



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 1 OF 2017

ALBERT MUNDU MUNGA PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT/RESPONDENT

RULING

1. The applicant on 3rd January, 2017 filed an application seeking the following orders:-

i. Spent;

ii. Spent;

iii. That the defendant/respondent herein by themselves their representatives, agents and/or servants or any person claiming to be under them, be restrained by way of a temporary injunction from evicting, harassing and/or from interfering with the plaintiff's quiet occupation of his dwelling house No. K10 situated at Kisauni pending the hearing and determination of this application of this suit (sic).

iv. That costs be provided for.

2. The application is supported by the affidavit of Albert Mundu Munga sworn on 3rd January, 2017 and the grounds in support of the application. Although the applicant's third prayer as drafted is not very clear, Ms. Chala, Learned Counsel for the applicant informed the court that she seeks a temporary injunction pending the hearing of the suit herein. She referred the court to an undated notice marked as AMM2 attached to the applicant's supporting affidavit, which was served on the applicant's neighbour. She submitted that the respondent thereafter moved into the applicant's house and seized his personal goods as listed in the annexure marked Amm1 attached to the said affidavit. Counsel further stated that the applicant was issued with a letter marked as AMM3 attached to his affidavit, authorizing him to pay rent but the respondent declined to accept the said payment.

3. Ms. Chala contested the respondent's claims that the applicant sublet the house thus going against the tenancy agreement. She added that the respondent did not indicate who the sub-tenant was, hence there was no proof at all of the sub-tenancy. She relied on the case of **Giella vs Cassman Brown** [1973] EA 358 in submitting that the applicant has established a prima facie case with a probability of success. She also referred to a letter marked as AMM4 attached to the applicant's affidavit that was addressed to the respondent by the Kisauni Estate Tenants Community Based Organisation (CBO) on its refusal to accept

rent from various houses including the applicant's.

4. Mr. Kiti, Learned Counsel for the respondent submitted that the applicant vacated the house in issue 10 years ago and sub-let it contrary to clause 3 of the tenancy agreement attached to the respondent's replying affidavit as SM1. He indicated that the tenancy agreement dated 1st July, 1996 which was renewed at a later date was between the defunct Municipal Council of Mombasa and the applicant. The respondent's Counsel contended that the applicant is in arrears of Kshs.49,781.00 and that he was issued with a demand notice dated 7th December, 2016 which was attached to the respondent's replying affidavit as Sm2. Counsel relied on the case of **Mrao vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR** to advance his argument on the principles for grant of an injunction. He submitted that the Court of Appeal in the said case stated that a prima facie case is more than an arguable case.

5. Counsel argued that the applicant had breached the tenancy agreement by failing to pay monthly rent as required on the 2nd day of each month in accordance with clause 2(a) of the tenancy agreement. He added that the said agreement was clear that non-payment of rent leads to revocation of and/or termination of the agreement. It was submitted that a notice was issued to the applicant on 30th December, 2016 to vacate the house and that is when he moved to court. Mr. Kiti stated that it costs Kshs. 10,000/= to collect rent of Kshs. 1,100/= which is expensive to the respondent.

6. He prayed for the application to be dismissed with costs and if the court grants an injunction, the applicant be compelled to pay the outstanding rent and storage charges for his goods.

7. In a brief rejoinder, Ms. Chala submitted that the notice attached to the respondent's replying affidavit is dated 7th December, 2016 but the one that was handed over to the applicant by his neighbour was undated. It did not indicate who served it, who received it, or the date and time of service. She further stated that Counsel for the respondent did not address the contents of the annexure marked as AMM3 attached to the applicant's affidavit which states that the applicant should be allowed to pay rent as his house is not among the houses marked for closure. Counsel indicated that the applicant's letter dated 20th December, 2016 was duly served on the respondent. She prayed for the applicant's goods to be released to him.

The issue for determination is if the applicant has satisfied the principles for the grant of an injunction.

