REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 4522 OF 1992

RIPPLES LTD .....APPLICANT

VERSU

KAMAU MUCUHA.....DEFENDANT

RULING

On 21.8.92 M/S Salim Dhanji and Co Advocates filed a chamber summons on behalf of M/S Ripples Ltd as the plaintiffs/applicants against Kamau Mucuha the defendant/respondent under certificate of urgency.

The application was filed under s 3A CPA, o 39 rules 1 (9) 3, and 9 of the CPR and other relevant provisions of law.

In essence the application was based on the claims that defendant had unlawfully evicted the plaintiff/applicant from a shop in Rumwe House along Mfangano Street Nairobi where the latter had been subleasees. Defendant/respondent had at the same time and while alleging that plaintiff/applicants were owing outstanding rents as at the time of eviction, also levied distress on the latter's goods. Plaintiff/applicant had been running a catering business on the premises. The catering facilities, stock-in-trade etc had been carted away by the agents of the defendant/respondent to an unknown place whereupon plaintiff/applicant had suffered loss and damage as well as embarrassment and indignity. Plaintiff/applicant did not have rent arrears to pay and thus defendant/respondent act was illegal and dealings respecting the land in the Transfer of Property Act. The two shops were let to the plaintiff/applicant for 6 years by the defendant, Yaya Towers Ltd, who are the registered owners of the plot. The rent payable was agreed at Kshs 28,869.60 per month for the first two years, and thereafter such rent as would be agreed upon between the parties. There were other terms and conditions which are not relevant here.

After some time the tenant was in arrears of rent. That much is conceded by the tenant. On 21st April 1992, the landlord took steps to distrain for rent. The bailiff went to the premises then, took inventory of what he considered to be sufficient properties to realize the rent then outstanding, was paid his charges, and was promised payment on the next day for the rent then due and outstanding and therefore withheld further action. Payment was duly made by the tenant on 22nd April, 1992. The landlord was apparently paid the rent. It then instructed the bailiff to evict the tenant, which he did by forcibly entering into and seizing its property within the premises and asported it away. The landlord then locked up the premises. Later on the same day it put in a new tenant. All that provoked this application and the suit.

The applicant's contention and case is that the landlord's action was malicious, unlawful and calculated to humiliate its directors and shareholders, and has resulted in grave loss and damage, which loss and damage are irreparable unless they are put back in possession. Its conduct was oppressive and criminal.

On the first issue, this Court should not waste time on it at all. The Court is satisfied that the plaintiff/applicant has established a *prima facie* case against the defendant/respondent. It has been put before this Court that the two parties had a sublease in respect of the shop No 1 Rumwe House. Although it was not registered yet it ought to have been since it went over the 12 month period (it was for 5 and a half years), it is trite law that as a contractual relationship between the two, this Court should give it effect. No party should be allowed to resile from this contracts' effects because the same was not registered. This is lent much more weight in law in view of the fact that plaintiff/applicant was allowed possession. When it moved in, it occupied the shop and started its business. Plaintiff/applicant was running its business and paying rents to defendant/respondent. This is not in dispute. Defendant/respondent did accept the rents. Accordingly the relationship can and should be given effect by this Court between the two parties.

The effect this Court gives now is that as plaintiff/applicant claims that as it was wrongly evicted from the premises as well as bearing the distress for rents which it says were never in arrears and whereas the defendant/respondent did those acts on the premise that rents were indeed outstanding, the two parties have triable issues which this Court will need to dispose of at a full hearing.

In the meantime the status quo must be maintained and accordingly plaintiff/applicant is entitled to its prayer for an interim injunction and the same is hereby ordered. It may be observed that this Court did not deem it necessary to move to the other aspects involved in considering whether or not to issue an interim injunction like the matter of damages or balance of convenience. It was satisfied that a *prima facie* case, arguable and with a probability of success had been made out by this plaintiff/applicant. Accordingly the order issued. The defendant/respondent should not demise or alienate shop No 1 at all.

The next aspect of the prayer in this application namely whether or not a mandatory injunction should issue. In all the treatises, precedents and court arguments etc whenever an issue of mandatory injunction arises it is clearly understood and accepted that such an injunction should only issue in the clearest and special cases only. It should issue with utmost care and even reluctance. This Court appreciates this stance well. The rationale for this stance should be that the effect of an order for a mandatory injunction is that the party against whom the order is made should do or undo something. Many side effects may follow such an act. So it is well understood as to why Courts issue such orders with care and even reluctance. So much for that. In our instant case, should a mandatory injunction issue? The answer is in the affirmative. The reasons follow in the next paragraph.

A mandatory injunction will issue not as a matter of course. The case should be special and calling for such an order. This case is special. The two parties had a sublease agreement - an unregistered lease which operated as a contract between the two. Part of that contract said:-

> 3. Any agreement between the landlord and the tenant as to rent payable during reviewed period shall be in writing signed by the parties.
>
> 4. If no such agreement has been made not less than four (4) months before the applicable review date the landlord may at any time thereafter by seven (7) days notice to the tenant require an independent valuer to be appointed to determine the current rental value of the premises...

