REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 3098 OF 1990

DUNCAN NDERITU.....PLAINTIFF

BETHWELL MAREKA GECAGA .....PLAINTIFF

JAMES SIDNEY NESBIT t/a Trustees

Of African Club.....PLAINTIFF

VERSUS

JOHN HARUN.....DEFENDANT

RULING

By a chamber summons dated 24th/9/90 brought under orders XXXIX rules 2(1) and 2 and order XXXV and section 3A and Civil Procedure Act the plaintiff seeks the following orders:

1. That the defendant be ordered to hand over to the plaintiff the premises known as LR 209/930 Monrovia Street Nairobi forthwith.

2. The defendant be restrained by injunctions from interfering with the plaintiffs use and enjoyment of the suit premises.

3. That the defendant be ordered to remove forthwith from the suit premises all his personal belongings.

4. That the suit to proceed to hearing on the position of damages only if any.

5. That costs of the application be provided for.

The three applicants describe themselves in the plaint as duly constituted trustees of African Club a society duly registered under the Societies Act and as serving on their own behalf and on behalf of the members of African Club. They state in para 3 of the plaint that they are registered owners as trustees of LR No 209/930 together with buildings and improvements erected and being thereon. That fact is submitted by the copy of the title deed annexed to the affidavit of Mr Duncan Ndegwa. The title deed shows that the land is a leasehold under Government Lands Act for a period of 99 years from 1/6/1903 to 1/6/2002 and which is registered under Registration of Titles Act.

In paras 3, 4 and 5 of the plaint, the applicants state that by exchange of letters in August, 1983 and 1984,

the applicants agreed to let the premises to the defendant for a period of 3 years from l/9/83 at a monthly rent of Shs 10,000/-; that a formal lease was to be drawn and executed but it was never executed but that the defendant took possession of the premises, that the defendant failed to pay the proposed rent and by a letter dated 2/8/84, the applicants revoked the agreement and asked the respondent to vacate the premises. Two letters written by Mr D N Ndegwa are annexed to his affidavit. The 1st letter is dated 5/8/83 and addressed to the respondent. In that letter Mr D N Ndegwa agreed that the respondent do occupy the African Club from 8/8/83 on terms proposed in the respondent's letter (letter not annexed) and that the full terms and conditions of the occupancy would be contained in a substantive lease agreement which was being drawn. The 2nd letter is dated 17/8/? (presumably 17/8/83), it confirmed that the keys were handed over to the respondent on 5/8/83 on the undertaking that the respondent would pay monthly rent of Shs 10,000 wef 1/9/83 and added;

> "However, in order to put the premises in proper working order, it has been agreed that you retain Shs 5,000/= per month for the 1st six months which means that from 1st March, 1984, the rent would be 10,000/=. These arrangements are made for the 1st three years renewable on agreement by both parties. A lease agreement will be prepared and signed at your cost soon".

The letter dated 2/8/84 annexed to Mr Ndegwa's affidavit which is his letter to the respondent reads:

> "In the circumstances of your inability to fulfill the terms and conditions of leasing the African Club, I am directed by the trustees to terminate the arrangements set out in my letter dated 17/8/83 and your reply hereof dated 30/8/83. For your information, the amount outstanding on rent amounts to Shs 50,000 and the trustees request for the payment to be met soonest – could you please ensure the return of all keys personally handed over to you at this address".

In paras 6, 7, 8 and 10 of the plaint, the applicants state *inter alia* that, the respondent gave back the premises in about September, 1984, that thereafter the applicants let the premises to three successive tenants which 1st lease expired on April 1988 but that the respondent wrongfully trespassed passed and continues to trespass on the premises in Nov 1989.

In para 11 of the plaint, the applicants state that prior to the trespass the applicants were contracted to lease the premises to one Gatonye V Kariuki for 5 years from January 1990; correspondence relating to agreements to let the premises to four successive tenants are attached to Mr Ndegwa's affidavit.

Lastly in para 9 of the plaint, the applicants state that in May/June 1987, the respondent without applicants knowledge, authority or consent purported to make payments to Nairobi City Commission and Department of Lands relating to rates and land/rent for the premises. They state further that if the respondent did so, he paid of a volunteer and wife as a person regally and/or corrollable to do so.

The respondent has filed a defence. In para 2, he denies that African Club is a registered society under the Societies Act.

Respondent in para 3 of the defence accepts that the premises were let to him and he went into possession immediately but states that the premises were not in a habitable condition, that the applicants failed to meet them in a habitable condition and the respondent's effort to renovate the premises were frustrated by the applicants. The respondent denies in his defence that he released the premises to the applicants and maintains that he has been in possession since 1983 and that he paid Shs 308,807/20 to Nairobi City Commission as amounts of rates and Shs 264,772/50 to Commissioner of Lands as ground rent upon demands as occupied by the relevant authorities. He denies that he failed to pay rent. He denied knowledge of the successive leases and states that in December 1989, an auctioneer authorised by the applicants unlawfully trespassed into the premises and damaged his goods as a result of which the respondent filed suit No HCCC No 5705/89 where he obtained an order for injunction and which suit is still pending.

