



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1333 OF 2013

KANUBHAI SOMABHAI PATEL.....1ST PLAINTIFF

HANSA KANUBHAI SOMABHAI PATEL.....2ND PLAINTIFF

VERSUS

RAPID COMMUNICATIONS LIMITED DEFENDANT

RULING

Introduction

This ruling is on a Notice of Motion dated 15th December 2014 filed by the Plaintiffs and a Preliminary Objection raised by the Defendant on the said Notice of Motion dated 5th February 2015. This Court directed that the said Notice of Motion and Preliminary Objection be heard and determined together, and parties were directed to file and serve their submissions on the same.

The Application

The Plaintiffs in their application are seeking orders of a mandatory injunction compelling the Defendant to hand over vacant possession of Land Reference No. 1870/VI/86 Cedar Road, off Lantana Road, Westlands, Nairobi (hereinafter referred to as "the suit property") to the Plaintiffs, and in default the Defendant be evicted therefrom. Further, that there be liberty to apply.

The application is based on the grounds stated in the application and supporting affidavit sworn on by the 1st Plaintiff. These are that the Plaintiffs are the registered owners of the suit property, and that pursuant to a lease agreement dated 15th January 2013, the Plaintiffs leased the suit property to the Defendant for a period of one (1) year with effect from 1st February 2013, which lease Agreement expired on 31st January, 2014. Further, that by a ruling delivered in **ELC Misc. Application No. 105 of 2013 - Rapid Communications Limited vs Kanubhai Somabhai Patel** on 1st August 2014, the Court restrained the Plaintiffs from evicting the Defendant from the suit property, which injunction was conditional upon the Defendant paying the Plaintiff's the monthly rent due on the 1st day of the month with effect from 1st September 2014, and that in the event the Defendant failed to make the payment, the injunction order was to lapse.

The Plaintiffs claim that the Defendant has failed to make timely payments of the rent for November and December 2014 as ordered by the Court. Further, despite the Court order lapsing as a result of this failure to make payments in the manner ordered by the Court, the Defendant has refused to hand over vacant possession of the property to the Plaintiff. It is contended that being the case, the Plaintiffs are now

entitled to vacant possession of the suit property in view of the fact that the full term granted to the Defendant under the lease Agreement has already expired and the injunctions issued in favour of the Defendant have lapsed.

The Plaintiffs further stated that they have made it clear to the Defendant that they have no interest in retaining the tenancy and/or accepting any further rent, and that they stand the risk of suffering losses on account of lapse of the construction permits and other approvals issued by the County Government of Nairobi. Further, that the continued use of the suit property by the Defendant as an office is contrary to law as it is contrary to the terms of the grant to the Plaintiffs.

The Plaintiffs attached a copy of the said lease agreement, the termination notice given to the Defendant; the Defendant's application and ruling thereon delivered in **ELC Misc. Application No. 105 of 2013 - Rapid Communications Limited vs Kanubhai Somabhai Patel** and of cheque deposit slips by the Defendant being payment of rent.

The Preliminary Objection

The Defendant's Preliminary Objection dated 5th February 2015 is on the grounds that the Plaintiffs should have obtained leave of the Court to withdraw the Notice of Motion dated 29/5/2014 to which the Defendant had replied to vide the Replying Affidavit sworn on 23/7/2014. Further, that the suit herein was filed in this Court on 5/11/2013 after ELC Misc. Civil Case No. 105 of 2013 had been filed under Certificate of Urgency on 1/11/2013 and served on the Plaintiffs on 4/11/2013.

The Defendant in addition contends that this Court did hold in its ruling delivered on 28/5/2014 in ELC Misc. Civil Case No. 105 of 2013 that "the tenancy of the suit premises falls within the definition of the controlled tenancy as it was for a term of one year". That in view of the said Ruling of 28/5/2014, the Plaintiff can only terminate a controlled tenancy pursuant to the provisions of the Landlords and Tenants (Shops, Hotels and Catering Establishment) Act.

The Defendant also also opposed the Plaintiffs' application in a replying affidavit sworn on 13th February 2015 by its Chief Executive Officer, Anwar Hussein. The deponent reiterated that the Defendant's case in **ELC Misc. Civil Case No. 105 of 2013 – Rapid Communications Limited vs Kanubhai S. Patel** which deals with identical matters as in this suit is still pending, and that this Court ought not to proceed with this suit but should stay the same. Further, that this Court has no jurisdiction to entertain this suit, and the Plaintiffs can only invoke the relevant provisions of the Landlord and Tenants (Shop, Hotels and Catering Establishments) Act in its attempt to determine the existing tenancy between the parties.

