



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
CIVIL SUIT NO.389 OF 2016
YUSUF MOHAMMED ALI JIWA

T/A AJIWA PROPERTIES.....1ST PLAINTIFF/APPLICANT

SOROYA INVESTMENTS LIMITED.....2ND PLAINTIFF/APPLICANT

VERSUS

FLORENCE WANGARI MWANGI.....1ST DEFENDANT /RESPONDENT

JOYCE NJOKI.....2ND DEFENDANT/RESPONDENT

GRACE NJERI.....3RD DEFENDANT/RESPONDENT

RULING

This IS the Notice of Motion dated 17th January 2017 this brought under Order 51 Rule of the Civil Procedure Rules, Section 1A, 3A and 63(e) of the Civil Procedure Act.

It seeks orders;

- 1. Spent.**
- 2. Spent.**
- 3. THAT an order do issue staying the proceedings of the Tribunal in the Business Premises Rent Tribunal Cause No.150 of 2016 pending hearing and determination of this suit.**
- 4. THAT costs of this application be provided for.**

The grounds are set out on the face of the application. The main grounds being;

- a. The Business Premises Rent Tribunal Cause No.150 of 2016 was filed subsequent to this matter.**
- b. That the Tribunal has been notified of the existence of the suit herein before this superior court**

c. That unless the proceedings in the Business Premises Rent Tribunal are stated the plaintiff will suffer irreparable damage relating to the property known as Yunis Building erected on LR No. Mombasa/Block XX/45A and be deprived of part of the said property.

The application is supported by the affidavit of Yusuf Mohammed Ali Jiwa T/A Jiwa properties sworn on the 17/1/2017. The application is opposed. There are grounds of oppositions filed by the defendants/respondents on the 2/2/2017 and a Replying Affidavit sworn by Florence Wangari Mwangi the 1st defendant/respondent on the 2/2/2017.

I have considered the submission of the counsels substantiating their client's respective positions in their respective affidavits. The plaintiffs/applicants contention is that by a letter dated 12/10/2016 they offered to lease to the defendants the premises measuring 600 square feet on the ground floor of Yunis building of the title Number Mombasa/Block XX/45A herein after referred to as the "suit premises". That the said offer was open for acceptance within ten (10) days.

Further upon fulfilling certain conditions;

Namely:

- i. That the defendants were to pay a deposit of Kshs.270,000.00.**
- ii. To deposit first quarter rent of Kshs.270,000.00**
- iii. Legal fees of Kshs.45,132.00.**

It is further the plaintiff's contention that the 1st defendant issued them with a bankers cheque of Kshs.270,000.00 and two personal cheques dated 27/10/2017 for legal fees.

The cheque for Kshs.270,000.00 was returned for lack of sufficient funds. That by a letter dated 25/11/2016 the defendants were informed that the offer had lapsed. It is therefore the plaintiffs/applicants contention that the Business Premises Rent Tribunal has no jurisdiction to entertain the matter.

That unless the proceedings at the Tribunal are stayed there is a likelihood of conflicting parallel orders.

The defendants/respondents intention is that they were never served with any letter informing them the offer had lapsed and that the plaintiffs/applicants have frustrated their occupation of the premises by locking the same thereby denying them access to the premises. They pray that the application be dismissed with costs.

I have considered the pleadings, the application, Supporting Affidavit and annexures. I have also considered the grounds of opposition Replying Affidavit together with submissions of counsel. The issues for determination are:

- i. Whether the intended lease between the plaintiffs and the defendants gave rise to a landlord/tenant relationship.**
- ii. Whether the tenancy herein is a controlled tenancy hence falling within the Landlord and Tenant (Shops, Hotels And Catering Establishments) Act Cap 301.**

I have gone through the intended lease. The same is for a period of 5 years and 6 months from 1/12/2016 to 31/5/2022. Before then the defendants were to fulfill certain conditions. The cheque which was dishonoured was not replaced by the defendants. There having been no replacement the offer then lapsed.

The defendants were informed in writing. I therefore find that failure by the defendants to fulfill all the conditions within the time set frustrated the contract. The tenancy did not come to effect. The 1st

defendant admitted that she did not replace the cheque. There was an offer which lapsed for want of consideration.

I find that the intended tenancy did not take off. The plaintiffs and the defendants cannot be treated as landlord and tenants within the context of the Landlord and Tenants (Shops, Hotels And Catering Establishments) Act Cap 301

Under Section 2 (1) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act “ a controlled tenancy is defined as a tenancy of (shop, hotel or catering establishment) :-

a. Which has not been reduced in to writing; on

b. Which has been reduced into writing and which :-

i. Is for a period not exceeding five years; or

ii. Contains provisions for termination otherwise than for breach of covenant within five years from the commencement thereof or

iii. Relates to premises of a classified under sub sections (2) of this section provided that no tenancy to which the government, the community or a local authority is a party whether as landlord or tenants shall be a controlled tenancy.

I have looked at the intended lease therein the same in writing. It is for a period of 5 years 6 months and the date of commencement was to be 1/12/2016.

This I therefore clear that even if the tenancy had taken off, it would not a controlled tenancy. I would therefore not be governed by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301.

The tenancy herein failed to take off because the defendant failed to fulfill certain conditions.

The landlord/tenant relationship was not created.

Further reasons I find that the Business Premises Rent Tribunal lacks jurisdiction to entertain any dispute between the parties herein.

It is therefore in the interest of justice that the proceedings in the business premises rent tribunal be stayed. I find merit in this application and I grant the orders sought. Namely

1. That the proceedings of the Tribunal in the Business Premises Rent Tribunal Cause No. 150 of 2016 be and are hereby stayed pending the hearing and determination of this suit.

2. That costs of this application do abide the outcome of the suit order accordingly.

L. KOMINGOI

JUDGE

6/4/2017

Ruling dated and delivered in open court on the 6th day of April 2017 in the presence of Ms. Maina for the respondent. Mr. Masine for sheyeye for the applicant and the court clerk Koitamet

L. KOMINGOI

JUDGE

6/4/2017

Ms. Maina will seek orders of stay pending formal application.

L. KOMINGOI

JUDGE

6/4/2017

Court

Stay granted for seven 7 days pending the formal application stay.

L. KOMINGOI

JUDGE

6/4/2017