



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.396 OF 2017

REMTONE HOLDINGS COMPANY LIMITED.....PLAINTIFF

VERSUS

MASHUKUR ENTERPRISES LIMITED.....1ST DEFENDANT

NAKURU DISTRICT LANDS REGISTRAR.....2ND DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff having purchased a leasehold title which expired before transfer; process of renewal of lease having commenced; in the meantime, respondent acquiring a new lease to the suit property; the law being that the holder of the previous expired lease having first priority to its renewal; no explanation offered as to how respondent acquired a new lease and why previous holder was not allowed her pre-emptive right; prima facie case established by the applicant; application for injunction allowed)

1. This suit was commenced on 16 October 2017 by way of plaint over the land parcel Nakuru Municipality Block 4/127 which is land measuring approximately 0.3764 Ha, and which is developed with several rental units (hereinafter referred to as "the suit premises"). Together with the plaint, the plaintiff filed an application for injunction, seeking to restrain the 1st defendant from the suit premises, pending the hearing and determination of this case. The application is opposed by the 1st defendant/respondent. This being an application for injunction, I stand guided by the principles laid down in the case of *Giella vs Cassman Brown (1973) EA 358*, where it was held that to succeed in such an application, the applicant needs to demonstrate a prima facie case with a probability of success, demonstrate that she stands to suffer irreparable loss if the injunction is not granted, and where the court is in doubt, it will decide the application on a balance of convenience.

2. In order to assess whether or not an application has laid down a prima facie case, it is inevitable that a preliminary assessment of the applicant's case be made, and where the respondent has replied, that assessment must be made in light of the response by the respondent. The assessment of the case is only preliminary, aimed at making a decision on how the subject matter of the suit should be preserved, and is not a final decision, which must await a full hearing of the suit. After hearing the case, the court will then make a final finding of the case, which may very well differ from what was held at the hearing of the application for injunction.

3. What then is the respective cases of the parties?

The case of the applicant is found in the plaint and in the affidavits in support of the application. In brief, it is the case of the applicant that it purchased the suit property on 25 July 2002 from the previous registered owner, one Harmmeet Kaur, at a consideration of Kshs. 8,000,000/=. The purchase price was paid in full and the original Certificate of Lease released to the applicant, after which the applicant took possession of the suit premises. The applicant also continued paying the land rents and rates. On 11 October 2017, the 1st respondent sought to take possession of the suit premises, claiming that the same is now registered in its name. The applicant went to investigate at the Land's office and found that the 1st respondent was issued with a Certificate of Lease on 3 October 2017. The applicant has averred that it has never sold the suit property, and is of the view that the Certificate of Lease held by the 1st respondent, was fraudulently acquired. The applicant thus wants the 1st respondent restrained from the suit premises, pending the hearing and determination of this case.

4. On its part, the 1st respondent has replied to the application through the replying affidavit of one Mustafa Abdi Aman. He has averred that the 1st respondent is a company registered under the Companies Act, Cap 486, Laws of Kenya. He has contended that the 1st respondent applied for, and was allocated the suit property, and was thereafter issued with a Certificate of Lease on 3 October 2017. It then entered into tenancy agreements with various persons on 5 October 2017. He has stated that the 1st respondent is now the proprietor of the suit premises and has a constitutional right to deal with it.

5. The plaintiff filed a supplementary affidavit sworn by Hellena Cheserem, its director. She has deposed inter alia that the 1st respondent has

not shown how it got the land, as it has not exhibited any letter of allotment, or show that it applied to be allotted the land. She has further deposed that in the month of March 2017, she was approached by one Ibrahim Isaack who informed her that he had a cousin by the name of Ali Maalim Muktar, who wanted to lease the suit premises. She then leased the same out to him. He paid the rent, but later defaulted, and in the month of August, she wrote to him demanding for rent and followed up by levying distress for rent. In October 2017, she received a letter dated 10 October 2017, from Mashukur Enterprises Limited, the 1st respondent, claiming to have been in peaceful occupation of the premises "even before the Certificate of Lease was issued" and that is the first time she came to know of the 1st respondent. After the filing of the suit, she investigated the existence of the 1st respondent company, and was informed that it does not exist, though a company by name of Mashkur Enterprises Limited does exist. She also wrote to the National Land Commission over the lease owned by the 1st respondent. The National Land Commission wrote through a letter dated 17 November 2017, that the 1st respondent's lease appears to have been issued when the process of renewing the previous lease was still going on.

6. I allowed both Mr. L.M Karanja for the applicant, and Mr. Ochang Ajigo for the 1st respondent, to make submissions, which they duly did, and I have considered the same in my ruling.

7. I have seen from the documents presented before me that the applicant, vide a sale agreement dated 25 July 2002, purchased the suit property from its previous owner. It however appears that no actual transfer of the title was done to the plaintiff, although the applicant was handed over the documents of title, and took possession of the suit premises. The suit property is held under a leasehold title granted for a term of 99 years from 1 December 1912. It therefore means that the lease actually expired on 1 December 2011 and needed a renewal. The letter of the National Land Commission states that the lease to the 1st respondent was procured while there was a process going on to extend the lease to the previous owner, who has pre-emptive rights.

