



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 41 OF 2015

DEVOTER OKWACH

ANISA ABDALLA

ANNA ISALU NDUGA

RAMILA MOHAMED AHMED & 19 OTHERS.....PLAINTIFFS

VERSUS

THE BOARD OF TRUSTESS TELPOSTA PENSION SCHEME

LLYOD MASIKA LTD.....DEFENDANTS

R U L I N G

1 The 23 plaintiffs by their plaint pleaded that they are tenant of MOMBASA/BLOCKXXIII/184 M1. That property belongs to the 1st defendant. Plaintiffs plead that they entered into those tenancies by virtue their then employment with the defunct Kenya post and telecommunication corporation. After the restructuring of that corporation which rendered the plaintiff unemployed the plaintiffs pleaded that they continued renting the aforesaid hoses. They allege that from the year 2006 the 1st defendant unreasonably began increasing the rent. The plaintiff refused to sign the lease presented by 1st defendant in the year 2010 on the ground that since they are contributors to the Trust of Teleposta Pension they are owners of the premises they occupy.

2 The plaintiff also pleaded that the 1st defendant offered them their respective apartments for purchase.

3 The second defendant is sued on the ground that as an agent for the 1st defendant increased rent of the plaintiffs.

4 The plaintiff filed an interlocutory application by way of Notice of Motion dated 19th March 2015, by which they seek injunction pending the hearing and determination of this suit to restrain the 1st and 2nd defendants by themselves and their agents from evicting the plaintiffs from selling or disposing or mortgaging; or dealing with the property MOMBASA/BLOCK/XXIII/184 M1.

5 What I have before me is an interlocutory injunction application. The correct approach of such an application was stated in the holding in the case **MBUTHIA –V- JIMBA CREDIT FINANCE & ANOTHER** (1988) KLR where the court of appeal stated:

The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits.

6 Bearing that caution in mind I will appropriately deal with the issues raised in the application.

7 The plaintiff's application is brought to restrain the defendants, their servants or agents from evicting them on the basis that they do not owe the 1st defendant any rent arrears.

8 The 1st defendant in a very detailed affidavit sworn by Peter K Rotich of 28th April 2015 contended to the opposite of what is stated by the plaintiff. The 1st defendant set out the amount of arrears owned by each plaintiff. 1st defendant attached statements of accounts showing the arrears owed which range from Ksh 191,500 up to Ksh 959,000 it was deponed on behalf of the 1st defendant that the 1st defendant depends on such rents to pay pension to those who have retired. The 1st defendant deposition on rent arrears was not controverted. On prima facie basis therefore the plaintiff in rent arrears, even as they approach this court for equitable relief.

9 The plaintiff's allegations that the 1st defendant should be stopped from evicting them or disposing the property on the ground the 1st defendant had agreed to sell the property, has no legal basis. It is defeated on a prima facie basis by lack of written contract as required under Section 3 (3) of the Law of Contract Act Cap 23. That Section provides:

No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

10 For the plaintiffs to be successful in their application they need firstly to establish that they have a case with probability of success; secondly that if an injunction is not granted irreparable harm will be suffered by the plaintiff which harm cannot be compensated with damages; and if the court is in doubt it will determine the application on balance of convenience.

11 In my humble view having considered the evidence before court on a prima facie basis I find that the plaintiffs did not establish a case with probability of success. They are tenants. That being so they are obligated to pay rent. They, as it has been shown by the 1st defendant, have failed to pay their rent to date. Secondly the plaintiffs alleged to have a right to an injunction because the 1st defendant is selling the property to them. That assertion is defeated by Section 3(3) of Cap 23.

12 It follows that the plaintiff has not satisfied the court in respect of the first principle of granting injunction.

13 The plaintiff acknowledges that the property belongs to the 1st defendant. They therefore fail to show what harm they will suffer, if they are evicted, which harm cannot be compensated with damages. If plaintiffs are wrongly evicted, they can be compensated with damage which can easily be ascertainable.

14 Having found that the plaintiffs have not satisfied the first two principles of injunction, and having no doubt in my mind in respect to that finding I will not consider where the balance of convenience lies.

15 On the above finding the plaintiff's Notice of Motion dated 19th March 2015 is dismissed with costs to the defendants. The pending Notice of Motion dated 22nd April 2015, filed by plaintiffs is hereby struck out with costs to the defendants for being an abuse of court process. It is similar to the one dated 19th March 2015.

Dated and delivered at Mombasa this 24th day of August 2015

MARY KASANGO

JUDGE

24.8.2015

Coram

Before Justice Mary Kasango

C/Assistant –

For: Plaintiffs:

For Defendants:

Court

The judgment is delivered in their presence/absence in open court.

MARY KASANGO

JUDGE