



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 29 OF 2012

JAMES MUTENDE

ANDERSON MULI PLAINTIFFS

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT

RULING

By the Notice of Motion dated 21st February, 2012 and filed herein on 22nd February, 2012 the plaintiffs/Applicants sought a temporary injunction to restrain the Defendant its agents, servants and/or employees from evicting them from their houses namely **Block 119 Door D and Block 119 Door A, Railway Lower Estate, Kisumu** pending final determination of this case.

The grounds for the application as can be discerned from its face and supporting Affidavit are that the Plaintiff/Applicants are tenants of the Defendant and that the defendant in breach of the lease agreement and especially the implied term of quiet enjoyment without following due process threatened to evict them.

In opposition to the application the defendant filed a replying affidavit sworn by **Sammy K. Kipsamo** its Regional Co-ordinator in which he justifies that the termination of the applicants` leases was lawful as they had breached the same by subletting the houses, using them for commercial purposes and falling into arrears of rent. Defendant also filed a **Notice of preliminary objection** 2012 and grounds of opposition both dated 1st March, 2012.

On 3rd May, 2012 the applicants sought and obtained leave to file further affidavits in which they depose that they were never given notice or even told the reason for their eviction and that nobody else had been evicted for subletting. They deposed that they were victimized because they refused to bribe the officials of the defendant Corporation and that the District Commissioner intervened and ordered their reinstatement but when he left the officials switched off their phones and did not answer the applicants` calls.

The application was scheduled to be heard on 1st November, 2012 together with another filed by interested parties but was adjourned to 12th June, 2013. There is no record of what transpired on 12th June, 2013 but several dates were taken thereafter but the application was not heard. It was not until 18th September, 2014 that it was agreed that the application be canvassed by way of written submissions. These were duly received albeit that they refer to a Notice of Motion dated 21st February, 2014 whereas the application for determination is dated 21st February, 2012.

I have considered all the material placed before me including the rival submissions of the learned

Advocates for the parties. To succeed the plaintiffs/Applicants must demonstrate that they have a prima facie case with a likelihood of success, that damages would not bear adequate remedy or in the absence of those two that the balance of convenience tilts in their favour. (**see Giella V. Cassman Brown Ltd (1973) EA 358**)

It would appear from the affidavit of **James Mutende** sworn on 21st February, 2012 in support of the application that by the time the applicants came to court they had already been evicted. At paragraph 6 he states:

**“ On Friday 17th February, 2012 I was shocked
when the Defendant`s agents and/or employees
evicted me from the house without giving me
any reason or Notice.”**

At paragraph 7 he deposes “That up to the time of swearing this affidavit, I have not received any official communication as to why I was evicted.” He then goes on to state at paragraph 8 and 9

**“ That later in the day I learned that other
tenants were also evicted. These other tenants
were later allowed to get back into their houses.
That it was I and the 2nd plaintiff Anderson
Muli who were refused to get back into our houses.”**

These depositions are reiterated in the further affidavits sworn on 3rd May, 2012, clearly therefore the Notice of Motion dated 21st February, 2012 had been overtaken by events as the applicants had already been evicted. Whereas this court appreciates that the applicants too have a right to housing and ought not to be evicted at a whim the Notice of Motion and indeed the suit is misleading. Moreover at paragraph 9 of the plaint the plaintiffs aver that their claim against the defendant is for an injunction restraining the defendant from evicting the plaintiffs until determination of this suit or until expiry of the lease. At paragraph 4 of the plaint they aver that their lease agreements were to expire in December, 2012. That being the case and there being no evidence that the leases were extended the applicants have not demonstrated that they have a prima facie case with a likelihood of success and accordingly the Notice of Motion is dismissed with costs to the Defendant.

E.N. MAINA

JUDGE

Dated, signed and delivered at Kisumu this 26th day of March, 2015

In the presence of:-

Mr. ONdego for the applicants/plaintiff

Mr. Ajouga for the defendant

Moses Okumu- Court Assistant