



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 1078 OF 2013

GURJEET SINGH BANSAL.PLAINTIFF

VERSUS

COASTAL KENYA ENTERPRISES..... DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 29th October 2013 in which the Plaintiff/Applicant seeks for the following orders:

1. Spent.
2. The Defendant's Statement of Defence dated 26th September 2013 be dismissed or struck out.
3. Judgment be entered as prayed in the Plaint dated 10th September 2013.
4. The Defendant to meet the costs of this Application.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Gurjeet Singh Bansal, sworn on 29th October 2013 in which he averred that he is the registered owner of all that parcel of land known as L.R. No. 12458/10 in Industrial Area, Nairobi (hereinafter referred to as the "suit property"). He further averred that except for a stone perimeter wall all around the suit property, he has never developed it in terms of constructing buildings or any structures thereon. He further averred that sometimes in 1993 he was approached by the late Satti Bhogal who was a director of the Defendant with a request that he leases the suit property to the Defendant for use in storage or and servicing of its roads construction machinery and equipment. He stated that he acceded to that request and agreed to lease the suit property to the Defendant for Kshs. 110,000/- per month which was revised up to Kshs. 220,000/- in the year 2010. He confirmed that since 1993, no written lease agreement was ever entered into or executed between himself and the Defendant but that there has never been any problem between them. He further averred that in his opinion, the Defendant has always been a month to month tenant on the suit property and that such a tenancy can be terminated by giving the Defendant a one month notice. He further averred that on 22nd July 2013, he sold the suit property to Neg Investments Limited at the price of Kshs. 100 million. He confirmed that they entered into a sale agreement and that he has received the deposit of Kshs. 10 million. He confirmed that he was required to hand over the suit property to the said company with vacant possession. He further averred that in order to achieve that, he sent the Defendant a written notice through his lawyers requiring the Defendant to vacate the property

and hand over possession to him by 30th September 2013. He then stated that his lawyers were subsequently served with court papers in respect of **BPRT Case No. 468 of 2013** and **CMCC Misc. Application No. 706 of 2013** which led him to file this suit. He averred that the Defendant is not a controlled tenant and therefore neither the BPRT nor the Chief Magistrate's court have jurisdiction to hear this dispute. He further averred that the Defendant's statement of defence does not disclose any reasonable defence, is frivolous, vexatious and is calculated to delay the fair trial and quick determination of this suit, is an abuse of the court process and is merely intended to frustrate his right to vacant possession of the suit property. He further said that unless this matter is concluded urgently, he would not be able to hand over vacant possession of the suit property to the buyer in terms of the sale agreement leading to the buyer rescinding the same.

The Application is contested. The Defendant filed the Replying Affidavit of Swaraj Singh Bhogal, a director thereof sworn on 15th November 2013 in which he averred that the glaring omission in the Plaintiff's Application is that the Defendant lawfully obtained injunctive orders against the Plaintiff's threat of unlawful eviction from the suit property on 25th July 2013 before Hon. Andayi SPM in **Misc. Application No. 706 of 2013** which orders were subsequently extended by Hon. A. Lorot on 30th October 2013. He further averred that the said Application was filed after the Defendant filed a complaint/reference being **BPRT Case No. 468 of 2013** but the Tribunal was not sitting. He further averred that there are triable issues raised in their defence which cannot be ventilated at this stage of the proceedings. He further averred that there is no clear and unequivocal admission on their part to warrant judgment at this stage of the proceedings. He further averred that the fact that there is no written tenancy agreement between the parties does not imply that the Defendant is a month to month tenant. He also averred that the Plaintiff did not raise the issue of the structures on the suit property during the many years they remained thereon and wondered why they were an issue now. He further averred that the Defendant was engaged in the business of building and civil engineering contractors and was a protected tenant. He further averred that he was going to raise the issue of this court's jurisdiction asserting that this suit ought to be heard and determined by the Business Premises and Rent Tribunal. He asserted further that in view of the above, it was doubtful whether this matter can be dealt with through summary judgment but instead has to go to full trial.

In response thereto, the Plaintiff filed his Supplementary Affidavit sworn on 18th December 2013 in which he averred that terms and conditions for the Defendant's occupation of the suit property were solely within his knowledge and the knowledge of the late Satti Bhogal and that the current directors of the Defendant did not know what those terms were. He further denied that he was ever furnished with any drawings of structures for the suit property. He further averred that the Director of City Planning disowned the drawings and the purported approval letter. He further contended that the only issue this court has to consider is the user of the suit property by the Defendant. He contended that the Defendant has put the suit property into illegal use.

The Defendant filed a Further Affidavit sworn on 21st January 2014 by Swaraj Singh Bhogal in which he stated that both his brother and he were privy to the discussions between the Plaintiff and the late Satti Bhogal on the terms and conditions of the lease. He further asserted that summary judgment orders sought by the Defendant without the benefit of a full trial are totally unwarranted at this stage of the proceedings.

Both the Plaintiff and the Defendant filed their written submissions which have been read and taken into account in this ruling.

The issue to be considered by this court is whether this court should strike out the defence and enter judgment against the Defendant as prayed by the Plaintiff. I have no doubt that this court has power at any stage of the proceedings, to strike out a pleading, including a plaint or defence. However, in what circumstances can the court properly exercise such power? In the case of **Sunday Principal Newspaper Limited [1961] 2 ALL E.R. 758**, the principles for striking out were expressed thus,

***“It is established that the drastic remedy of striking out a pleading or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case.*”**

Indeed it has been conceded before us that the rule is applicable only in plain and obvious cases....”

Further to this, the remedy of striking out a pleading is rarely resorted to or granted. It is a harsh and drastic one. It is only granted in cases where it is clear that the pleadings objected to really disclose no arguable case. It can only be granted where the case is plain, obvious, weak and one that cannot be redeemed by amendment. Madan, J.A in **D.T. Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR** stressed as follows,

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by way of cross-examination in the ordinary way (Seller LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

After perusing the pleadings in this suit, I note that the Plaintiff seeks vacant possession of the suit property and as such seeks to have the Defendant evicted therefrom. However, the Defendant has raised a defence that it is a controlled tenant within the meaning of the Landlord and Tenant (Shops, hotels and catering establishments) Act and cannot therefore be evicted as the Plaintiff seeks. Whether or not there exists a controlled tenancy with respect to the suit property is a matter which cannot be determined at this juncture as the same requires to be subjected to tendering of evidence within the context of a full trial. This is not an issue that can be determined at this stage of the proceedings. To that extent therefore, I find that the defence filed by the Defendant raises triable issues that ought to be ventilated at a full trial. Accordingly, I disagree with the Plaintiff that the defence ought to be struck out.

Accordingly, this Application is dismissed. Costs shall be in the cause.

DELIVERED AND SIGNED AT NAIROBI THIS 30TH

DAY OF MAY 2014

MARY M. GITUMBI

JUDGE