



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO 2864 OF 1987

INDUSTRIAL DEVELOPMENT BANK LIMITED PLAINTIFF

VERSUS

BOBMIL INDUSTRIES LIMITED & FLOW METERS

& ALLIED HARDWARE LIMITED..... DEFENDANT

RULING

The motion before the court is based upon the Affidavit of JAO Adera Chief Legal/corporation Secretary of the plaintiff Bank.

The plaintiff prays for orders:-

- 1. That the vacant possession of the suit premises LR No 209/4025 be given to the plaintiff.***
- 2. Costs of the application.***

The plaintiffs, application is objected to by the 1st defendant and grounds of the objection were filed on 5th August, 1987. The application was, it is observed, served upon the 2nd defendant but made no appearance at the hearing of this application.

The following issues have been submitted by the consent of parties for the court determination:-

- 1. What relationship exists between the plaintiff and the defendant as regards the suit premises?***
- 2. Were the second defendant and the first defendant capable of entering into a valid lease on the suit premises without the written consent of the plaintiff?***
- 3. If 'yes', is the plaintiff entitled to have the "lease" terminated without notice? Alternatively, is the said lease enforceable against the plaintiff when it has not consented to it?***
- 4. If the answer to No 2 above is in the negative, is the plaintiff entitled to possession forthwith?***
- 5. What order should be made on costs?***

Mr M'bmoti, inter alia submits that the alleged lease not having been consented to by the plaintiff is invalid unenforceable against the plaintiff. The first defendant must be taken to have had notice of charge (Inst & General Clauses Act Cap 2) Mr Maini contends that his client, occupies the whole of the suit premises under a valid lease entered between the 1st defendant (his client) and the proprietor (2nd defendant) voluntarily, openly for valuable consideration.

The applicant/plaintiff therefore have no legal right to evict the 1st defendant from the premises.

Mr Maini in support of his argument relies upon section 65(a) (1) of the transfer of property Act.

He has also cited the decision made in ***Iron Trades Employers Insurance Association Ltd v Union Land & House Investors Limited*** (1937) CH 313. The facts pertaining to the application before the court are not in dispute. These brief are:-

The plaintiff/applicant holds a first legal charge over the 2nd defendant's property known as Title No I R 3000 Land ref No 209/4025 as security for advance made to the second defendant by the plaintiff in the sum of Kshs 2,271,000.

The plaintiff furthermore holds a legal debenture over the assets present and future of the 2nd defendant to secure the above said amount.

Under the charge thus created the 2nd defendant covenanted under with the possession of the charged property to the 1st defendant.

The 2nd defendant having failed to repay the charged debt on the due date the plaintiff appointed joint receivers and managers on 6th July, 1987 over the assets and property secured to it.

The plaintiff/applicant is unable to have access to the said property as the first defendant refuses to allow access and claims his right under the lease.

The total amount at present due to the plaintiff amounts to Kshs 2,885,464.80.

The 2nd defendant and the 1st defendant's 'Tenancy Agreement' is dated 1st July, 1987. This agreement stipulates a monthly rental of Kshs 16,500/- and dated of commencement is shown as 1st May, 1987. Under clause 4 of the said agreement a right of renewal for a further term of 12 months is provided subject to certain conditions.

The agreement is duly stamped but is not registered against the Title. Date of the stamp is shown on 30th July, 1987. The second defendant having failed to repay the principal sum and interest thereon, a receiver and manager was appointed by the plaintiff, subsequently, the suit was filed on 16th July, 1987.

On considering of all the facts before me, and the submissions made by the learned counsel I find that the facts pertaining to this application are entirely distinct from the circumstances and facts of the decision cited to me made in ***Irons Trades Employers Association Ltd*** (supra on which Mr Maini makes considerable reliance in support of his submission.

I find that the facts pertaining to the grant of this tenancy by the second defendant to the first for a period of twelve months with an option of renewal for a further period in the circumstances are tainted with malefide.

The entire exercise it appears, is to deprive the applicant mortgages his right under the charge.

The charge was duly registered. It is a notice to all. Is it conceivable for the 1st defendant to have entered into a tenancy without investigation of the title?

The answer could only be that prudent person would take care and is not likely to act blindly. If he does

not take care he would be acting at his own peril.

I note that the suit is filed on 16th July, 1987 the tenancy agreement is stamped 14 days later on 30th July, 1987. This delay is not explained. More over in my view the 2nd defendant can only lease or let what belongs to him and not an interest which is already subject of a charge.

'He who comes to equity must come with clean hands'. The applicants application find is well merited I do not find that sufficient reasons exist for not allowing this application.

All the issue submitted have been dealt.

Application is therefore granted as prayed. The applicant/plaintiff to enter the vacant possession of the suit premises being L R 209/4025 costs of this suit, to the applicant/plaintiff.

Order accordingly.

August 26, 1987

AMIN J