



REPUBLIC OF KENYA

Aroko v Ngotho & another

High Court, at Nairobi
March 5, 1991

Githinji J

Civil Case No 689 of 1991

Landlord and Tenant – lease – absence of an agreement in writing - a lease becomes a periodic tenancy – section 46 (1) Registered Land Act - tenancy landlord accepting rent after expiry of notice to vacate – effect of such acceptance – section 52 (2) of the Registered Land Act - whether Kenya’s Distress for Rent Act has provisions for double rent where a tenant holds over as in the English Distress for Rent Acts 1737.

The plaintiff / applicant was a tenant in a dwelling house situated in Plainsview, Nairobi.

She sought an injunction to restrain the landlord from selling her household goods which were allegedly distrained on account of arrears of rent.

The plaintiff contended that she was a tenant from month to month and that she had paid all the rent in full.

The defendant/ respondent on the other hand contended that the lease had been for one year which was subsequently renewed for a similar period and that she did not wish to renew it any further. It was thus the respondent’s contention that the applicant continued to occupy the premises without her (respondent’s) permission.

In support of her application for discharge of the *ex-parte* injunction the landlord contended that when the applicant was distrained for arrears of rent the premises were rented to a third party who took possession of the same, an allegation which was denied by the applicant.

During the hearing of the application no disclosure was made whether or not the initial lease was in writing. There was further evidence that the landlord’s agents continued receive rent from the tenant after the expiry of the notice.

The landlord in levying distress claimed that she was entitled to double rent due to the fact that the tenant failed to give vacant possession to the premises when the lease expired.

Held:

1. In the absence of a lease in writing then the lease was a periodic tenancy in terms of Section 46(1) (b) of the Registered Land Act which period was a month to month tenancy as the rent was being paid monthly. Such monthly tenancy would be terminated by one month’s notice.

2. Section 52(2) of the Registered Land Act makes it absolutely clear that the landlord's acceptance of rent after the expiry of the notice to vacate should be taken as evidence of the landlord's consent to continued occupation by the tenant.

3. Section 18 of the English Distress for Rent Act 1737 specifically provides for double rent where the tenant fails to give vacant possession at the determination of the term for the lease. Our distress for Rent Act has no such provisions.

4. Even if there was right of forfeiture the landlord could not have exercised it by peaceable re-entry when the tenant was still in occupation of the premises. He would have enforced it by an action within section 56 (2) of the Registered Land Act.

5. A lease is an interest in land and if the applicant is evicted he may not be able to get a house in similar estate at the same rent.

Cases

1. *Giella v Cassman Brown and Co Ltd* [1973] EA 358

2. *Thatcher v Pearce (CH) and Sons (Contractors) Ltd* [1968] 1 WLR 748; (1967) 112 SJ 379; 19 P&CR 682

Statutes

1. Registered Land Act (cap 300) sections 46(1)(b), (c); 52(1), 56(2), 58, 59(1)

2. Distress for Rent Act (cap 293) section 14

3. Distress for Rent Act 1737 [UK] section 18

Advocates

Miss Nguku for the Plaintiff.

March 5, 1991, **Githinji J** delivered the following Ruling.

This application by the tenant of a dwelling house LR No 93 / 1024 Plainsview Estate against the landlord of the Plainsview to restrain the landlord and his agents from evicting the tenant and to restrain the landlord from selling the distrained goods until the determination of the suit. The applicant states in the affidavit to court the application that he has been a month to month tenant from 11/6/ 88 and that he has paid all the rent upto the month of February 1991. That there is no rent due. That the respondent distrained for arrears of rent in the sum of shs 52,130 on 7/2/91 and has threatened to evict the applicant and to sell the distrained goods.

In the plaint she prays for an injunction, an order that the 2nd (plaintiff / defendant (respondent) all house goods seized, and general damages for trespass and unlawful detention of the goods. An *ex parte* injunction was granted on 12/2/91. The landlord on 14/2/91 filed an application for discharge of the *ex parte* order of 12/2/91.