8. The principles of injunctions were enunciated in the case of **Giella vs Cassman Brown Co. Ltd [1973] EA 358** where it was held that in order to grant the injunction as prayed, the court must be satisfied that:-

(i) The applicant had established a prima facie case with a probability of success;

(ii) The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and

(iii) If the court was in doubt, the application would be determined on a balance of convenience.

9. It is not in contention that the applicant was residing lawfully in house No. K10 on plot No. 1469 section I M.N as per the tenancy agreement attached to the respondent's replying affidavit and marked as SM1. The respondent however deposes in paragraph 6 of its affidavit that the applicant vacated the house more than 10 years ago and sublet the house contrary to clause 3 of the tenancy agreement. It was alleged that he had failed to pay rent for over 12 months and owed Kshs. 49,781.00 to the respondent, which he had failed to settle despite several requests for payment.

10. The respondent attached to his replying affidavit a demand notice dated 7th December, 2016 marked as SM2 that was served on the applicant. It is shown to have been served by Francis and Mwinyi, it was endorsed with the signature of an unnamed person as the recipient; the date and time of service is not

shown. Counsel for the applicant on the other hand contended that the demand notice served on the applicant was undated, did not give the names of the persons who served it, received the said notice and the date and time of service. It is therefore at variance with that availed by the respondent's Counsel to this Court.

11. The applicant in paragraph 5 of his affidavit deposes that on/or about 14th December, 2016 he received a demand letter from his neighbour which was addressed to him. The applicant attached to his supporting affidavit an annexure marked as AMM3 being a letter dated 16th December, 2016 signed by the Chief Officer Lands, Planning and Housing of the County Government of Mombasa addressed to the Chief Cashier of the Department of Finance & Economic Planning of the said County Government indicating that House No. K10 - Khadija estate was not among the houses to be closed. The authenticity of the said letter was not put into doubt by the respondent's Counsel.

12. The letter marked annexure AMM 2 states in part that "*We hereby demand that the said amount of Kshs. 49,781 be paid within the next seven (7) days from the date of service of this letter/demand notice, failure to which the County Government/Landlord shall be at liberty to levy distress on your property as provided on clause 3(a), (b) of the tenancy agreement*".

Pursuant to the said notice, the applicant's goods were seized. The schedule of items seized from house No. 10 by the respondent shows that the applicant's goods were seized on 16th December, 2016. This on the same date that the Chief Officer gave authorization for the applicant to pay rent.

13. Having analyzed the facts of this case and the conflicting actions on the part of the Officers of the County Government of Mombasa who do not seem to have been reading from the same script, I am satisfied that the applicant has made out a prima facie case with a probability of success against the respondent. The applicant in paragraph 7 of his affidavit states that the respondent has since 16th December, 2016 been taking people to view the house he occupies with an intention of renting it out to another person but he has kept it under lock and key. The foregoing shows that the applicant stands to suffer irreparable harm as once the house he has occupied for 40 years is leased to another tenant, he is unlikely to regain it.

14. Ms Chala prayed that the applicant's household goods be returned to him. Mr. Kiti on his part prayed that the applicant be ordered to pay the rent arrears and storage charges for his goods if an interim injunction was to be granted. In the circumstances of this case, I am satisfied that the applicant is deserving of the orders sought. I hereby grant an interim injunction pending the hearing and determination of the case. I also order for the applicant's household goods to be returned to him upon payment of the outstanding rent of Kshs.49,781.00 outstanding as at the time of the filing of the present application. The applicant did not contest that he owed the respondent the said amount of money in rent. The applicant shall also pay storage costs of his goods. Each party shall bear its own cost.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 24th day of May, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Muganda holding brief for Ms. Chala for the plaintiff/applicant

Mr. Abed holding brief for Mr. Kiti for the defendant/respondent

Mr. Oliver Musundi - Court Assistant