I will revert to the evidence in due course but let me omit examine the nature of the application; and the reliefs sought.

It is apparent that the chamber summons is intended to achieve two major reliefs at the same time namely summary judgment for possession of the suit premises and for interlocutory injunction. The application for summary judgment should be by notice of motion while the prayer for interlocutory injunction would be chamber summons.

Ground No 6(a) and 6(b) of the grounds of opposition state arriving other things that the application is misconceived, blind in law and an abuse of the process of the court.

The two applications should not have been consolidated in one application because they seek conflicting orders. If much thought was put to the drafting of the application it would have been recognized that the application for inter-locutory injunction is unnecessary because if the applicants succeed on the application for possession execution proceedings will follow including committal proceedings in case for disobedience. The applicants witness did not infact address the Court on prayers for injunction but in the prayer for possession of the suit premises.

Consequently I will at this stage without much ado, strike out from the chamber summons the heading "Order XXXIX rules 2(1) and (2)" and the prayer for injunction. That would leave the prayer for summary judgment for possession prayer No 3 of the chamber summons is unnecessary because it is part of the prayer for possession.

It is argued that the order sought does not avail the plaintiff under order XXXV of Civil Procedure Rules. That is what ground No 6(a) of the grounds of possession states.

But it is clear from order XXXV rule 1(1)(b) of Civil Procedure Rules that a landlord may apply for summary judgment to recover from a tenant whose term has expired.

Such applications are common in Courts of law – see *Hola G Holdings Ltd v Lavarini's Restaurant Ltd & Another* Civ Appeal Nos 48 and 49 of 1980 (consolidated); *Batchelor's Bakery Ltd v Westlands Securities Ltd* CA No 2 of 1978 and *Trikam Magaulal Gohil & Another v John Waweru Wamai* CA No 42 of 1982.

The fact that the application is made in chambers instead of Court is not fatal for order L rule 11 of Civil Procedure Rules recognises that such an error can be made and empowers the Court either to adjourn it to Court or hear it in chambers. The error is only in the venue otherwise the application complies with the objection raised by the respondent, that the issue of injunction is *res judicata* not only stands because I have already struck out the prayer for injunction. But the respondent also states in para 10 of grounds of opposition that there are similar issues of law and fail in HCCC No 5725/89 and in the present suit which suits are both pending in this Court.

I have perused the amended plaint in HCCC No 5705/89 dated 12/1/90 annexed to the respondent's replying affidavit. In that suit, the respondent has sued three parties, an advocate, a firm of auctioneers and Mr Bethwel Mareka Gecaga in connection with damages suffered by the respondent as a result of allegedly unlawful eviction of the respondent from the suit premises on 9/12/89.

He claims compensation for value of goods damaged during the unlawful eviction, damages and an injunction to restrain the three defendants from interfering with the respondents possession and enjoyment of the premises.

In the amended plaint, the respondent states in para 4 that he carries on business in the premises pursuant to an agreement entered into in the year 1983 between him and African Club, in para 5 that since then he has reserved and used the premises as a store and has paid money in pursuance with the Rating Act and in para 8 that prior to the unlawful eviction, he had not received prior notice from any person or authority with superior title. Those are the only three facts on which that suit is forwarded.

He does not in that suit seek a declaration that he is a lawful tenant of African Club or a declaration that his eviction was unlawful, it is apparent that HCCC No 5705/89 does not concede the legality of the

respondents possession of the suit premises but concedes only the damages arising from the alleged unlawful eviction. It may be argued that the difference between the two is indistinguishable but without facts stated in the plaint to show the legality of the tenancy forwarded by prayers for appropriate declarations, that suit is incapable of reviving the disputed tenancy which is the subject matter of this suit. It is apparent that this suit is different from HCCC No 5705/89 as it essentially seeks the ejectment of the respondent from suit premises resulting from the forfeiture of the tenancy. In any case the respondent has not brought an application for stay of proceedings in this suit pending the determination of this suit and has now sought the consideration of the two suits.

I conclude therefore that the issues in this suit are different from the issues in HCCC No 5705/89 and that this Court has jurisdiction to proceed with this suit inspite of the fact that HCCC No 5705/89 is still pending.

Having got the technical hurdles out of the way, I shall now consider the merits of the application for decree of possession. In an application on summary judgment, if the applicant has set out in his affidavit (s) in support of his motion and exhibits facts which are properly true and sufficient to warrant the granting of his prayer for summary judgment the respondent must discharge the onus on him if showing his defence(s) raises triable or *bona fide* issues. They will be only of law or fact.