The foregoing provisions of the parties contract terms appear at page 12 of the sublease. They follow the terms of the agreement regarding the review of the rents 2 and a half years from the effective date - 1.2.88. This date was not disputed inspite of the fact that some of these details were missing from a copy of the lease which was exhibited by the plaintiff/applicant. It was said that the original copy had always been with the defendant who had failed and/or neglected to register it. So the first review date fell on or about 1.8.90; come this time no review of rents was carried out. The defendant/respondent did not issue the 4 months notice as per the agreement. No independent valuer was commissioned to determine the current rental value of the premises. So plaintiff/applicant continued to pay the Kshs 10, 000/- pm and rightly so. This has not been disputed. Come the 17.7.1992 and defendant/respondent serves the plaintiff/applicant with a notice of "Rent Arrears." The Court heard that the demanded arrears wef 1.7.1990 were a result of the reviewed rents. The sum stood at Shs 72,000/- interest at 2% was added and

a grand total stood at Shs 97,920/-. It has been noted that the procedure to review rents was not followed. There was nothing in writing for such reviewed rents as per the parties agreement herein. Yet defendant/respondent deponed in his replying affidavit dated 1.9.1992 that the rents now demanded were valid as:-

> "...the defendant and previous plaintiff's directors verbally agreed to increase monthly rent to Shs 13,000/- only wef 1.7.1990..." (underlining added).

Defendant/respondent does not name the directors he had a verbal review of rents with. In any case where there exists a written contract, it is trite law that verbal oral evidence or claims about its terms will not vary/contradict the written terms. The terms demanded that any terms of review of rents shall be in writing and signed by both parties. Accordingly the Court rejected this line of defendant/respondent's argument. So it cannot be accepted that his notice to plaintiff/applicant dated 17.7.1992 was valid at all. It was null and void. Accordingly the plaintiff/applicant should not have taken his demand of Shs 97,920/- as a basis to levy distress for rents or even proceed to evict. Such sum was not validly and lawfully due to the defendant/respondent. So his action against the plaintiff/applicant was unlawful and clause 3 (page 10 of the sublease) does not avail him at all.

In any case, the Court heard that defendant/respondent not only purported to levy distress but he also re-entered the premises ie plaintiff/applicant was evicted and indeed another tenant was put in possession. The *Law of Landlord and Tenants* (by DL Evans) says the following on this "double relief" by the landlord:

> "...a landlord cannot distrain AND exercise a right of re-entry for forfeiture for non-payment of rents, but he may and usually does join an action for arrears in an action for forfeiture..." (Page 136).

In essence a landlord cannot avail himself the 2 remedies on a defaulting tenant at all. Here it has been seen that plaintiff/applicant was not in default at all. What was claimed by defendant/respondent as arrears was erroneous and unlawful. The landlord should only take one course of action against a defaulting tenant - ie either to distrain for rent OR institute an action for forfeiture of the lease/tenancy and repossession. Here the defendant/respondent took both reliefs to his benefit. It cannot be. The law does not permit it and this Court cannot allow it.

It is not out of the way to say that the defendant/respondent actions are not justified or excusable so that a mandatory injunction is refused. Indeed the situation is compounded further by his conduct in putting another tenant in the premises. Distress and eviction took place on or about 29.7.92 on the same day another tenant was put in possession at a rent of Shs 17,000/- pm a whooping Shs 7,000/- over and above what the plaintiff/applicant had been paying. As if that was not enough that tenant was none other than another tenant on the building. One called Charles Munge t/a Café Balalaika, his business in shop No 1 was called M/S Uni Trade Printers Ltd. It was claimed in plaintiff/applicant's affidavit and not denied by the defendant/respondent that in fact the said Charles Munge used his transport to move plaintiff's property from the premises. He was thus aiding the defendant in his unlawful act in order to benefit his own business interests. Accordingly it cannot be said that by being the "new" tenant he will be adversely affected for no act of his own at all.

In any case where installing the new tenant after an unlawful act by the defendant is in circumstances as these, then that new tenants rights should be left to him to sort out with his landlord when a mandatory injunction to reinstate the old tenant is issued.

This Court agreed entirely with the ruling of Bosire Judge in the case of *Belle Maison Ltd vs Yaya Towers Ltd* NBI HCCC 2225/92 where facts were on all fours with the instant case. In that learned ruling the Judge went in greater detail to appreciate the facts, the circumstances, the law and the case law before him. Some of the cited cases in that ruling were quoted here also eg *The Despina Pontikos* [1975] EA 38 *Daniel Ferguson* [1891] 2 Ch 27. *Thompson vs Parke* [1941] 2 All ER 477. *Achilli v Tonelli* [1927] 2 Ch 243. The learned counsel added *Esso Petroleum Ltd v Kingswood Motors Ltd* [1973] 3 All ER 1057. This

Court perused all these cases with patience and care. It was fortified in both the law and precedent that defendant's action should attract a mandatory injunction and the same is ordered. No damages are considered suitable in this case. In conclusion an interim injunction should and is hereby issued as per prayers (1) and (2) of the chamber summons. A mandatory injunction also issues as per prayer (3). It is further ordered that if need be a relevant police station's assistance be enlisted to ensure that plaintiff/applicant is reinstated in the premises within the next 7 days, together with all his machinery, facilities and stock-in-trade. In case any are damaged, have perished or are not in the original condition, the appropriate worked out compensation to be paid within 30 days of the working out.

Orders accordingly.

Dated and delivered at Nairobi this 28th day of August 1992.

J.W MWERA

JUDGE