8. We are entering a phase in the history of our country when leases granted during the colonial period are coming to an end. It is therefore important that the law on renewal of such expired leases be laid out with clarity so as to avoid instances where unscrupulous persons take advantage of a lacuna or ambiguity in the law to deprive title to the persons correctly entitled to a renewal of such lease. The law is set out in Section 13 of the Land Act, 2012, which provides as follows :-

13 (1) Where any land reverts back to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenya citizen and that the land is not required by the national or the county government for public purposes.

(2) The Commission may make rules for the better carrying out the provisions of this section, and without prejudice to the generality of the foregoing, the rules may provide for the following.

(a) prescribing the procedures for applying for extension of leases before their expiry.

(b) prescribing the factors to be considered by the Commission in determining whether to extend the tenure of the lease or re-allocate the land to the lessee.

(c) the stand premium and or the annual rent to be paid by the lessee in consideration of extension of the lease or re-allocation of the land.

(d) other covenants and conditions to be observed by the lessee.

9. It is clear from a reading of Section 13 (1) above, that the previous holder of the lease has the first right of priority over its renewal. The National Land Commission is in fact required by law to offer to the immediate past holder of the lease, the renewal of it, so long as the person is a Kenyan citizen and so long as the land is not required for a public purpose. Under Section 13 (2) of the Land Act, the National Land Commission is required to make rules for the better carrying out of this provision of the law. I am aware that the National Land Commission, through Gazette Notice No. 5734, published on 9 June 2017, did gazette, the "*Guidelines for Extension and Renewal of Leases*". Among the rules, is the requirement that the Commission will notify the holder of the expiring leasehold title of his pre-emptive rights to apply for extension of the lease, and if there is no response, the Commission will publish the notice in two newspapers of wide circulation.

10. It is therefore not in doubt that the person first entitled to a renewal of a leasehold, that is expiring or is expired, is the previous holder of the leasehold title, and not other persons. In our instance, it is Harmeet Kaur, who however sold his interest to the plaintiff and, who had not yet become registered as proprietor by the time the lease expired, that held the pre-emptive right which is now vested in the plaintiff company. At least, that is my finding at this preliminary stage, subject to being convinced otherwise after a full hearing of the case.

11. I have no idea how the 1st respondent procured the leasehold title that it now purports to hold. The 1st respondent averred that it applied for the lease but no application letter was annexed. Neither was any allotment letter annexed. There is also doubt as to whether the 1st respondent actually exists, given the letter from the Registrar of Companies, indicating that they do not have a registered company in the name of the 1st respondent. The lease that the 1st respondent holds is also questionable as it purports to grant a lease to the 1st respondent from 1 January 1998 for a period of 99 years, yet at that time, the lease to Mr. Kaur had not yet expired. Neither have I been shown that the procedure outlined in Gazette Notice No. 5734 was followed before the 1st respondent obtained a leasehold title to the suit land. I therefore, at this stage of the proceedings, have several doubts as to the authenticity of the lease held by the 1st respondent. The 1st respondent will of course have a chance to demonstrate that its title is a good title at the hearing of the suit.

12. Given my preliminary findings as demonstrated above, I am of the view that the plaintiff has established a prima facie case with a probability of success. I am further of the considered view that pending the hearing and determination of this suit, it is the plaintiff who should be in possession of the suit property to the exclusion of the 1st respondent. I was made to understand that upon obtaining the impugned lease, the 1st respondent placed its own tenants in the suit premises. I have held that pending hearing of the suit, the plaintiff ought to be in possession, and this possession is total possession and control of the premises. It means that the applicant is at liberty to either retain

the tenants put in the suit property by the 1st respondent, or procure its own tenants, and also charge whatever rent it deems appropriate for the suit premises, or indeed, keep no tenants. In other words, the applicant is not bound to keep the tenants placed by the 1st respondent, nor bound to charge the rent that the 1st respondent had chosen to charge, and that takes effect immediately.

13. In essence I have allowed the application for injunction and I now make the following orders which should prevail until this suit is heard and determined.

(i) That the 1st respondent and/or its servants/agents or any person purporting to act under its direction, is hereby barred from accessing, entering, being upon, placing any tenants, or in any other way, interfere with the plaintiff's quiet possession and occupation of the land parcel Nakuru Municipality Block 4/127.

(ii) That for the avoidance of doubt, the person entitled to place tenants on the suit premises is the plaintiff and the plaintiff is not bound to keep the tenants placed in the suit premises by the 1st respondent, nor charge the rent charged by the 1st respondent, or indeed keep any tenants on the suit premises.

(iii) That the 1st respondent and/or its servants/agents, or any person purporting to act under its direction, is hereby restrained from, charging, selling, leasing, or in any other way enter into any dealings and/or transactions in respect of the land parcel Nakuru Municipality Block 4/127.

(iv) That the costs of this application shall be costs in the cause.

14. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27TH day of November 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Ms. Gitau for the plaintiff/applicant

Mr. Ochang Ajigo for the 1st defendant/respondent

Court Assistant: Carlton Toroitich