



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E177 OF 2021

CENTRE FOR DOMESTIC AND DEVELOPMENT.....PLAINTIFF

-VERSUS-

TONY CHARLES WAMBAA.....DEFENDANT

RULING

1. This is the notice of motion dated 21st May 2021 brought under order 40 rules 1 and 2 of the Civil Procedure Rules.
2. It seeks orders:-
 1. Spent.
 2. Spent.
 3. **That the Defendant/Respondent by himself, his servants or agents be restrained from interfering with the Plaintiff/Applicant occupation or possession of those parcels of land known as Title NO. Muguga/Kanyariri/339 and Title No. Muguga/Kanyariri/1409 or from evicting the Plaintiff from the said parcel pending the hearing and determination of this suit.**
 4. **That this honourable court do make such orders as it may deem fit and grant in the circumstances.**
 5. **That the costs of this application be provided for.**
3. The grounds are on the face of the application and are set out in paragraphs (a) to (f).
4. The application is supported by the affidavit of Edith Wairumu Murogo, a director of the Plaintiff sworn on the 21st May 2021.
5. The application is opposed. There is a replying affidavit sworn by the Defendant/Respondent on the 11th June 2021.
6. He also filed a notice of preliminary objection dated 15th June 2021 on the grounds that the dispute herein is of a commercial nature. Further that the subject properties are situated within Kikuyu area which is within Kiambu County.
7. On the 28th July 2021, the court with the consent of the parties directed that the preliminary objection and the notice of motion be heard together and that they be canvassed by way of written submissions.
8. It is the Plaintiff's/Applicant's submissions that the Defendant made representations to the Plaintiff that the lease would be a long term lease extending beyond the executed lease. That the Defendant is bound by the said representation by virtue of the law of estoppel. It has put forward the case of **Commissioner of Lands vs Hussein [1968] 1EA 586**. It prays that the Defendant be restrained from evicting the Plaintiff.
9. The Defendant/Respondent on the other hand submits that the Plaintiff/Applicant has not established a prima facie case with probability of success. The lease has expired. The Plaintiff was given notice that the lease would not be renewed hence no rights of the Plaintiff have been infringed upon by the Defendant. He has put forward the case of **Mrao Ltd vs First American Bank of Kenya & 2 Others [2003] KLR 125**.

10. He further submitted that he is the one who is likely to suffer irreparable harm and not the Plaintiff. That this matter ought to have been filed in Kiambu County where the property is situated. He has put forward the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696**.

11. He prays that that the suit be dismissed as this court lacks jurisdiction.

12. It is the Defendant's/Respondent's submissions that he is desirous of returning to his rightful home and there is no danger of disposition of the suit property. He has relied on the case of **Robert Mugo Wakaranja vs Ecobank Kenya Ltd & Another [2019] eKLR**. It is his further submissions that the title of a registered owner shall not be defeated. The lease expired on 31st May 2021.

13. The Plaintiff/Applicant no longer has permission of the Defendant/Respondent to be on the suit property. The Plaintiff/Applicant has become a trespasser. The Defendant/Respondent being the registered proprietor of the suit property should be compensated by the Plaintiff/Applicant. He has put forward the cases of **Philip Ayaya Aluchio vs Chrispinus Ngayo [2014] eKLR** and **Nakuru Industries Ltd vs S. S. Mehta & Sons [2016] eKLR**. He prays that the application be dismissed with costs.

14. I have considered the preliminary objection dated 15th June 2021. The first ground is that this court lacks jurisdiction to hear and determine this matter as the same is a commercial dispute and not a land dispute. I disagree. This is purely a Tenant and Landlord relationship. Under Section 13 of the Environment and Land Court Act this court has jurisdiction to hear and determine this dispute.

15. The other ground is that this court lacks geographical jurisdiction to hear and determine this suit at the subject property is situated in Kikuyu area within Kiambu County. Under Article 48 of the Constitution all persons are guaranteed access to justice.

16. This court takes judicial notice that though Kikuyu is within Kiambu County, the nearest Environment and Land Court is in Thika. It means this court is near to Kikuyu than ELC Thika hence the Plaintiff's decision to file this matter here. No prejudice has been occasioned to the Defendant by this matter being filed in this court. I find no merit in this preliminary objection and the same is dismissed.

17. I have also considered the notice of motion and the affidavit in support. I have also considered the replying affidavit. The issues for determination are:-

i. Whether the Plaintiff's/Applicants application meets the threshold for grant of temporary injunction.

ii. Who should bear costs of this application?

18. The principles were set down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank Ltd & 2 Others [2003] KLR 125**, the Court of Appeal stated what amounts to a prima facie case.

19. It is not in dispute that the Plaintiff/Applicant was a tenant of the Defendant/Respondent by virtue of the lease duly executed by both parties. The lease is from 1st June 2016 to 31st May 2021. Clause 4:1 of the said lease provides that:-

“The tenant and the landlord shall be entitled to terminate this agreement on giving the other three (3) months written notice of their intention to do so and at the expiration of such period of notice this agreement shall cease and determine but without prejudice to any right of action accrued to either party during the currency of the agreement”.

20. It is not in dispute that the lease expired on 31st May 2021. Before its expiry, the Defendant/Respondent in a letter dated 2nd March 2021 notified the Plaintiff that he would not be renewing the lease. I find that it is clear from the letter that the Defendant/Respondent did not intend to renew the lease.

21. The Plaintiff's/Applicant's assertion that the Defendant/Respondent made a representation that the lease would be a long term one is not backed by any evidence. They have produced no evidence to suggest that the lease was to be extended beyond the executed lease.

22. I find that the Plaintiff has failed to establish a prima facie case with a probability of success at the trial.

23. The Plaintiff/Applicant was a tenant of the suit properties. What irreparable harm would it suffer? The issue of undertaking permanent developments does not take away the rights of the Defendant/respondent as the proprietor of the suit properties. It does not give the Plaintiff/Applicant any right as it was a tenant. No evidence has been adduced to confirm the developments.

24. The balance of convenience tilts in favour of the Defendant/Respondent who is the registered proprietor of the suit properties.

25. All in all, I find no merit in this application and the same is dismissed with costs to the Defendant/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2022

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Maina for the Plaintiff

Mr. Kimondo for Mrs. Nderitu for the Defendant

Steve - Court Assistant