If they are of fact, then, have denials by the respondent or his advocate in a pleading or a letter will not do because there must be a full and frank disclosure of the facts before the Court which will be proved and sufficient for it to rule that those issues are raised - as per Kneller JA (as he then was) in *Trikam Maganlal Gohil & Another* (*Supra*).

If there is any relationship of landlord and tenant in the recent case, then it is apparent that it is governed by the applied Transfer of Property Act 1882 of India.

Under s 106 of that Act a lease of business premises (as the suit premises in this case appear to be) is in the absence of a contract or local usage deemed to be a lease from month to month terminable by a 15 days notice in writing. A lease from year to year or for a term exceeding one year must be by registered instalment and or a period less than one year by oral agreement or by a registered instalment (s 107 of the Act).

If the lessee holds over after determination of the lease and lessor accepts rent or asserts to lessee's possession of the business, the lessee is assumed to be a month to month - tenant (s 116 and s106 of the Act.) The liabilities of a lessee include duty to pay or londer rent at proper time and on determination of the lease to put the lessor into possession (s 108 (C) and s108(9)). The lease can be determined by forfeiture or by expiration of a notice to determine the lease (s 111 (g) and (h) and the lessor can bring a suit for ejectment if the lessee does not surrender possession (s 112)).

The key issue which has been observed by a lot of side issues is whether or not the respondent is in law tenant of the applicants. In paras 3, 4 and 5 of the plaint, the applicant states that they agreed to let the suit premises to the respondent wef 1/9/83 at a monthly rent of Shs 10,000/= for three years but that no formal lease was executed and the respondent having failed to pay the proposed rent the agreement was revoked – by a letter dated 2/8/84 and the respondent was asked to hand over possession of the premises. Those averments are supported by the correspondence attached to Mr Ndegwa's affidavit to which I referred earlier. What is the respondent's reaction to those facts?

He agreed in para 3 of the defence that the premises were let to him and was put in possession. He asserts in para 6 that he has always been a lawful tenant and denies in para 7 that he has failed to pay rent.

In para 8 he totally denies para 5 of the plaint and puts the plaintiff to strict proof. And in para 13, he states that he has made substantial payments of rates and general rent. The replying affidavit is a repeat of the averments in the defence and nothing new is added.

The respondent does not deny at all there was an agreement of a lease on the terms stated in Mr Ndegwa's

two letters. He does not also deny that it was agreed that a lease would be drawn up and executed which fact never happened.

According to the respondent he paid for the rates and land rent in 1987. Are allegations of fact made by the plaintiffs in the plaint are deemed to be admitted by the respondent unless he traverses them in his defence or affidavit and a general denial is not sufficient traverse - order VI rule 9(1) and 9(3) of Civil Procedure Rules).

The conclusion here is that there was an agreement of lease for 3 years which was never drawn up or executed. Consequently the lease was not registered though the respondent was given vacant possession.

The legal consequence is that if there was a tenancy at all, then it was a month to month tenancy terminable by 15 days notice in writing. It seems that up to 2/8/84, there was indeed a month to month tenancy for Mr Ndegwa in his letter of 2/8/84 demanded the arrears of rent in the sum of Shs 50,000/=. The applicants state in the plaint that inasurance with the notice to vacate dated 2/8/84 the respondent vacated the premises in September 1984. The period from 2/8/84 to September 1984 is more than 15 days.

The respondent merely denies giving possession of the premises in September, 1984.

To prove that fact, the applicants have annexed correspondence to show that Taraka Motors took possession and paid Shs 120,000/- but that the tenancy was terminated in October, 1986. They have also annexed correspondence which proves that Mr J Munene became the tenant but his tenancy was terminated in about April 1988. Then there is a letter of acceptance to let the premises to Gatonye dated 27/11/89 (annexture “BMS 4”). The letter of 2/8/84 and the correspondence relating to letting to M/s

Taraka Motors, J Muparel and Mr Gatonye are probably true and indicate that the respondent was not in possession of the premises between 1985 and Nov 1989. Other than mere denials the respondent has not tendered any evidence to show on balance of visiability that he was in fact in possession of the premises during that period. In fact he does not state in his defence or affidavit that he has been paying rent that uphold the whole period including the period between the date of agreement and 2/8/84. He has neither attached any rent receipts nor correspondence to show that there was any relationship of landlord and tenant between him and the applicants.

Even if it is assumed in favour of the respondent that he did not give possession after the notice of 2/8/84, he would be deemed to have held over as a tenant from month to month if the applicants accepted rent from him or distrainal from Court or asserted to his continued possession - s 116 of Transfer of Property Act).

