEFENDANT

RULING

The plaintiff is the applicant in the application dated 26th November, 1992, in which he seeks a mandatory injunction to restore him back into the suit premises, to wit, Trustforte Building along Moi Avenue, Nairobi.

Two main issues raised here are, firstly whether s 52 of the Transfer of Property Act, applies to the present suit. Secondly, whether in effect this court is being asked to sit on appeal against the order of Shields J made on 15th October, 1992 discharging an injunction order which Kuloba J granted on 22nd July 1992.

The suit premises has been the subject matter of several cases before both the Business Premises Tribunal and this Court. The one which concerns us here is Tribunal Case No 559 of 1991. The plaintiff here was the applicant in that case with the present defendant as respondent. That suit was dismissed by the tribunal that it lacked jurisdiction to hear it, that there existed no relationship of landlord and tenant between the parties. The suit was dismissed on 25th September 1992. By that time this suit had been filed and there was an order of injunction in place.

The order of injunction granted herein was discharged on 15th October, 1992, and on the same day the applicant who was then in possession of the suit premises was evicted. That provoked the present application.

Mr Iseme, counsel for the applicant submitted before me that this client's eviction offended the provisions of s 52 of the Transfer of Property Act a statute of general application. That section provides:

“During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor – General in Council of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.”

Mr Iseme submission based on that section and two decided cases to wit, *Belle Maison Ltd –v-Yaya Towers Ltd* NAI IY.... No 2225 of 1992, and *The Ripples Ltd –vs- Kamau Mucuha* NAI HCCC No 4522,

of 1992, was that the defendant by evicting the applicant contravened the law as entitles the applicant to be reinstated.

Mr Wanyonyi for the defendant did not think, both the section and the two cases cited had any application to this matter. In his view this Court lacks the jurisdiction to entertain this suit, the proper forum being the 'Business Premises Tribunal'. The applicant, he said, had taken cognizance of that fact when he filed Tribunal Case No 559 of 1991. Consequently, this Court cannot be "Court having authority" to deal with issues touching on or relating to the suit premises. S 52, above is, therefore, inapplicable.

Mr Wanyonyi also submitted on the basis of s 5 of the Civil Procedure Act that because of the Landlord and Tenant (Shops etc) Act, cap 301, Laws of Kenya, which establishes the Business Premises Tribunal, to deal with disputes between landlord and tenant, the jurisdiction of the High Court is ousted. Consequently, he said, s 52, above, becomes inapplicable to this case.

The second submission relates to the jurisdiction of this Court to grant the orders sought. Mr Wanyonyi was of the view that the injunction order which was granted to the applicant having been discharged by Shields J, the applicant had only two options. He could apply for the review of the discharge order, or appeal against it. Similarly when the applicant's suit was dismissed by the tribunal his recourse was to appeal against the dismissal order. By coming to this Court with the present application, Mr Wanyonyi was of the view that he was trying to get what the Court refused him, and in effect was appealing to the same Court against an order made by it. The application he said is an abuse of the process of the Court and should therefore be struck out.

Mr Wanyonyi had an alternative argument. It was his view that even if s 52, above applies to this suit the power of the Court is limited to prohibiting any dealing with or transferring the suit property but does not include reinstating the applicant.

The Business Premises Tribunal has already ruled that, in its view the relationship of landlord and tenant does not exist between the parties. So that the applicant may only seek a remedy from this or any other Court with jurisdiction to grant the reliefs he seeks herein. The first limb of Mr Wanyonyi's submission does not therefore avail his client. Moreover, even if the tribunal had not so ruled that it lacked the jurisdiction to handle the dispute which was referred to it, from the pleadings no issue of jurisdiction has been raised. The defendant/respondent's case appears to me to be that the applicant is not and has never been its tenant. The respondent cannot be allowed to approbate and reprobate the matter of tenancy. So, to my mind, the suit property is caught up by the provisions of s 52, of the Transfer of Property Act.

Moreover even if I were to uphold Mr Wanyonyi's submission as to the place of suing, there is another suit under continuation. The applicant has appealed against the decision of the tribunal dismissing his suit. An appeal is a continuation of a suit. The definition of suit includes an appeal. So that even without the present suit the suit property would be caught up by s 52, above by reason of the appeal the applicant has filled. I do not wish at this stage to belabour the issue whether s 6 of the Civil Procedure Act applies to the instant suit.

The next issue which Mr Wanyonyi raised is one of *res judicata*. The applicant is not by the present application seeking to have the defendant restrained by injunction from doing any act. Nor is he seeking an order to reverse what Shields J did. Shields J did not decree or order that the applicant vacate the suit premises. He merely discharged the order of injunction which Kuloba J had granted the applicant. The present application is merely based, at least as I understand it, on the fact that the defendant allegedly acted contrary to the law by evicting the applicant.

The law it breached is s 52, of the Transfer of Property Act.

S 52, above, is to my mind intended to obviate a multiplicity of suits likely to result from dealing with the suit property before the final determination of the pending suit.

Having come to the conclusion that s 52 applied to the suit property in light of the pendency of the

present proceedings the issue that immediately presents itself is whether the defendant/respondent contravened the section. The defendant concedes it evicted the applicant. It may have had a good reason for doing so. That is not material here. It had notice of this suit and the appeal against the tribunal decision dismissing the plaintiff's suit before it. That being so it was obliged to abstain from interfering with the status quo without the leave of this Court. The discharge of the injunction order did not entitle them to evict the applicant without a court order.

The applicant had been in occupation of the suit premises for sometime. At no time had the respondent/defendant applied for his eviction. The dispute between the parties is whether or not the plaintiff is a tenant of the defendant/respondent. Resolution of the issue will require evidence. The stage has not reached when evidence can be adduced. The case may ultimately be decided either in favour of or against the applicant. Having been in occupation of the suit premises and for a relatively long time a rebuttable presumption was raised that he was lawfully there. Moreover, documents on record show he had moved into the premises with the full knowledge of the defendant/respondent. In the circumstances a *prima facie* case with a reasonable probability of ultimately succeeding is shown to exist. Damages are normally an inadequate remedy in matters involving rights to immovable property. Moreover, the balance of convenience will favour the applicant being reinstated into possession.

The law is that a mandatory injunction should not be granted to affect the rights of innocent third parties. (*Priscilla Wambui Danson – vs – Nairobi City Commission* NAI HCCC No 837 of 1984, or where the defendant is not capable of complying with the order (*The Despina Pentikos* [1975] EA 38). It is a jurisdiction which should be exercised only in special circumstances. The special circumstances must as always, depend on the facts and circumstances of each case.

The premises I am told is still vacant. The defendants concede they have taken steps to have somebody else move in as their tenant. S 52, above, enjoins them not to do so without authority of this Court. That authority has not been given. No request for it has ever been made.

On the other hand the law was contravened when the applicant was evicted without authority of this Court. The court has a duty to ensure compliance with the law by persons within its jurisdiction on being moved to do so. That is what the applicant requests this Court to do. The law must be vindicated. In those circumstances it is imperative that the applicant be restored into possession forthwith. That is the order I make. While in possession he must pay in advance unless the defendant is not inclined to accept the same, the rent which has hitherto been paid for the use of the premises. In the event that the defendant declines to accept the rent, it should be deposited in Court from time to time as and when it becomes due and payable, with effect from 1st March 1993. The defendant to bear the costs of this application to be agreed, otherwise to be taxed. Liberty to apply. Orders accordingly.

Dated and delivered at Nairobi this 24th day of February, 1993

S.E.O. BOSIRE

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JUDGE