



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. SUIT NO. 644 OF 2015

PLAYSTREET KINDERGARTEN LTD.....PLAINTIFF

VERSUS

ALL AFRICA CONFERENCE OF CHURCHES

REGISTERED TRUSTEES.....DEFENDANT

RULING

The Defendant seeks to have the order granted on 18th December 2015 reviewed on the basis that there is an error on the face of the record. That order restrained the Defendant from levying distress, evicting, developing, demolishing, alienating or interfering with the Plaintiff's occupation of L. R No. 1/305 Dennis Pritt Road ("the Suit Property") until the suit is heard and determined. The Plaintiff sought the injunctive orders when the Defendant threatened to levy distress for rent and issued a notice to the Plaintiff to vacate the Suit Property. The Defendant states that it only learnt of the existence of the injunctive orders on 22nd August 2016 and that the orders restrain the Defendant from selling its own property.

The ownership of the Suit Property is not in dispute. The Defendant contends that the injunctive orders were made on the strength of an undated lease that is not registered and that it ought not to have been admitted in evidence.

The Defendant is an international organisation with diplomatic status in Kenya and operates in 50 countries. The Defendant is in dire financial straits and passed a resolution to dispose of some of its assets such as the Suit Property. The Defendant has identified a purchaser for the Suit Property who is prepared to acquire it subject to the Plaintiff's lease. The Defendant cannot proceed with the sale owing to the injunctive order stopping it from alienating the Suit Property. The advocate currently representing the Defendant took over conduct of the matter after the application for injunction had been argued and granted. The Defendant maintains that it does not wish to evict the Plaintiff or interfere with its tenancy.

The application was opposed. The Plaintiff filed a replying affidavit urging that there is no ground for the court to review, vary, discharge or set aside the injunctive orders issued on 18th December 2015. The Plaintiff argues that since the Defendant has in the past acknowledged the existence of the lease it is estopped from denying the existence of the lease.

Parties filed written submissions. The undated lease which bears the stamp of the Collector of Stamp Duty of 13th February, 2014 runs until 31st December 2018.

The Plaintiff relied on the case of **Chon Jeuk Suk Kim and another V E.J. Austin & 2 others** (2013)

eKLR which dealt with the issue of the effect of non-registration of a lease where the formal lease had not been executed. It also relied on the case of **Bachelors Bakery Ltd V Westlands Securities Ltd** (1982) eKLR in which the court dealt with the issue of whether what had been created was a lease or tenancy agreement. The Learned Judge found that the tenant became a monthly tenant since the lease was not registered.

The Defendant relied on Section 18 of the Registration of Documents Act which provides that a document which must be registered will not be received as evidence in any transaction affecting the property that the document relates to except with the court's consent. Section 4 of the same Act requires that all documents conferring title or interest in immovable property should be registered. The Defendant relied on the case of **Garibi Ltd V Ogilvi East Africa Ltd** (2014) eKLR in which the court found that since the agreement was not registered it became void after the first year and the relationship between the parties became a periodic tenancy that could be terminated by a month's notice. The authorities relied on by both the Plaintiff and the Defendant deal with the issue of dating and registration of the lease.

The issue for determination is whether a tenant can restrict a landlord from disposing of its property. When the court granted the injunctive orders, it also included an order enjoining the Defendant not to alienate the Suit Property until the suit is heard and determined. The Defendant maintains that there is an error on the face of the record since the lease that formed the basis for the grant of the injunctive orders was not registered hence it is inadmissible in evidence and the court therefore erred by relying on it in granting the injunction.

The Defendant alleges that the Plaintiff has not been paying rent but it is unable to levy distress in light of the court order. The Defendant's counsel submitted that the proposed purchaser for the Suit Property is prepared to acquire the property subject to the Plaintiff's lease. The Plaintiff's director, Lucy Waithera Kariuki depones at paragraph 15 that it will not stay in the Suit Property a day longer past 31st December, 2018 when the lease expires.

The court has looked at order 45 Rule 1(1) of the Civil Procedure Rules and Sections 3A and 80 of the Civil Procedure Act pursuant to which this application is made. The grounds for review include the discovery of new and important matter or evidence which could not be produced at the time the order was made or mistake or error apparent on the case of the record or any other sufficient reason. The application is grounded on the error on the record since the lease was not registered. Clause 2 of the lease obligated the lessor to pay rents, rates, taxes and all other outgoings imposed on the premises other than those the lessee is liable to pay. The lessor is also enjoined to allow the lessee to enjoy the premises peacefully and without interruption if the lessee is paying the rent and performing its obligations under the lease. There is no obligation under the lease on the Defendant not to sell the Suit property.

Section 65 of the Land Act sets out some covenants implied on a landlord. These are couched in terms similar to the covenants in the lease here. Section 24 (a) of the Land Act provides that the registration of a person as a proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges belonging thereto.

The court finds that there was an error on the face of the record when the court issued the order restraining the Defendant from alienating the Suit Property yet the Plaintiff's grievance related to a notice of eviction and demand for rent arrears. The court finds that there is sufficient reason to vary the order issued on 18th December, 2015 and remove "alienating" to allow the Defendant to dispose of the Suit Property. The intended purchaser will acquire the Suit Property subject to the Plaintiff's lease which in any event will determine on 31st December, 2018. The court allows the application on these terms. The Defendant will have the costs of this application.

Dated and delivered at Nairobi this 28th day of June 2017.

K. BOR

JUDGE

In the presence of: -

Ms. Ronoh holding brief for Ms. Wageche for the Plaintiff

Mr. Gachuhi holding brief for Mr. Gachie for the Defendant

Mr. V. Owuor- Court Assistant