The two application have been heard together. The landlord states in his replying affidavit that :-

The lease was for one year from 2/6/88 at monthly rent of shs 5,500 payable two months in advance; that the lease agreement was renewed for a further period of one year from 2/6/89 to 1/6/90; that on 3/5/90, the respondents' agents informed the applicant that respondent did not intend to renew the lease, that the respondent gave the applicant one month notice to vacate by 1/7/90; that the applicant agreed to vacate by 31/7/90 but continued to occupy the premises

without the landlord's permission and that at the time of distress, the applicant was in rent arrears in the sum of shs 56,000.

The landlord states in the affidavit in support of his application for discharge of *ex parte* injunction that when the applicant was distressed for arrears of rent on 7/2/91, the premises were rent to one Rose Wanjiku Gachuki who under a written agreement of lease took possession on 8/2/ 91 and that the new tenant is not a party to the suit. I forgot to say that the landlord further states in his affidavit filed in court on 22/2/91 that after the distress the applicant vacated the premises and the landlord leases the premises to a new tenant. The landlord filed a further affidavit on 18/2/91 in which he states among other things that the new tenant took possession of the premises and started repairing it but the applicant accompanied by the Police forcibly entered the premises on 13/2/91 and put her things in the premises. The landlord further states in the same affidavit that the new tenant has keys to the premises and her furniture is still in the premises.

The applicant filed a replying affidavit on 26/2/91 in which he states that he is in physical possession of the premises and that the new tenant has not taken possession. The tenant's application has to be decided on the circumstances stated on *Giella v Cessman Brown and Co Ltd* [1973] EA 358. I am aware that in an application for injunction, I am not required to conclusively decide issues of fact and law but merely to weigh up the strength of each sides case.

The counsel for the landlord informs me that the suit premises is registered under the Registered Land Act (Cap 300 LK). The tenant states that he has been a month to month tenant since 2/6/88. The landlord states that the first tenancy was for one year and so is the second which expired on 1/6/90.

It was not disclosed whether or not the first lease was in writing. Annexure No 14 to the landlord's affidavit filed on 22/2/91 is particulars recorded by M/s Ebony Estates Ltd – the landlord's agents. According to that document which is dated 2/6/88, the tenant took possession of the premises on 2/6/88 "subject to the terms and conditions of the lease to be drawn up by the landlord's advocates". There is no evidence that any lease was in fact drawn up. In the absence of a lease in writing then the lease was a periodic tenancy in terms of section 46 (1) (b) of the Registered Land Act which period tenancy was a month to month tenancy as the rent was being paid monthly section 46(1) (c) of the Registered Land Act. By the same section such monthly tenancy would be terminated by a one months notice. Similarly it appears that the second tenancy which took effect on 2/6/89 was not in writing and so, it became a month to month tenancy terminable by one month notice. I conclude therefore that the tenant has *prima facie* established that the tenancy was a month to month tenancy from 2/6/88 to 2/6/90.

By a letter dated 25/5/90, Mr Willy Mutunga advocate gave the tenant a notice to vacate the premises wef 1/7/90. That was a valid notice as its duration was slightly more than one month. But correspondence showed that despite the tenant's letter dated 2/7/90 in which he indicated readiness to vacate the premises he did not do so. The tenant has annexed receipts to his affidavit filed on 26/2/91 to show that M/s Ebony the landlord's agents has been accepting rent from the tenant from July 1990. There is a receipt dated 24/1/91 in which the tenant's rent for Shs 6000 was accepted.

The rent schedule annexed to the landlord's affidavit filed on 22/2/91 in fact showed that the landlord's agents received rent for August, September, October, December 1990 and for January 1991. The landlord has not denied that the rent was renewed with his instructions and has not denied receipt of that rent. *Prima facie*, it is clear that the tenant held over in terms of section 52 (1) of the Registered Land Act and is deemed to a month to month tenant entitled to one month notice before termination. Section 52(2) of the Registered Land Act makes it absolutely clear that the landlord's acceptance of rent after the expiry of the notice to vacate by 1/7/90 should be taken as evidence of the landlord's consent to continued occupation by the tenant.

