



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT NO. 8 OF 2014

ELOY MOLINERO.....PLAINTIFF

VERSUS

PAR PROPERTIES LIMITED..... DEFENDANT

RULING

What is before me is the defendant's application brought by way of Notice of Motion dated 13th March, 2014 seeking an order that the plaintiff do furnish security in the sum of Kshs.664,075/= for the defendant's costs. The application was brought on the grounds that the plaintiff's suit is a sham with no prospects of success as the plaintiff has already vacated the suit property. The defendant has contended further that the plaintiff is a foreign national with no known fixed abode and can leave the jurisdiction of the court at any time. The application was supported by the affidavit of one, Joseph K. Maritim sworn on 13th March, 2014. In the said affidavit, the defendant has contended that the plaintiff and the defendant entered into a tenancy agreement in July, 2013 under which the defendant let to the plaintiff residential premises situated on LR No. 3734/871-13 Jacaranda Avenue, Nairobi for a period of one (1) year on terms and conditions that were set out in the said agreement. The defendant has contended that it was a term of the said agreement that either party could terminate the same by giving to the other two (2) months' notice. The defendant has contended that on 8th November, 2013, it gave the plaintiff a notice terminating his tenancy on the suit property with effect from 8th January, 2014. The defendant has contended that the plaintiff acknowledged receipt of the said notice and confirmed that he would vacate the suit property on 8th January 2014. The defendant has contended that the plaintiff did not vacate the suit property on 8th January 2014 in accordance with the notice that had been served upon him and his own undertaking aforesaid but instead ran to this court on 9th January 2014 for injunction claiming that the defendant was attempting to evict him from the suit property unlawfully. The defendant has contended that the plaintiff's tenancy was lawfully terminated with effect from 8th January, 2014. The defendant has annexed to its affidavit in support of the application, a copy of the tenancy agreement it had entered into with the plaintiff, the notice terminating the plaintiff's tenancy and correspondence exchanged with the plaintiff in which, the plaintiff had acknowledged receipt of the notice to vacate and confirmed that he would vacate the suit property by 8th January 2014. The defendant has contended that the plaintiff eventually vacated the suit property on 13th January 2014 without carrying out proper repairs and re-decoration to the premises. The defendant has contended that it has incurred additional expenses in the sum of Kshs.620,832/= in repairing and re-decorating the premises. It has also paid electricity bill in the sum of Kshs.43,243.47 which the plaintiff incurred. The defendant has contended that the plaintiff's suit raises no reasonable cause of action against the defendant now that the plaintiff has moved out of the suit property.

The application was opposed by the defendant through a replying affidavit sworn on 6th June 2014. In his

affidavit, the plaintiff has contended that this suit was brought as a result of the defendant's breach of the tenancy agreement that he (the plaintiff) had entered into with the defendant, and that, the defendant has not put forward any defence to show that the plaintiff's suit is a sham as alleged. The Plaintiff has stated that he is resident in Kenya at the moment and a permanent employee of the United Nations Office in Nairobi. He has stated further that he is married to a Kenyan and has lived in Kenya for over 20 years. The plaintiff has annexed to his affidavit a copy of his passport and what is said to be a lease that he has entered into with his current landlord.

The defendant's application was argued by way of written submissions. I have considered the application and the affidavit that was filed by the plaintiff in opposition thereto. I have also considered the respective submissions by the advocates for the parties and the authorities that were cited in support thereof. The powers granted to this court under Order 26 rule 1 of the Civil Procedure Rules to order security for costs is discretionary. In the case of **Pan African Bank Ltd. vs. Jasop Limited, Abraham Kiptanui & another (2002) eKLR, Kuloba J.** stated that:-

“The power given under this rule is discretionary and one which the court ought or ought not to exercise according to the circumstances of each case, and unless it is shown clearly that the exercise of the power is necessary for the reasonable protection of the defendant, the court ought not to interfere. It is in the light of the circumstance of each case that the court determines whether and, if so, to what extent or for what amount, a plaintiff may be ordered to provide security for costs, as the court thinks it just to so order.”

In the case of **Jaribu Credit Traders Ltd. vs. CFC Stanbic Bank Ltd. (2014) eKLR, Kamau J.** stated as follows with regard to the principles upon which the court exercises its discretion in applications for security for costs:

“The common thread in the cases cited herein above and those that were relied on upon by the defendant was that the plaintiff must have been unable to pay a defendant's costs in the event such a defendant was successful at the conclusion of the case as it would suffer a great deal in defending the plaintiff's case.”