The deponent averred that it was not true that the Plaintiffs were not aware of the existence of ELC Misc. Civil Case No. 105 of 2013 by the time they were filing this suit on 5/11/2013, as their advocates, at the time, M/s Mohamed Madhani & Company, Advocates had been served on 4/11/2013 with the Summons dated 31/10/2013 under a certificate of Urgency of even date. The deponent annexed a copy of the Certificate of Urgency and the Summons of 31/10/2013.

The deponent further averred that the Plaintiffs are not being truthful by stating that the Defendant herein has not paid the rent of November and December 2014, and he annexed a copy of the Defendant's bank statement showing that cheques Nos. 001215 and 001421 for Kshs.400,000/= each, deposited in Kanubhai S. Patel account were cleared on 7/11/2014 and 9/12/2014 respectively. Further, that the Defendant has paid the rent for January and February, 2015 even though the Plaintiffs have categorically stated that it does not intend to accept any further amounts as rent. The deponent in this respect annexed copies of the deposit slips for the rentals for the two months. It was also alleged that the Plaintiffs are using inappropriate County Government documents to unlawfully determine the existence tenancy, and that they have not come to Court with clean hands as they have failed to exhibit approved plans for construction on the suit property.

The Submissions

The Plaintiff filed submissions dated 25th February 2015 on both the Defendant's Preliminary Objection and their Notice of Motion. The Defendant's counsel filed submissions dated 23rd February 2015 on the Preliminary Objection and submissions dated 2nd March 2015 on the Plaintiffs' Notice of Motion.

On the Preliminary Objection, the Defendant argued that since this matter had not been consolidated with ELC Misc. Civil Case No. 105 of 2013, section 6 of the Civil Procedure Act applies to prevent the Court from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, same subject matter and same relief. Further, that Order 40 Rule 1 and 2 of the Civil Procedure Rules invoked by the Plaintiffs in their application cannot confer upon this Court jurisdiction to confer a mandatory injunction and cannot oust the Defendant's controlled tenancy from being under the purview of the Landlords and Tenants (Shops, Hotels and Catering Establishments) Act and the attendant procedures to terminate a tenancy.

It was also submitted for the Defendant that the reason given by the Plaintiffs that they require vacant possession of the suit premises to enable it develop the same is not backed by any documents, and is not one of the grounds which a landlord can use to terminate a tenancy pursuant to section 7 of the Landlords and Tenants (Shops, Hotels and Catering Establishments) Act. The Defendant cited the decisions in **Speaker of the National Assembly vs Hon James Njenga Karume, Civil Appeal No. 92 of 1992** and **International Centre for Policy and Conflict vs Attorney General & Others, Misc. Civil Cause No. 226 of 2013** in support of his arguments.

The Plaintiffs on their part submitted that the Court granted a conditional injunction on 1st August 2014, on the condition that the Defendant pays the monthly rent on the 1st day of the month, failing which the orders would lapse. Further, that the Defendant had admitted in its affidavit that it paid the monthly rent for November and December 2014 on 7th November 2014 and 9th December 2014 respectively which were not the first days of the month, and the orders therefore lapsed. The Plaintiffs cited the decisions in **African Airlines International Limited vs Eastern and Southern Development Bank (2013) eKLR** and **Dimken Kenya Limited & 4 Others vs Barclays Bank of Another (2007) e KLR** in this respect.

It was also submitted by the Plaintiffs that the tenancy agreement between the parties lapsed on 1st February 2014, and that since all the orders that sustained the Defendant's possession of the suit property have lapsed, it has no right to the said property. Therefore that the Defendant is trespassing on the suit property, and its willingness to pay for the said property does not amount to a right to occupy the same. The Plaintiff relied on the decisions in **Jaj Super Power Cash and Carry Ltd vs Nairobi City Council & 20 Others, Civil Appeal No. 111 of 2012** and **Ahmed Ibrahim Suleiman & Another vs Noor Khamis Surur, (2013) eKLR** in this regard.

It was submitted with regard to the Defendant's Preliminary Objection that Order 25 of the Civil Procedure Rules allowed the Plaintiff to withdraw its application or suit without leave of the Court by filing in Court and serving on the other party a notice of withdrawal. Further, that the only time leave is required is under Order 25 Rule 2(2) of the Civil Procedure Rules when a suit has been set down for hearing, and that their application dated 29th May 2014 did not have a hearing date when the Plaintiffs filed a notice withdrawing it on 18th December 2014.

Further, that the existence of ELC Misc Case No. 105 of 2013 does not bar the Court from determining the issues herein as the two suits are on the tenancy between the parties herein, and the possibility of the Court rendering conflicting decisions is remote. Lastly, the Plaintiffs submitted that the preliminary objection raised by the Defendant did not fall within the requirements of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd**, and ought to be rejected.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. There are two issues for determination, the first is whether the Defendant's preliminary objection raises pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. If not, the Court will then proceed to address the second issue as to whether the Plaintiffs have met the threshold for the grant of the

mandatory injunction sought.