Again the respondent has not shown that the applicants accepted any rent for that period or asserted to his continued possession and in the absence of any evidence the inference that he held over as tenant from month to month cannot be drawn. The letting of the premises to other people and the admitted eviction of the respondent on 13/12/89 is indication of the fact that the applicants did not give any consent to the possession clause 36 of the respondent’s affidavit sworn on 21/12/89 annexed to his affidavit.

In his application clearly show that he is only in possession because his manager went into the premises with enough manpower that overpowered the applicants agents. The inference is that the respondent voluntary resisted the eviction.

There is evidence that the respondent paid land rent and commission rates in the middle of 1987. The applicants acknowledge that fact but state he paid as a volunteer and up or a person legally compellable to do so. Respondent state that he did so because there was a denial by relevant authorities. S 20 (i) of the Rating Act cap 267 makes the rateable owner as the person liable to pay the rates.

By s 2 of the Rating Act, a rateable owner has the meaning assigned to it by s 7 of the Valuation for Rating Act - cap 266 which includes the order of registered freehold or tenant for life in possession or in

reversion, it also includes categories of lessees of property under a registered lease for periods ranging from 21 years to 25 years. As provided in section 15, 16 and 17 of the Rating Act, if the rateable owner fails to pay the rates after 30 days of publication, he can be given a notice of 14 days to pay and in default enforcement proceedings can be commenced against him. But if the rateable owner fails to pay the rating authority can serve the tenant with a notice to pay the rent direct to rating authority until the arrears are duly paid. S 18(1).

It is clear that the respondent does not fall in the definition of rateable owner in s 7 of Valuation for Rating Act. In default of the rateable owner paying the rates, the rates, the lessee can only be compelled to pay the rent directly to rating authority and get in discharge from the rating authority.

As there is local law - the Rating Act governing the liability to pay rates, then section 108(g) of the Transfer of Property does not apply. Even if it does, the tenant who pays such rates is required to deduct the rates paid from rent or otherwise recover the money from lessor. It is noteworthy that neither in this suit nor in HCCC No 5705/89 has the respondent counter-claimed for the payments made. Any set off or counter-claim may entitle a defendant to defend to the extent of such set off or counter-claim (order XXXV rule 2(2) of Civil Procedure Rules). The underlying principle is that before the occupier can be entitled to be served with a notice to pay the rent directly to rating authority or indeed to pay the rates, he must be a tenant of the lessor. The mere payment for such rates does not create a tenancy unless the lessor consents.

In any case, the respondent has not annexed any correspondence to show that a demand was made or any notice to pay served by the rating authorities. The payment of rates by the respondent when he is not required to pay by the lease agreement or by the Rating Act indicates that the respondent has renewed his clearance as a lessee and is claiming title himself. If so then the lease determines by forfeiture – s 111 (g) of the Transfer Property Act. Although the respondent has not pleaded that he is a protected tenant, his counsel did argue so. Further he has stated so, in his affidavits filed in HCCC No 5705/89 which he has admitted in this application. But he must first show on a balance of probability that he is a tenant before he can claim protection.

After anxious consideration of all aspects of the suit I conclude that the applicant has shown by acceptable evidence that the tenancy agreement for month to month tenancy was terminated by a notice dated 2/8/84 which was never waived; that there was no month to month tenancy by holding over, that when the respondent paid the rates he was not a tenant and that since payment of rates did not create a new tenancy.

There are no genuine triable issues regarding the tenancy raised by the respondent in his defence and in his affidavit. It is quite clear that the respondent has unlawfully been laying claim to the possession of the premises and he forcibly retained possession which his remedy lies in a claim against the lessors for the rates paid which claim has not been made in this suit.

Rent is a consideration for the lease and as the respondent has not paid any rent for all those years, it is unjust for him to deny the applicants a decree for immediate possession.

Lastly, the respondent has raised the point that African Club has been deregistered which fact is proved by LN 2946 of 18/7/86.

As provided in s 38 of the Societies Act (cap 108) after deregistration of a society the Minister responsible has a discretion either to appoint a receiver of the society or be vest the properties of the society in the receiver.

There is absolutely no evidence that a receiver has been appointed and the suit premises vested in the receiver; until the appointment for such receiver and the vesting of the property in them, the applicant as registered trustees of the immoveable property have a legal duty to recover the property and account it to the receiver when he is duly appointed. The respondent has not shown that the applicants title has expired and is estopped from landlords title - see paras 29 and 30 at pages 18-19 of *Wood Fall Landlord and*

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On the whole, the respondent has not shown that he should have leave to defend on the claim for decree of possession.

Consequently I enter judgment for the plaintiff for a decree of possession as prayed in prayer (b) in the plaint and order that the respondent to give vacant possession forthwith and in default to be forcibly evicted.

I give the respondent leave to defend on the claim for damages costs of the application to the applicants.

Dated and delivered at Nairobi this 17th day of May 1991.

E.M GITHINJI

JUDGE