In the absence of a written lease, there is an implied agreement between the tenant and the landlord that so long as the tenant pays rent and observes and performs the agreements and conditions, the tenant would have peaceful and quiet possession of the premises without any lawful interruption by the lesser or any person rightfully – section 53 (a) RLA

The circumstances under which the tenant allegedly vacated the premises is not clear. The landlord says that after he distrained for rent on 7/2/91, the tenant vacated the premises. The tenant denies so and says that he is still in possession. The tenant filed the suit on 11/2/91 and if he had left the premises and still wanted to repossess the premises he would have stated so in the plaint instead he stated that there was a threat to evict him. The landlord states that the tenant repossessed the premises on 13/2/91. The tenant denies. That is a matter which can only be decided after the hearing. At this stage, I find it incredible that the tenant would have vacated the premises on his own volition only to forcibly re-enter a few days later.

If the landlord is saying that he exercised his right of forfeiture because of tenant's breach to pay rent, then it is disputed that any rent was in arrears. That is a serious dispute for the tenant has annexed some receipts showing that he has paid Shs 6000/- monthly rent up to January 1991. It is 8 months from July 1990 to February 1991. The total rent payable for the 8 months is Shs 48,000/- The rent schedule by the landlord show that the tenant has paid a total of Sh 36,000/- between July 1990 and January 1991. That would leave arrears for 2 months only. Yet the landlord states that the rent is in arrears in the sum of Shs 56,000/-.

The proclamation issued by the bailiff which is dated 7/2/91 showed that the rent in arrears was shs 52,130. The basis for those figures is that the landlord claims what he is entitled to double rent wef July 1990 by virtue of section 14 of the Distress for Rent Act. That is disputed by the tenant. Section 14 of the Distress for Rent Act replies only where the tenant has given a notice to the landlord that he wishes to vacate the premises. The tenant has not given any specific notice to vacate. He was being pressed to vacate and promised to vacate by July 1990 which he did not do. Section 18 of the English Distress for Rent Act 1737 specifically provides for double rent where the tenant fails to give vacant possession at the determination of the terms for the lease.

Our Distress for Rent Act has no such provision. I think that it is section 52(1) of the Registered Land Act which applies in this case. Under that section holds the premises on a month to month tenancy on the same conditions as those of the lease which means that he pays the same rent as he was paying before. In any case there was no notice of forfeiture served on the tenant – section 58 of Registered Land Act. Even if there was right of forfeiture the landlord could not have exercised it by peaceable reentry when the tenant was still in occupation of the premises. He would only have enforced it by an action within section 56 (2) of the Registered Land Act. Section 59 (1) of the Registered Land Act gives the Court jurisdiction to grant the tenant relief from forfeiture. In any case courts of equity grant relief against forfeiture for non-payment of rent. In *Thalches v C of Pearce and Sons (Contractors) Ltd* [1968] 1 WLR 74g, relief against forfeiture for non-payment of rent was granted even when the landlord had re-entered peacefully. As regards the issue of wrongful distress, if the landlord is not entitled to double rent on section 52(1) of the Registered Land Act leave to provide then the tenant would only have been in arrears for two months and the sum of shs 52,130 shown in the proclamation as owing would not be owing. Miss Nguku states that rent at shs 6000/- has been paid unto months of February 1991 and that she has receipts which she has not all annexed to the tenant's affidavit. It is possible that she may be able to show that even the two months rent is not owing. If no rent was owing at the time of distress then the levying of distress would be unlawful or at least excessive and court should stop the sale of the seized goods pending the determination of the lawfulness or otherwise of the levy of distress.

The landlord states that a new tenant has leased the premises. I have been shown a lease agreement which takes effect on 8/2/91. As I have shown above what is the sending issue as to whether or not the lease had been lawfully terminated before the landlord entered into a new lease agreement. If the lease was subsisting on 8/2/91 then the landlord is in breach of the covenant for quiet possession by releasing to another tenant. The applicant is in physical possession of the premises. He has raised serious issues of law and fact which will have to be determined. It should be remembered that a lease is an interest in land and if the applicant is evicted he may not be able to get a house in a similar estate at the same rent. It is well known that there is a serious shortage of houses in Nairobi and damages in that case may not be the appropriate remedy.

The new tenant has not applied to be joined as a co-defendant to protect her interest.

In all the circumstances I am satisfied that the tenant has established a *prima facie* case with a possibility of success and I award his application with costs and grant prayers No 1 and 2 in his chamber summons filed on 12/2/91. Consequently I dismiss the landlord's application filed on 14/2/ 91 with costs.