



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

CONSTITUTIONAL PETITION NO. 6 OF 2019

ABDI SHEIKH IDRIS.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF GARISSA.....1ST RESPONDENT

NATIONAL HOUSING CORPORATION.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. Coming up for determination is the Petitioner's Application dated 12th June, 2019 and filed on 14th June, 2019 supported by the affidavit of the Petitioner Abdi Sheikh Idris of even dates seeking the following Orders: -

1) Spent

2) Spent

3) **THAT the Honourable Court be pleased to issue a temporary injunction against the County Government of Garissa from issuing eviction notices to tenants and /or evicting them from Garissa rental housing scheme pending inter partes hearing and determination of this Application**

4) **THAT the Honourable Court be pleased to issue a temporary injunction against the County Government of Garissa from issuing eviction notices to tenants and /or evicting them from Garissa rental housing scheme pending inter partes hearing and determination of this Petition.**

5) **THAT this Honourable Court be pleased to issue a temporary order staying the Implementation of tender No. CGG/WB/UD/T/001/2018/2019 for proposed construction of Qorahey market in Garissa Township Sub-County, Garissa County pending inter partes hearing and determination of this Application.**

6) **THAT this Honourable Court be pleased to issue a temporary order staying the Implementation of tender No. CGG/WB/UD/T/001/2018/2019 for proposed construction of Qorahey market in Garissa Township Sub-County, Garissa County pending inter partes hearing and determination of this Petition.**

7) **THAT the Honourable Court be pleased to make any further orders as it deems fit and just.**

2. Only the 2nd Respondent filed a response to the Application vide a Replying Affidavit by William Keitany sworn on 3rd July, 2019 and filed on 14th July, 2019.

3. Both Parties agreed to dispose of the application by way of written submissions, but only the 2nd Respondent filed their written submissions.

BACKGROUND

Applicant's Case

4. The petitioner in support of this application alleges that he is a tenant of the 2nd Respondent in its Garissa rental housing scheme,

christened LG/MWD/20/22 and occupies house Number MG 22. It is his position that the 1st Respondent is the agent of the 2nd Respondent for purposes of rent collection and onward transmission. And that as it stands the 1st Respondent has an outstanding debt of Kshs. 1,795,653.40/= in respect of the subject Housing scheme LG/MWD/20/22.

5. It is his case that pursuant to the above outstanding debt, the 2nd Respondent reserves the right to sue and recover the outstanding amount pursuant to section 6(2) of the Housing Act CAP 117 and as such the 1st Respondent has no authority to demolish the said houses.

6. It is the Petitioners Applicant contention that the 1st Respondent has issued an eviction notice in the guise of renovating the premises, yet the real intention is to construct a market place and the Deputy Governor Residence. This they contend is contrary to section 11(b) of the Housing Act which mandates the 1st Respondent to sell or let but not demolish existing rental houses.

7. The petitioner alleges that the intended demolition contravenes Article 40 of the Constitution and Article 25 of the Universal declaration of Human Rights.

8. In sum, he urges this court to grant the sought interim reliefs stopping the demolition as the tenants will suffer irreparable loss and damage, arguing that the balance of convenience lies in their favours as tenants.

2nd Respondents Case

9. In opposition to the Petitioners Application, the 2nd Respondent averred that it is a statutory body established under section 3 of the Housing Act with the mandate to provide various housing needs to Kenyans.

10. In respect to the subject property, they averred that pursuant to section 7(1)(c) of the Housing Act it developed a rental housing scheme composed of 28 houses for the defunct County Council of Garissa succeeded by the 1st respondent. And that the costs were passed to the 1st Respondent as a loan facility with specific repayment term.

11. It is their case that the 1st Respondent has since cleared the loan facility and has been cleared by the 2nd Respondent pursuant to section 16 of the Housing Act, and that it no longer has any interest in the subject property as its ownership is in the hand of the 1st respondent, arguing that the applicant has no case against the 2nd Respondent urging the court to dismiss the application with costs.

