



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
ENVIRONMENT AND LAND COURT
LAND CASE NO. 228 OF 2013

WHITRIS COMPANY LIMITED.....PLAINTIFF
=VERSUS=
PAPILO LIMITED.....DEFENDANT

R U L I N G

Introduction:

1. There are two Applications both filed by Plaintiff before me. The first Application is dated 9th December 2013 seeking for an order of injunction restraining the Defendant from evicting the Applicant from the suit premises pending the hearing of the suit.
2. The Second Application is dated 21st January 2014 seeking for the orders of stay of proceedings in Malindi CMCC No. 408 of 2013 pending the hearing and determination of the suit.

Application dated 21st January, 2014.

3. The Application dated 21st January, 2014 seeking for the stay of the proceedings in the lower court is premised on the grounds that the Plaintiff has filed this suit for injunctive orders as a sub-tenant; that there is a pending suit in the lower court which was filed by the Defendant as the landlord and that for avoidance of issuance of conflicting orders by the two courts, the proceedings in the lower court should be stayed forthwith.
4. According to the Plaintiff, it has not been named as a party in the lower court although the parties are litigating over the same subject matter; that the lower court has no jurisdiction to grant the orders prayed for by the Plaintiff in this court and that the Application has been filed in the interest of equity and justice.

The Application dated 9th December 2013.

5. The Application dated 9th December 2013 is seeking for the following orders:
 - a. THAT the Defendant/Respondent by itself, its agents, employees and or servants be restrained from evicting the applicant unlawfully, disconnecting electricity and or water, closing the main

- gates or any other points of egress and ingress, evicting the applicant and or interfering in any way whatsoever with the smooth running of the applicant's business pending the hearing and determination of this case.
- b. That the applicant be allowed to deposit the rent with the court pending the hearing and determination of this case.
 - c. The costs of this application be provided for.
6. According to the Supporting Affidavit of the Plaintiff's director, the Plaintiff is engaged in the business running a bar and restaurant on the suit property since January 2013. It is the Plaintiff's director's deposition that it was orally agreed between the Plaintiff and the Defendant that the Plaintiff will lease the premises for a term of five years from the time the Applicant took possession in January 2013.
 7. According to the Plaintiff's director, the business premise was previously engaged by Dominos Investments Kenya Limited who proceeded and sold the business to the Plaintiff for Euros 8,000.
 8. Since the beginning of the business, it was deponed, it was agreed that the Defendant's guests would take daily meals at the Plaintiff's restaurant without paying but instead their bills were to be offset by way of deduction from the monthly rent which the Defendant was entitled to be paid by the Plaintiff being Euros 600 per month; that on 22nd November 2013, the Defendant proceeded to close the premises and insisted on the rent being paid. The Defendant declined to receive two cheques for Kshs. 314,460/= from the Plaintiff.
 9. The Plaintiff's director finally deponed that the Landlord has never approached him to sign the Tenancy agreement and that the notice of two days that he was issued with by the Defendant is illegal and against the provisions of Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.
 10. The Plaintiff finally deponed that it is a controlled tenant under the Landlord and Tenant (Shops, Hotel and Establishment) Act.

The Defendant's case:

11. The Defendant's director filed a Replying Affidavit and deponed that the Defendants has never had any oral agreement with the Plaintiff as alleged; that it was an express term of the lease between the Defendant and Dominos Investments Limited that the Lessee could not sub let or part with ownership of the premises unless with the consent of the Defendant and that the said Dominos Investment has never sought from the Defendant the said consent.
12. According to the Defendant, the lower court in CMCC No. 408 of 2013 has already issued orders against Dominos Investment Limited for the closure of the Restaurant and that the Plaintiff does not have *locus standi* to commence this suit against the Defendant in the absence of any lease agreement.