The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the present objection, the ground raised by the Defendant that no leave of the court had been sought to withdraw the Plaintiffs' Notice of Motion dated 29/5/2014 requires certain facts to be ascertained, and cannot therefore be raised as a preliminary objection. The only ground that is raised by the Defendant that is capable of giving rise to a valid pure point of law is the prior filing of ELC Misc. Case No. 105 of 2013 by the Defendant which is not contested.

The law as cited by the Defendant requires that where a suit is filed involving the same issues and parties as in a previous pending suit, then the later suit should be stayed. This requirement is provided for in section 6 of the Civil Procedure Act. It is not in dispute that the parties in the present suit and those in ELC Misc. Case No. 105 of 2013 are the same. The issue in the two suits is the tenancy and occupation of the same premises. Therefore this suit ideally ought to be stayed.

However, this Court notes in this regard that there is no suit that is still pending and/or subsisting in ELC Misc. Case No. 105 of 2013, as the said suit was commenced by way of a summons dated 31st October 2013 pursuant to section 12(1)(a) and 12(4) of the Landlords and Tenants (Shops, Hotels and Catering Establishments) Act, and which was disposed of by the rulings delivered therein by this Court on 28th May 2014 and 1st August 2014. The Defendant's Preliminary Objection therefore fails for this reason.

Coming to the second issue before the Court, the principles for the grant of mandatory injunctions were set out by the Court of Appeal in **Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109**, wherein it was held that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

As to what constitutes a *prima facie* case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** stated as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Applying these principles to the Plaintiff's Notice of Motion, while the Court notes that it is not in dispute that the Plaintiffs are the owners of the suit property and that their lease agreement with the Defendant has expired, it is also the case that this Court has also found in the ruling delivered in ELC Misc Case No. 105 of 2013 on 28th May 2014 that the tenancy of the suit premises therefore fall within the definition of a controlled tenancy as it was for a term of one year, and is subject to the provisions of the Landlords and Tenants (Shops, Hotels and Catering Establishments) Act.

The Court however in the said ruling held that that even though the Defendant herein had established a

prima facie case, it was not deserving of the injunction sought as it has not brought any evidence to show that it has been meeting its part of the bargain in terms of payment of rent. This ruling was varied on 1st August 2014 whereby the Plaintiffs herein was restrained for a period of six months only from evicting the Defendant from the suit premises, and only on condition that the Defendant pays the monthly rent due on the 1st day of the month with effect from 1st September 2014. Upon default by the Applicant the injunction orders would lapse.

The Defendant claim that they have paid rent in accordance with the Court orders, while the Plaintiffs allege that the injunction orders lapsed as the said rent was paid later than the 1st day of the month as ordered by the Court. This indeed is the position as shown by the evidence of the payments given by the Defendant as well as the Defendant's own pleadings. In addition the injunction orders have also lapsed by effluxion of time as the period of six months which was the duration of the said orders has expired.

It was the expectation of this Court that the parties herein would use that period of six months to prosecute their respective claims in the Business Premises Tribunal, which was the appropriate fora, this Court having found that the tenancy between the Plaintiffs and Defendant was a controlled tenancy.

However, since no evidence of such action having been undertaken by the parties was provided, this Court is minded and has jurisdiction to bring the dispute herein to an expeditious end, pursuant to the provisions of section 1A, 1B and 3A of the Civil Procedure Act, and has in this regard considered the requirements as regards notice set out in section 4 of the Landlords and Tenants (Shops, Hotels and Catering Establishments) Act which applies to the tenancy between the parties.

It is accordingly hereby ordered as follows:

1. The Defendant herein shall hand over vacant possession of Land Reference No. 1870/VI/86 Cedar Road, off Lantana Road, Westlands, Nairobi to the Plaintiff at the expiry of 3 months from the date of this ruling.
2. The Defendant shall during the said three months promptly pay the monthly rent due on the 1st day of each month with effect from 1st May 2015.
3. Upon default of either Orders 1 or 2 hereinabove, the Plaintiff shall be at liberty to evict the Defendant from Land Reference No. 1870/VI/86 Cedar Road, off Lantana Road, Westlands, Nairobi.
4. Parties shall be at liberty to apply.
5. Each party shall bear their own costs of the Plaintiff's Notice of Motion dated 15th December 2014 and the Defendant's Preliminary Objection dated 5th February 2015.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____21st____ day of ____April____, 2015.

P. NYAMWEYA

JUDGE