Submissions

12. Vide their written submissions, the 2nd Respondent reiterated the above stating that the 1st Respondent does not need the approval of the 2nd Respondent to either demolish or evict tenants from the rental scheme.

13. The 2nd Respondent in regard to the application submitted that the same does not meet the conditions set in the case of **Giella –v- Cassman Brown (1973)EA 358**, being that an applicant has to establish a prima facie case, whether damages are adequate remedy and balance of convenience. They went ahead and submitted on the three conditions.

14. On the first issue of Prima Facie case, the 2nd respondent submitted that the applicant has failed to establish a prima facie case, arguing that no right of the applicant has been infringed as was held in **Mrao Ltd vs First American Bank of Kenya and 2 Others (2003)KLR 125**, it is their argument that the case against the 2nd Respondent has no basis as it no longer has control of the subject property after the 1st respondent cleared their facility and therefore it is at liberty to do what it deems fit with the subject property.

15. In respect to damages the 2nd respondent submitted that the loss that can be occasioned to the Petitioners can be recovered through the award of damages if the sought injunctions are denied by this court. They submitted that both the 1st and the 2nd Respondent are in a position to compensate the petitioners in case of losses. In this regard they rely in the Court of Appeal cases of **Vivo Energy Kenya Limited vs Maloba Petrol Station Limited & 3 Others (2015) eKlr and Amrital vs City Council of Nairobi, Civil Appeal No. 47 of 1981**.

16. On balance of convenience the 2nd Respondent submitted the same lies in favour of dismissing the application as it is a waste of judicial time and public resources.

Issues and Determination

17. I have considered the application, the affidavit in support and against, the grounds of opposition and the 2nd Respondent submissions. I have also considered the cited authorities. The principles to be applied when considering an application for temporary injunctions are well settled. In the above cited case of **Giella –v- Cassman Brown (1973)EA 358**, the conditions were laid and that is:

“First the applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. And thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

18. Further, in **Mrao Ltd vs. First American Bank of Kenya Limited and 2 others (2003) KLR 125**, the Court of Appeal defined a prima facie case 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.”

19. In this case the applicant is alleging that his right to property protected under Article 40 of the Constitution is likely to be infringed by the 1st Respondent who intends to demolish the subject houses where he is a tenant. He alleges that the 1st Respondent still owes the 2nd Respondent the money advanced for the construction of the subject property. The 2nd Respondent denied the same stating that the 1st Respondent has since cleared the debt and is free to do whatever it wishes with the property.

20. At this stage the court ought not to make conclusive findings, however it has duty to determine whether the applicant has established a prima facie case. The applicable case in the circumstances is the **Mrao Ltd vs. First American Bank of Kenya Limited and 2 others (supra)** since the applicant is alleging an infringement of his fundamental right to property.

21. It is his contention that the 1st Respondent action is contrary to section 11(b) of the Housing Act which mandates the 1st Respondent to sell or let but not demolish existing rental houses. The 1st Respondent has not entered appearance to oppose the instant application, only the 2nd Respondent has filed response and submissions in opposition to the application.

22. From the material on record, I find that the applicant has established a prima facie case against the 1st Respondent, Secondly, the applicant has demonstrated that they stand to suffer irreparable harm not compensable in damages as the intended eviction and demolition affects his home. Additionally, the balance of convenience tilts in favour of the applicant as he stands to suffer if this court was upon conclusion of this suit is to find in his favour.

Decision

23. The upshot is that the Notice of Motion dated 12th June, 2019 is merited. The same is hereby allowed with no orders as to costs.

Read, delivered and signed in the Open Court this 30th day of January, 2020.

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E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Musyoka Bobo for the 2nd Respondent.
2. Mr. Nura for the 1st Respondent.
3. Fardowsa: Court Assistant present.