



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELC CASE NO. 92 OF 2014

CHARITY MWIKALI NDUNDA.....PLAINTIFF

VERSUS

AMOS MWANGI KARIUKI.....DEFENDANT

RULING

The application before this court for consideration is the Notice of Motion dated **30th January 2014** brought under **Order 40 Rule 2 and Order 51 Rule 1 & 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act** seeking for orders that an injunction be issued restraining the defendant their servants agents and or servants from evicting ,dispossessing or in any was interfering with the plaintiffs occupation and or possession of house on LR No 209/8405/14 Riverside pending the hearing and determination of this suit.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of the plaintiff deposed on the same day stating that she is the tenant in the house on the suit property after taking up tenancy in 2010 for a monthly rent of Ksh 45,000/- which she has been remitting to date. She averred that she informed the landlord that she intended to convert the said houses into a hostel due to its proximity to the University of Nairobi-Chiromo campus which the defendant agreed on condition that he gets his rent on time. She further stated that she took the house when it was in a dilapidated state and renovated it, made partitions and bought several beds and other related items for purposes of running the hostel which was named Metropolitan Boys Hostel. That on 3rd September 2013, she received a letter from the defendant asking her to vacate and deliver the said house to which she explained to the defendant that she had students who had begun their semester and could not interrupt their learning as she was unable to find them alternative hostel and also herself since she resided there whereby the defendant allowed her to continue with the tenancy. Later on 19th December 2013, the defendant through his advocate sent her a letter asking her to deliver the keys to the house at their offices. That when she issued bankers cheques to the defendant, he declined them but instead sought to have deliver the house in vacant possession. She contends that the defendant failed to allow the student to complete their stay in the hostel as they had paid their rent for the whole semester and the next two succeeding semesters. She therefore seeks this court to grant her the orders since she does not have a place to stay and where to relocate the students.

This application has been opposed by the defendant who swore a Replying Affidavit that was filed in court on 11th February 2014.He stated that the plaintiff and the defendant got into a tenancy agreement on 1st July 2010, whenever he rented out the suit premises to the plaintiff for residential purposes. That the said tenancy provided that the tenancy period was for two (2) years with effect from 1st July 2010,either

party was to give a three (3) months **Termination Notice** and the tenant should keep the premises and fixtures in clean and good condition. He added that the tenancy never provided for renewal of the lease as he contemplated using the said premises as his residential home. The defendant further added that he wrote to the plaintiff asking her to clear the outstanding arrears amounting to Ksh 360,000/= and to hand over the suit premises as the lease was expiring on June 2012. He averred that the plaintiff pleaded for more time within which she would clear the outstanding rent arrears which he granted. That she finally cleared the rent on 14th August 2013, thereafter he served the plaintiff with a **three months' notice to vacate**. That after the expiry of the three months' notice he instructed his advocates to ask the plaintiff to vacate the suit premises as she had refused to comply with the notice. He contended that the plaintiff has not been paying rent since she was in arrears and defaulted in payments and that the plaintiff never informed him that she was running a hostel in the suit premises neither had he authorised her to put up a hostel. He also stated that the plaintiff had no authorisation from the City Council of Nairobi to put up hostels and he had been served with a Notice of intended prosecution for contravening the Public Health Act. That when he visited the premises he was shocked to find that the plaintiff no longer resided in the premises and had converted the premises into a hostel and that the premises were in a deplorable condition. He also stated that the plaintiff is dishonest because she commenced a business upon receipt of termination notice which was served upon her on 3rd September 2013 and that her intention was to frustrate the defendant's quest to regain his premises for his own use. Therefore the plaintiff has come to court with unclean hands and undeserving of the prayers sought in the application.

In a rejoinder the plaintiff filed a further affidavit on 11th March 2014 where she reiterated the contents of her supporting affidavit.

Parties agreed to canvass this application by way of written submissions. The plaintiff filed her submissions on 23rd March 2014 where she relied on the case of **Giella –vs- Cassman Brown Ltd [1973] EA 358**. On whether the plaintiff had a prima facie case, she submitted that the defendant had agreed to extend the tenancy for a further four months from 30th June 2012 hence the new end of term would have been 30th November 2012, she further stated that the defendant should have taken over the premises after the end of the four months and not 10 months after the end of the verbal extension of the tenancy. On whether the plaintiff would suffer irreparable injury that cannot be compensated by damages, she submitted that she had students who were residing in the hostel and she was unable to get alternative accommodation for them. On whether the balance of convenience tilted in favour of the plaintiff, she submitted that the circumstances of the case was to the effect that the balance of convenience tilted in her favour.

