



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. NO. 29 OF 2013

THE BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUND.....PLAINTIFF/APPLICANT

-VERSUS-

SEBORGA LEISURE LIMITED.....DEFENDANT/RESPONDENT

RULING

[1] The Plaintiff in this case is the owner of all that premises known as Hazina Plaza comprised in LR. No. Mombasa Block XX/328 and 329 Part b. It is contended that by a lease agreement between the plaintiff and the defendant the plaintiff let part of the premises to the defendant. Pursuant to that lease the tenancy was terminable by either party giving notice on the prescribed format as provided under Landlord and Tenant (Shops Hotel Catering Establishment) Act Chapter 301 Laws of Kenya.

[2] That on 24th April 2012 the plaintiff served the defendant with the said notice under Section 4(2) of the Landlord and Tenant Act aforesaid for the termination of the tenancy on 1st July 2012. The Plaintiff argues that the defendant did not within the prescribed period file reference in the Business Premises as is required under the provisions of section 6 of the Act objecting to the said termination. The plaintiff avers that the tenancy was duly terminated on the said 1st day of July 2012. He argues that the defendant has wrongfully failed to deliver up the premises to the plaintiff. The applicant filed a notice of motion on 21st September 2013 asking for judgment to be entered as prayed in the plaint.

[3] The defendant on his part duly filed appearance and his defence. In his defence, he avers that the notice dated 24th April 2012 was not served on it until 4th May 2012 when it alleges, the notice was left on its premises. The defendant avers that the notice was defective and that the same cannot subject it to reference under Section 6 of the Landlord and Tenant Act and that it was not obligated to react thereof and that section 10 of the Act would be inapplicable in the circumstances.

[4] To support its claim, the plaintiffs annexed the notice under the Act dated 24th April 2012 which was to take effect on 1st July 2012. The plaintiffs also annexed a notice from the Municipal Council of Mombasa. A notice issued under section 119 of the Public Health Act Cap. 242 requiring the plaintiff to make various renovations on the premises further on 12th October 2012 the office of the town clerk issued a notice dated 12th October, 2012 to the plaintiff claiming that the house has been left in ruins, dangerous and dilapidated state. The notice required that the plaintiff must within 21 days of that notice discontinue the use of the building and embark on repair work.

[5] When this motion came up for hearing Mr. Wafula Learned Counsel told the court that this is a 12 storey building and the defendant occupies the ground floor. The building has 12 floors.

He argued that the building is condemned and is not fit for human habitation. He argued for the tenant to continue staying in the building and serving members of the public therefrom, we are waiting for a disaster to happen. He argued that the respondents are not arguing that the notice was not served, they only contend it was served on 4th May 2012 and therefore 2 months could not be achieved by 1st July 2012. Mr. Wafula further argued that the respondents were not arguing that the house is not dilapidated and that notice was not given by the social authority for all to move and vacate the building. He argued that the applicants want to reconstruct the building and cannot do so without vacant possession. He said that all other tenants have moved and vacated out of the premises. Mr. Wafula argued that this is a massive 12 storey building and the losses to the plaintiff and public are colossal

[6] Mr. Mwakisha Learned Counsel for the Respondent relied on the fact that two clear months must be given. That the notice must be in accordance with the act. That the procedure for applying for the judgment was erroneous. That the defendant's defence should not be dismissed summarily.

[7] To my mind the issue of notice is pertinent.

The notice that was given to the respondent to move and vacate was dated 24th April 2012. The applicant argues it was served in time to give the respondent two clear months to move and vacate by 1st July 2012. The defendant on its part contends it was served on 4th May 2012 and therefore did not give the respondent two months as is required by the Landlord and Tenant Act aforesaid.

This is an issue that can easily be canvassed by the parties at hearing of the suit *But is this the only issue here?*

[8] There is no dispute that this is a 12 storey building. The same is dilapidated and condemned by the health authorities as a danger to the public. The applicants have already been given 21 days to close the entire building and start renovations. They cannot do so because the respondent, the only tenant on the premises now has refused to move and vacate from the ground floor to allow for renovations as ordered by the Public Health Authorities. The court was informed that the respondent deals with members of the public in its premises on the ground floor. Mr. Wafula Learned Counsel argues that allowing members of the public to come in that building is a disaster waiting to happen. Mr. Mwakisha Learned Counsel for the respondent did not refute those allegations. His only assertion that the notice to vacate was not proper under Cap. 301 Landlord and Tenant Act and that he is not bound to comply with the Act. He did not deny that all the other tenants in the 12 floors have moved and vacated out of the building. *Should a court of law wait for disaster to happen when the danger has been pointed to it only for the reasons that a notice was not properly issued under some Act?*

[9] I think this would be irresponsible and unjustifiable. Human life is precious and should be protected. This is a case of public good against individual good. Allowing people to remain or be served in a condemned premises for whatever reasons is not only unseasonable. It is also being blind to reality.

I am persuaded by the applicant that it has made a compelling case in its application. I allow it with costs. Judgment is entered for the plaintiff and against the defendant as prayed with costs.

Dated and delivered at Mombasa in open Court this 28th day of February, 2014.

S.N. MUKUNYA

JUDGE

28.2.2014

In the presence of:

Mr. Wafula Advocate for the plaintiff/applicant

Mr. Mangunya for Mwakisha for respondent