



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 453 OF 2014

MUSA HASSAN ALI.....PLAINTIFF/APPLICANT

VERSUS

HANNAH WAIRIMU GITAU.....1ST DEFENDANT

JOHN KARIUKI GITAU.....2ND DEFENDANT

RULING

The application for this courts consideration is the **Notice of Motion** dates **11th April 2013**, brought under **Order 40 Rule 4 (2)** of the Civil **Procedure Rules 3** of the High Court vacation (Practice and Procedure Rules) and the Judicature Act seeking for orders that a temporary injunction do issue restraining the Defendants/Respondents, their servants or agents from interfering with the Plaintiff/Applicant's hotel business and from distressing for rent, from evicting the Plaintiff/Applicant or in any way interfering with the Plaintiff/Applicants quiet and peaceful possession ,occupation and tenancy within the demised Land Reference **No 36/II/128 Eastleigh ,Nairobi** pending the hearing and determination of this suit. That the Plaintiff/Applicant gives an undertaking as to damages.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of the Plaintiff/Applicant stating that he is the tenant of the 1st defendant at her business premise on LR No 36/II/128 Eastleigh since 22nd June 2010. Then he had been paying rent regularly and promptly and have had peaceful enjoyment of the premises carrying on his business until 30th March 2014 when the Defendants/Respondents through their advocates wrote a letter dated 9th January 2014, asking her to vacate the premises .He claimed that he was a protected tenant within the meaning of the terms in the **Landlord and Tenants(Shop, Hotels and catering Establishments Act Cap 301)**, in respect of the premises. He also avers that he has invested all his resources on the said premises since 2010 and stands to lose greatly ,prejudice and damage if the un procedural, malicious and unlawfully eviction is not stopped by this court . Further that should the state of affairs herein be allowed, he will suffer irreparable loss damage and harm. He also contended that the Defendants/Respondents are in the process of breaking onto the hotel and eventually evicting him from the suit property and he is apprehensive if the orders sought are not granted he will greatly suffer as the Defendants/Respondents have refused to accept rent for April 2014 claiming outrageous false allegations against him with the aim of unlawfully removing him from the suit premises.

This application is opposed. The defendants have filed a replying affidavit that was deposed by

Hannah Wairimu Gitau who stated that the jurisdiction in tenancy matters lies at the **Business Rent Tribunal** at the first instance and that this suit as filed is bad in law, an abuse of the court process and ought to be struck out. That once a reference has been filed at the tribunal, the same ought to be determined first before any other proceedings can be undertaken in any other court or tribunal adding that both parties herein have pending suits at the tribunal. She further stated that the Plaintiff/Applicant had been in breach of the tenancy agreement for failing to pay rent in time when not became due. Further that the Plaintiff has perpetrated nuisance to the landlord and other tenants ,using the lease premises for purposes other than the purposes agreed on as per the tenancy agreement ,failure to keep /maintain the premises in good tenable repair and condition, failing to pay utility bills and tampering with the electric metre. She contends that the Plaintiff/Applicant is undeserving of the orders sought because of material non-disclosure. That the Plaintiff/Applicant has been indolent and has only taken action when time had lapsed therefore he cannot be allowed to seek shelter from the very law that he has severally flouted.

The Defendants/Respondents in addition to filling their replying affidavit filed a Preliminary objection on the grounds that this court lacked jurisdiction to determine this suit.

The application was canvassed by way of written submission. The when the parties filed their written submissions the Plaintiff/Applicant submitted that he had satisfied the requirements as laid down in the case of **Giella –Vs- Cassman Brown Limited [1973]EA 358,**. He further submitted that he has shown that he has a probability of success given that the **eviction notice** by the Defendants/Respondents is illegal and in contravention of the laid down procedure under the **Landlord and Tenants (Shop, Hotels and catering Establishments Act Cap 301)**.He also added that the tribunal had no jurisdiction to grant the orders of injunction .

On the Preliminary Objection raised by the Defendants/Respondents, the Plaintiff/Applicant submitted that this court has the jurisdiction to hear this suit for the reasons **that Section 13 of the Environment and Land Act** has given this court the original and appellate jurisdiction to hear and determine disputes in accordance to Article **162 (2) (b) of the Constitution** which determines disputes relating to land and environment. They also state that this dispute is anchored on land as the dispute emanates from an interest in land being a lease agreement and the lease translated to a grant to an interest in the land. They also relied on the case of **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors (1969) EA 696**.On the submissions that the tribunal had no jurisdiction to grant injunction they relied on the case of **R-vs- Business Rent Tribunal & Another & Ex parte Davies Motor Corporation Limited [2013] e KLR**

The Defendants/Respondents in their written submissions submitted first on the preliminary objection which they had raised. They cited the **Mukisa Biscuits**, case where it was held that a preliminary objection is in the nature of what used to be a demur, where it raises pure points of law. The Defendants/Respondents also cited section 12 of Cap 301 and also the case of **Jitendra M. Kanabar & 2 others –vs- Fish and Meat Limited ,where** the court held that

