



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 133 OF 2015

IAN PAUL HUTCHISON

T/A BANHOF BA AND RESTAURANT MTWAPA.....PLAINTIFF

=VERSUS=

1. CHARLES CHISHENGA MAJANJA.....DEFENDANT

R U L I N G

Introduction:

1. What is before me is the Application by the Plaintiff dated 4th August, 2015. In the Application, the Plaintiff is seeking for the following orders:-

- (a) THAT a temporary injunction be issued restraining the Defendant, his agents, servants, employees, relatives, and/or assigns and any other person/s claiming under the Defendant from evicting the Plaintiff from the rented premises namely Bahnhof Bar & Restaurant Mtwapa situated on Plot No.742/III/MN till hearing and determination of the application herein and thereafter till the hearing and determination of the Plaintiff's suit filed herein.**
- (b) THAT the OCS Mtwapa police station to supervise and assist in the execution of the Court order herein.**
- (c) THAT this Honourable Court to make an order directing the Defendant, his agents, servants, employees, relatives and any other person/s claiming under him to compensate the Plaintiff for the goodwill of the Plaintiff's business situated on the above mentioned premises and all the expenses the Plaintiff incurred in developing and improving the business since the commencement of the lease at current market rates.**
- (d) THAT the costs of this application be provided for.**

The Plaintiff's/Applicant's case:

2. The Plaintiff has stated in his affidavit that he has a subsisting lease with the Defendant; that by a letter dated 7th July, 2015, the Defendant threatened to evict him from the suit premises and that he has no arrears of rent.

3. According to the Plaintiff, there have been ongoing discussion between himself and the Defendant; that in the event the business is sold, he is entitled to the payment of good will and all improvements amounting to Kshs.5,000,000 and that the Defendant is bent on evicting him so that he can benefit from his good will and improvements.

The Defendant's case:

4. In his Replying Affidavit, the Defendant deponed that the Lease dated 12th May, 2008, the subject of this case, expired way back on 12th August, 2013; that no renewal ever took place and that the Plaintiff became a tenant at will.

5. According to the Respondent, he complied with the expired Lease by giving the Plaintiff a notice in writing of one month.

6. It is the Respondent's deposition that due to his ill health, he has decided to dispose off the suit property to enable him educate his last born child; that the Lessee breached the terms of the Lease by engaging in illegal and unafrikan acts and that the Plaintiff has accumulated a sum of over Kshs.1,000,000 being a debt with KPLC.

7. The Respondent finally deponed that the Plaintiff is abusing the process of the court because he had filed another suit being Kilifi PMCCC No. 251 of 2013; that he has no intention of renewing the lease and that the name BANHOF BAR AND RESTAURANT is an entity registered in his.

Further Affidavit

8. The Plaintiff filed a Further Affidavit in which he deponed that the Lease of 12th May, 2008 has not expired because it stood renewed for a further 5 years 3 months subject to payment of rent; that the Defendant has been accepting rent of Kshs.30,000 per month and that the said lease does not have a provision for termination.

9. The Plaintiff deponed that the cause of action in Kilifi PMCC No.251 of 2013 is different; that it is only this court that has jurisdiction to handle the current dispute and that he is entitled to the payment of good will of Kshs.5,000,000.

Submissions:

10. The Plaintiff's advocate submitted that there is a subsisting lease between the Plaintiff and the Defendant dated 12th May, 2008; that the Lease was renewed for a further term of 5 years 3 months in September 2013 and that the Plaintiff continued to pay rent at Kshs.30,000 per month.

11. Counsel submitted that the Plaintiff is up to date with the payment of rent and that there is no provision in the Lease requiring the Defendant to give one month notice in writing.

12. The Defendant's advocate did not file his submissions.

Analysis and findings:-

13. The Plaintiff is seeking for injunctive orders restraining the Defendant from evicting him from the suit premises. The Plaintiff is also seeking for an order directing the Defendant to compensate him for the "good will" of his business situated on the suit property.

14. On the other hand, the Defendant wants the Plaintiff to leave his premises because the Lease dated 12th May, 2008 lapsed on 12th August, 2013.

15. It is not in dispute that the Plaintiff entered into a Lease agreement dated 12th May, 2008 with the

Defendant.

16. According to the terms of the Lease, the Plaintiff leased the premises known as BANHOF BAR & RESTAURANT in the building standing on plot no.742/III/MN (the suit premises) as a going concern for “a term of five (5) years and three (3) months starting the first day of June two thousand and eight and thereafter shall be renewed for successive terms of five (5) years and three (3) months (subject nevertheless as provided under) at the following rents.”

17. According to the Lease, the Plaintiff was to pay Kshs.20,000 per month in respect of the first year and Kshs.25,000 per month in respect of the 2nd, 3rd, 4th and 5th years.

18. In respect of the second term of 5 years and 3 months, the Lease provided that the Plaintiff was to pay Kshs.30,000.

19. The lease also provided for the payment of rent of Kshs.35,000 per month in respect of the third term of 5 years and 3 months and thereafter an increase by Kshs.5,000 per month in respect of subsequent terms.

20. It is true that the first term of the Lease ended in September 2013.

21. The Defendant has not denied that he continued receiving rent of Kshs.30,000 for the second term of 5 years and 3 months, which is to run until the year 2018.

22. The plain reading of the Lease shows that the Lease was to be renewed automatically for 5 years and 3 months subject to the payment of the rent.

23. Having continued to pay the rent of Kshs.35,000 per month, being the rent for the second term, the Plaintiff has shown, prima facie, that he should continue occupying the suit premises until the year 2018.

24. The Lease did not provide for the termination of the Lease, except where rent remains unpaid for three months or where the premises or any part thereof is destroyed, damaged by fire, civil commotion or an accident not attributed to the negligence of the Lessee or his agents.

25. In the circumstances, and considering the terms of the Lease, I find that the Plaintiff has established a prima facie case with chances of success.

26. Indeed, unless the injunctive order is issued, the Plaintiff is likely to suffer irreparable damages considering that he has invested in the suit premises on the understanding that the second term of the lease is to run until May, 2018.

27. Consequently, I allow the Plaintiff's Application dated 4th August , 2015 in terms of prayer numbers 2 and 5.

28. The issue of compensating the Plaintiff for the good will of the business can only be determined after hearing of the main suit.

Dated, signed and delivered in Malindi this 16th day of **September**, 2016.

O. A. Angote

Judge