Analysis and findings:

13. It is not in dispute that on 1st May 2012, the Defendant entered into a lease agreement with Dominos Kenya Investments Limited for a term of six years. The lease was in respect of the business known as Mariposa Restaurant situate on land portion number 12843, Malindi. The rent payable by the lessee was Kshs.60,000/= per month.
14. Clause 10 of the lease agreement provided that the lessee shall not transfer, sublet or part with the possession of the premises or any part thereof without prior consent in writing from the lessor whose consent will not be unreasonably withheld.
15. The said lease agreement between the Defendant herein and Dominos Kenya Investments Limited removed the suit premises from the purview of the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act because the lease agreement was for a period exceeding five years (See Section 2 of the Act).
16. The Defendant herein has sued Dominos Kenya Investment Limited in Malindi CMCC No. 408 of 2013 in which it is claiming that the said Dominos Kenya Investments Limited, the lessee has defaulted in rent payment for over seven months. The Landlord, who is the Defendant herein is

- claiming in the lower court for rent arrears from the lessee of Kshs.446,000/= as at 15th November 2013 and for vacant possession.
17. On the other hand, the Plaintiff herein is claiming that Dominos, the lessee, sold the business to the it for Euros 8000 on or about January 2013, a few months after the Defendant entered into a lease agreement with Dominos.
 18. Although the Plaintiff, who is alleging to be a sub-tenant, has claimed that the Defendant, through Dominos Investment Kenya Limited, wrote a letter to it demanding Kshs.400,000/= from it, the letter marked as exhibit IT3 is actually by Dominos Investments and not the Defendant. Indeed, the said letter has made reference to the demand letter which had been received from the Defendant herein (the landlord) and addressed to Dominos Investments for the payment of rent amounting to Kshs.400,000/=.
 19. It would appear that even after receiving Euros 8,000 from the “Sub-tenant”, Dominos Investments Limited was demanding the same monthly rent that it was required to pay to the Landlord from the Plaintiff – the sub-tenant. However, and as I have already stated, the Defendant herein, as the landlord, never demanded in writing for the rent arrears from the Plaintiff.
 20. According to the Plaintiff's director, at the beginning of the business, it was an understanding between the Defendant and the Plaintiff that the Defendant's director and guests would be taking meals at the Plaintiff's restaurant without paying cash but instead their bills were to offset the monthly rent which was Euros 600 per month.
 21. The Plaintiff has annexed on its affidavit the invoice addressed to the Defendant amounting to Kshs. 702,685 being the value of the meals that were consumed by the Defendant's director and guests between January 2013 and October 2013.
 22. The copies of the Bills for the said meals annexed on the Plaintiff's affidavit have not been signed by the Defendant's director. There is no evidence of any nature before me that indeed an agreement existed between the Plaintiff and the Defendant, either expressly or by implication that the meals taken by the Defendant's director and guests were meant to off-set the monthly rent, or that indeed the meals which were taken by the Defendant’s director and his guests were never paid for.
 23. Although the Plaintiff claims that the Defendant has acknowledged the Plaintiff's status as a sub-tenant, and that in the absence of a written agreement between them the tenancy is controlled pursuant to the provisions of the Act, there is no evidence, either expressly or impliedly that that is the position. All the defendant is saying in its affidavits is that the purported sub tenancy is illegal for want of consent in writing.
 24. The Lease agreement between the Defendant and Dominos Investment was clear that the Defendant had to give a written consent before Dominos Investment could sub-let the suit premises. The Plaintiff has denied ever giving such a consent. There is also no evidence that the Defendant waived its right to give the consent for the property to be sub-let to the Plaintiff by receiving the monthly rent from the Plaintiff.
 25. This court cannot therefore come to the aid of the Plaintiff in a case where the Plaintiff’s occupation of the suit premises, *prima facie*, is illegal. As was held in the case of **Scott Vs Brown, Dopering, MCNAB & co (3) (1892) 2 QB 724**, no court should enforce an illegal contract or allow itself to be an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to its notice.
 26. Consequently, I find, *prima facie*, that the Plaintiff has not shown that a tenancy relationship, whether written or oral, between it and the Defendant exists.
 27. If the Plaintiff has any claim as against the Defendant and Dominos Investments Limited, it should raise those issues in Malindi CMCC No. 408 of 2013. This court cannot stay that suit because the Plaintiff in that suit is seeking to enforce the lease agreement that it entered into with Dominos Investments.
 28. Having found and held that the Plaintiff has not established a *prima facie* case with chances of success, I dismiss the Plaintiff's Applications dated 9th December, 2013 and 21st January 2014 with costs.

Dated and delivered in Malindi this 8th day of May, 2014.

O. A. Angote

Judge