“This was a controlled tenancy. The Notice was given under the Act. Only the tribunal can determine the issues at hand. In the end I agree that this court lacks jurisdiction to hear this suit and the application”

The Defendants/Respondents further stated that the Plaintiff/Applicant had filed a suit in the tribunal that has substantially the same issues in this suit and relied on **Section 6 of the Civil Procedure Act**. On the Plaintiff/Applicant’s application the Defendants/Respondents submitted that the application should be dismissed for it does not meet the requirements of **Giella –Vs- Cassman Brown Limited** .Further that the Plaintiff/Applicant ought to have shown that the suit has a probability of success and that if the injunction is not granted he will suffer irreparable damage which cannot be compensated by an award of damages. That this suit having been filed in the wrong court it ought to be struck out given that the Defendants/Respondents had issued a proper notice to the Plaintiff/Applicant establishing the grounds upon which the tenant was being evicted.

Before delving into the substance of the applicant’s Notice of Motion application, I will first deal

with the issue of preliminary objection that was raised by the Defendants/Respondents. They had not stated that this court lacked jurisdiction to entertain this suit. It is trite law that jurisdiction is everything and without it the court downs its tools. With regard to lack of jurisdiction to entertain this suit, this court will refer to the case of **Rafiki Enterprises Limited –vs- Kingsway tyres and Automart Limited Nai Civil Apln No 375 of 1996 (UR)** where the Court of Appeal held inter alia that,

“Every court has a duty to determine whether or not it has jurisdiction in a particular matter”.

Further, in the case of **Kimani Wanyoike –vs- Electoral Commission Civil Appeal No 213 of 1995 (UR)** the Court of Appeal ruled that,

“Where there is a law prescribed by either a Constitution or an Act of Parliament governing the procedure of the redress of any particular grievance, that procedure should be strictly followed.”

The Defendants/Respondents contend that since this is a dispute on Tenant Landlord relationship, its jurisdiction is solely vested with the Business Premises Rent Tribunal (BPRT) as the Plaintiff/Applicant is a controlled tenant as per the description of section 2 of the ***Landlord and Tenants (Shop, Hotel and catering establishments) Act***. Again, since both parties herein have filed reference at the tribunal the Court should let the tribunal deal with the said references. The applicant on the other hand defended himself for coming to this court by citing section 13 of the Environment and Land Court Act which provided that this court was clothed with the original and appellate jurisdiction to hear and determine all disputes in accordance with Art 162 (2) of the Constitution and with the provisions of the Act or any other written law relating to Land and Environment. The applicant also submitted that the Business Premises Rent Tribunal does not have jurisdiction to grant injunctions yet he has sought the very order in both his Complaint and the application.

Having carefully examined the pleadings from the parties this court renders its decision as follows; Matters of jurisdiction in my view are supreme and cannot be cured even by the overriding objective under ***Section 1A and 1B of the Civil Procedure Act*** .The Business Premises Rent Tribunal is empowered through the Act to determine disputes relating to Landlords and tenants. There is a reference pending at the tribunal, however Section 12 of the ***Landlord and Tenant (Shops, Hotels and catering establishments) Act*** provides that the tribunal is not vested with authority or jurisdiction to award special, general or exemplary damages. The said section also does not make provision for injunctions and declarations. I therefore hold that the tribunal lacks jurisdiction to grant the reliefs sought in this application and at the same time this court in granting the said orders will not be overstepping on the tribunal’s jurisdiction in preventing the Defendants/Respondents, their servants or agents from interfering with the Plaintiff/Applicant’s hotel business and from distressing for rent, from eviction or interfering with the Plaintiff/Applicant’s quiet and peaceful possession ,occupation and tenancy within the demised Land Reference No 36/II/128 Eastleigh ,Nairobi. This is because the orders sought are within the jurisdiction of this court as provided for by section 13 of the Environment and Land Court Act.

Having considered the submissions herein, I find that the Preliminary Objection is not merited and the same is dismissed entirely. However, on the Notice of Motion dated 11th April, 2014 , the Court finds that the same is merited and it is allowed in terms of prayer No.5 on condition that applicant gives an undertaking as to damages which issue will have to be ventilated by the parties and agreed upon.

I note that both parties have filed references at the tribunal which is pending determination and that the Respondents have refused to collect rent from the applicant. I order that the rent herein should be deposited in this court and receipts forwarded to the Respondents for record keeping. I also make an order that this suit be stayed to pave way for the hearing and determination of the references filed at the tribunal.

It is so ordered.

Dated and delivered and signed this 21st day of November 2014.

L GACHERU

JUDGE

In the Presence of:-

M/s Chelagat for the Plaintiffs

Mr Muhia holding brief for Kimeu for the Defendant

Court : Court Clerk

L GACHERU

JUDGE

M/s Chelagat .

We can come back next week to make our submissions on the issue of undertaking.

L GACHERU

JUDGE

Mr Muhia: We can come back in next week, no objection.

L GACHERU

JUDGE

Court:

Further mention on 26th November, 2014 for ventilation on the issue of undertaking.

L GACHERU

JUDGE