The defendant filed his submissions on 7th May 2014 where he equally relied on **Giella-vs- Cassman Brown Ltd (supra)** and stated that the tenancy lease expired in 2012 and when the plaintiff continued to stay in the premises the tenancy became a month to month tenancy. He further submitted that he issued the notice to vacate and deliver up possession on 3rd September 2013 which notice gave her up to 31st December 2013. She also received a letter from the defendant's advocates on 19th December 2013 asking her to deliver keys to the house at the advocate's offices which letter was served two weeks before the expiry of the notice to vacate. The defendant has disputed having any knowledge of the existence of a boys hostel in his premises as there was no evidence for the plaintiff to support her claim adding that the process of converting a residential premise to that of commercial user as the one for the Boys hostel required a procedure that involves the owner of the premises and authority to operate as such from the relevant authorities. He also added that he was served by the City Council of Nairobi a **notice** of intended prosecution and has been put on notice to demolish illegal temporary structures constructed on the property used as boarding rooms. The defendant also raised the issue that the plaintiff was in the business of running a lodging and not a hostel as alleged for the reasons that the names of the hostel as presented was Metropolitan Boys Hostel while the licence she was issued as permit was for Living Concept lodging and Guest House, therefore the two sets of documents cannot relate to the same business establishment. The plaintiff has therefore not shown this court that she has a prima facie case with a probability of success. On irreparable injury, the defendant submitted that the plaintiff is capable of renting suitable premises of lodging/guest house or a boy's hostel where she will continue with her business. He further submitted that the plaintiff did not raise the defendant's inability for compensation of any loss. On the

balance of convenience the defendant submitted that he is being denied the use of his property and because of the activities of the plaintiff he is now facing eminent prosecution for flouting City by laws having been served with a **notice to comply**. He added that the continued occupation of the suit premises by the applicant in the present state is exposing the defendant to arrest and prosecution which is inconveniencing to the defendant.

I have considered the pleading and the submissions filed by the parties herein. The Plaintiff maintains that it has met the threshold of grant of injunction as enunciated in the **Giella -v-Cassman Brown** case as she has established a prima facie case with chances of success and that she has demonstrated that she will suffer irreparable loss if the injunction sought is not granted. The defendant on the other hand has claimed that he issued a proper notice to vacate and therefore he does not see the need to have the injunction issued as the plaintiff is out to frustrate him in recovering back his house.

It is not in dispute that the parties herein got into a tenancy agreement that expired after two years. However there are conflicting averments on how the tenant was allowed to stay further after the expiry of the term. What is evident also from the pleadings is that the plaintiff started a business of a boy's hostel without the knowledge of the defendant. This is because there was no written agreement between the two parties on the issue of boys' hostel. Further the defendant has annexed in his affidavit a notice from the City Council asking him to demolish all the illegal structures used as boarding rooms and that the defendant was required to provide a change of user certificate that allowed the defendant to operate a boys' hostel in a domestic dwelling house. This court finds that the plaintiff is not candid in her allegation that the defendant was aware of her operating a hostel in his premises for the reason that change of user is a process that has to be approved by the City Council of Nairobi and for it to be actualised it had to be by the participation of the defendant as the landlord/owner of the premises. This court finds that the plaintiff has not persuaded this court that it has a prima facie case with a balance of probability.

Having found that the plaintiff has not shown a prima facie case with a probability of success, this court will look at the second limb of whether the plaintiff would suffer irreparable loss. The plaintiff has stated that she has a hostel whereby the students have paid for two semesters and moving them away will prejudice her greatly as she had no place to relocate the students. This court makes a finding that the two semesters as per her affidavit comes to an end sometime in December 2014. Therefore she will not suffer any irreparable loss should they be evicted from the premises. The balance of convenience titles in favour of the defendant who runs the risk of being prosecuted should he not comply with the City by laws as served on him in the notice.

From the foregoing this court finds no merit in the application filed by the plaintiff and is hereby dismissed. This court makes the following orders:-

- 1. The Plaintiff shall be given 30 days from the date of this ruling to vacate the premises voluntarily. In default, the plaintiff be evicted from the premises by the defendant and/or his agents in compliance with the law.*
- 2. The Plaintiff shall pay any outstanding rent arrears to the defendant on the date the plaintiff will be vacating the premises.*
- 3. Costs of the application be borne by the Plaintiff.*

Orders Accordingly.

Dated, Signed and delivered this **11th day of December 2014**

L. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff/Applicant

..... for the Defendant/ Respondent

Kamau: Court Clerk

L. GACHERU

JUDGE