



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 53 OF 2014

ANWAR MOHAMED BAYUSUF LIMITED PLAINTIFF

- V E R S U S -

NEW OCEAN TRANSPORT LIMITED 1ST DEFENDANT

LESK INVESTMENTS LIMITED 2ND DEFENDANT

RULING

Introduction

[1] The applicant has filed this motion dated 1th March, 2014 firstly praying for an ex parte temporary injunction against the defendants from impeding or preventing the plaintiffs from accessing and entering Plot Number 194/VI/Mainland North. He has applied that upon hearing the application interpartes that this court grants an order for eviction against the defendants jointly and severally by themselves, their agents, servants or otherwise, to quit and vacate with all their belongings and cease trespassing and hand over vacant possession of Plot Number 194/VI/Mainland North. The grounds upon which the application is sought are that the plaintiff is the registered proprietor entitled to possession of the suit land.

[2] The defendants opposed this application. The main thrust of their defence is that there was an agreement of a commercial lease of under 5 years 3 months. That tenancy expired. A new lease of 2 years was granted. The tenancy became protected and fell under the purview and protection of the landlord and tenant (Shops, Hotels and Catering Establishments) Act Cap. 301. The applicant stated that on 1st August, 2007 he received a notice of termination of tenancy. He said the same was defended. He annexed copies of the reference to the tribunal. He argued that in 2008 the first defendant herein in the High Court Mombasa in Civil Appeal No. 174 of 2008 a stay of execution order was issued pending the hearing and determination of the appeal. That stay still prevents any action on the suit premises some 6 years after.

Background

[3] New Ocean Transport Company Ltd the 2nd defendant herein became a tenant in the suit premises through a 5 year 3 month lease which subsequently expired. Thereafter it was granted a two year lease by M. A. Bayasuf Ltd (not a party to this suit) for two years from 1st February, 2003 to 1st February, 2005.

The lease expired but the tenant continued to hold over. On 9th May, 2007 the property was

transferred to the plaintiff in this case. On 1st August, 2007 the 1st defendant landlord M.A. Bayusuf & Sons Ltd issued a termination of tenancy with effect from 1st November 2007. On 26th September 2008 the business premises rent tribunal ordered the tenancy between the New Ocean Transport Co. Ltd the 1st defendant herein and M. A. Bayusuf & Sons its landlord terminated.

[4] The said New Ocean Transport Co. Ltd the 2nd defendant herein filed an appeal no. 174/2008 and then filed an application on 21st October, 2008 for stay of execution of the tribunals order.

The application was granted and the second defendant herein was asked to deposit Kshs. 500,000 as security. This order was delivered on 8th April, 2009.

Analysis

[5] The 2nd defendant in appeal no. 174 of 2008 was required by law to cause the appeal to be admitted within 30 days of filing under Order 42 rule 11 and was supposed to comply with Section 79B of the Act. After such compliance the Registrar of the Court is supposed to notify the 2nd defendant/appellant who should have served all respondents within seven (7) days of receipt of notice from the Registrar. Thereafter the 2nd defendant after having received notice should have in not less than 21 days caused the appeal to be listed down for giving of directions by the Judge in Chambers. The appeal no. 174 of 2008 had therefore strict and limited period for having it prepared for hearing. It is the parties to that appeal that have a duty and a legal obligation to move the court and no one else.

[6] I have called for the court file and noticed that the appeal herein has never been listed before a Judge for directions. This is over 6 years since it was filed. It has laid in the Court registry unattended. It is not hard to understand why the 2nd defendant does not want the appeal to be admitted for hearing or even to proceed to hearing. This is the appeal that protects his tenancy since it cannot be asked to move and vacate the suit premises while the appeal is pending for hearing. M.A. Bayusuf & Sons sold this property in 2007 and is no longer interested in the suit property. The plaintiff/applicant in this case is not a party to the appeal. This was a tenancy between New Ocean Transport Ltd the 1st respondent, and the seller of the premises M.A. Bayusuf & Sons. The plaintiff cannot be blamed for not having moved the court. The plaintiff has never received any rent from the 1st defendants. It is therefore quite obvious that New Ocean Transport Ltd the 1st defendant, is using the appeal as a shield. It is abusing the process of the Court and preventing the applicant the user and enjoyment of his land. This is because for the six years it has refused to have the appeal admitted for hearing to pave the way for eventual hearing.

[7] I am well aware that the plaint asks for the same thing as this application. I am well alive to the fact that by allowing this application I will be determining the suit. However, this is necessary to prevent the blatant abuse of the court process by New Ocean Transport Ltd the 1st defendant.

There is no averment that a caveat or any inhibition was ever registered against the suit property or that the plaintiff purchaser was not bonafide when he purchased the suit property. The Business Premises Tribunal found in 2008 that there was no tenancy between New Ocean Transport Ltd the 1st defendant, and M.A. Bayusuf & Sons. This remains so until, the High Court overrules that decision. The High Court can do so if New Ocean Transport Ltd the 1st defendant were to have the appeal admitted and have it successfully determined in its favour. It has taken six years to do so and it does not appear that the second defendant herein has any intention to do so. It has refused to do so for the selfish reasons that I stated earlier. It is my finding that, should the appeal succeed damages shall be an adequate remedy, since it is alleged by the plaintiff in its statement that the appellant does not personally occupy the premises but only uses part of the same as a junk yard. It was further argued by counsel for the respondent that this court does not have jurisdiction to hear this matter. However this court has jurisdiction under Section 13 (5) of the Environment and Land Act 2012.

Orders

I am on the whole convinced that on the balance of convenience the plaintiff is entitled to the prayers sought. I grant him the orders sought in the application with costs.

Dated and delivered in open Court at Mombasa this 5th day of June, 2014.

S. MUKUNYA

JUDGE

5.6.2014

In the presence of:

Mr. Asige Advocate for the applicant

Mr. Mooraji Advocate for the respondent