I am in agreement with the position of the law stated in the foregoing cases. What I need to determine is whether the defendant has established that the plaintiff would not be able to pay its costs in the event that it successfully defends this suit. It is not in dispute that the plaintiff was at all material times a tenant of the defendant in respect of the premises known as LR. No. 3734/871-13 on Jakaranda Avenue, Nairobi (**“the suit property”**). It is also not in dispute that the plaintiff vacated the suit property on 13th January, 2014 less than a week after filing this suit on 9th January 2014. In his plaint, the Plaintiff has contended that the defendant had not served him with a proper notice to vacate the suit property in accordance with the tenancy agreement that he had entered into with the defendant. The Plaintiff has contended further that the defendant wanted to evict him unlawfully from the suit property. The plaintiff has sought a permanent injunction to restrain the defendant from interfering with his tenancy and peaceful occupation of the suit property. By the time the defendant filed the present application, the defendant had not filed a statement of defence to the plaintiff's claim. In its affidavit in support of the present application the contents of which I have highlighted above, the defendant has contended that the plaintiff's tenancy was lawfully terminated with effect from 8th January 2014 and that the plaintiff having vacated the suit property, the substratum of this suit has collapsed. In the case of **Shah vs. Shah (1982) KLR 95**, the court stated as follows on the test to be applied in applications for security for costs:-

“The general test in an application of this nature is not whether the plaintiff has a prima facie case with a probability of success but whether the defendant has shown that it has a bona fide defence.”

From what I have set out above, I am satisfied that the defendant has a bona fide defence to the Plaintiff's case with prospects of succeeding at the trial. This finding takes me back to the question that I had set out to answer namely, whether the defendant has demonstrated that the plaintiff would not be able to pay its costs if it succeeds at the trial of this suit. The plaintiff has claimed that he is a permanent employee of the United Nation sat its office in Nairobi. He has annexed to his affidavit what is said to be a passport that

was issued to him by the United Nations on 4th November, 2008. The said passport shows that it expired on 4th November 2013. There is no evidence before me that the validity of the said passport was extended. The Plaintiff who is now 62 years old has also not furnished this court with a copy of his employment contract with the United Nations to confirm that he is still in the employment of that institution. The plaintiff has annexed to his affidavit in opposition to the application herein what he has referred to as a lease between him and his current landlords. The purported lease was intended to show that the plaintiff has a fixed abode within the jurisdiction of the court. I am in agreement with the defendant's advocates' submission that what the plaintiff has purported to be a lease is not a lease at all. The document is not signed by the plaintiff's purported landlords. The last page (page 17) thereof also shows that it was purportedly drawn on 16th December 2013. If at all the plaintiff had already found alternative premises to move to by 16th December 2013, I wonder why he decided to file this suit on 9th January, 2014 for a permanent injunction to restrain the defendant from interfering with his peaceful occupation of the suit property. I am of the view from the forgoing that the information that the plaintiff has provided with regard to his employment and place of residence in Kenya is hazy. The plaintiff has also not made any attempt to show that he has assets in Kenya. The plaintiff may be married to a Kenyan but I don't think that is a factor that should weigh in the mind of the court when considering whether the Plaintiff would be able to pay the defendant's costs herein if the plaintiff loses the suit. Taking all factors into account, I am satisfied that the defendant has established that there is a risk of it not recovering its costs from the plaintiff should the plaintiff lose the suit herein. I am persuaded therefore that the defendant's application for security for costs has merit. As to the quantum of security to be furnished, I am of the view that the amount of Kshs.664,075/= proposed by the defendant is on the higher side and is not supported. The security sought is for costs and not for the decretal amount that the defendant may recover from the plaintiff on a counter-claim that it may bring against the plaintiff for repair charges and other expenses it incurred on behalf of the plaintiff. I would order security for costs in the sum of Kshs.250,000/=.

In conclusion, the defendant's application dated 13th March 2014 is allowed on the following terms:

1. The Plaintiff shall furnish security for costs in the sum of Kshs.250,000/= within 30 days from the date hereof.
2. The said sum of Kshs.250,000/= shall be deposited in an interest earning account in a reputable bank in Nairobi in the joint names of the advocates on record herein for the Plaintiff and the defendant pending the hearing and determination of this suit or further orders by the court.
3. The defendant shall have the cost of the application.

Delivered, Dated and Signed at Nairobi this...15th....Day ofJanuary.....2016.

S. OKONG'O

JUDGE

In the presence of

N/A for the Plaintiff

Mr. Khayata holding brief for Deya for the Defendant