



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 708 OF 2012

PHOEBE A. OMONDI

CAROLINE A. OMONDI

ROSELYNE A. OMONDI.....PLAINTIFFS

GRACE S. A. OMONDI

WINFRED OMONDI

T/A CHAKO TRAINING CENTRE

VERSUS

EVANS MURUNGARU KAMITI

T/A JESUS PROPHETIC MINISTRIES.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 14/11/12 brought under Order 36 Rule 1 (1) (b) of the Civil Procedure Rules, 2010 and Sections 3A of the Civil Procedure Act. It seeks the following orders:

1. That the honourable court be pleased to enter Summary Judgment against the Defendant/Respondent and further order the Defendant to handover vacant possession of all that balcony and/or premises above the 3rd floor comprised in Land Reference No. 209/12513 to the Plaintiffs/Applicants.
2. That the Defendant/Respondent do pay the costs of the suit and application.

The application is supported by the grounds appearing on the face of the application and the Supporting Affidavit of Phoebe A. Omondi sworn on 14/11/12 in which she averred that on or about 25/9/09 she and her co-applicants permitted the Defendant/Respondent to use for prayers and/or church service a hall (balcony) leased by them on Land Reference Number 209/12513 above the 3rd floor at 1 o'clock during the working days and on Sunday and further agreed that the Defendant was to pay for the use of lavatories, water and electricity on a monthly basis. She further indicated that on 1/10/09, the Defendant/Respondent accepted that offer and the conditions. She further stated that by their letter dated 28/1/11, they demanded vacant possession of the said premises from the Defendant/Respondent. She further stated that by his letter dated 22/2/11 the Defendant/Respondent accepted to give vacant possession to the Applicants and sought a grace period of about 3 months for the purpose of preparation

and relocation. She further averred that the Defendant/Respondent subsequently failed, refused and/or neglected to handover vacant possession after the expiry of the said period. She further stated that the Defendant/Respondent continued stay at the premises was illegal and unlawful and that he has no defence to the claim of the Applicants.

The Application is contested. The Defendant/Respondent filed his Replying Affidavit sworn on 3/12/12 in which he stated that Jesus Prophetic Ministries (hereinafter referred to as "JPM") is a registered society where he is only an official and that it is not a business name. He further indicated that the Plaintiffs have no right whatsoever to the premises that are occupied by JPM on L.R. No. 209/12513 as they are neither the tenants nor the owners of the same. He further indicated that the premises occupied by the Plaintiffs are on the 4th floor of Woodland House, Moi Avenue in a tented portion of the said floor. He further stated that sometime in September 2009 JPM was searching for a hall to rent for the purpose of establishing a church. He stated that he learnt there was a hall available on 4th floor Woodland House on Moi Avenue and he was informed that the people occupying the 3rd floor could give information concerning the hall. He stated further that the 3rd floor was occupied by Chako Training Centre where he met Mrs. Omondi, a director of the said Centre who informed him that they were the caretakers of the 4th floor space and that they could negotiate a lease for him with the Landlord who was said to be out of the country at the time. He further stated that they agreed that the premises would be let to JPM at the monthly rent of Ksh. 20,000/- and that JPM paid Ksh. 60,000/- being rent for three months. He further indicated that the said Mrs. Omondi gave them the key to the premises and informed them that she would give the rent paid to the Landlord when he came and that he would deal with the issue of toilets which were not there as well as a separate electricity meter and any other arising issues. He further averred that they stayed in the said premises for the remaining months of 2009 and the whole of year 2010 all the while being told that the owner was still outside the country. He further swore that JPM used to pay rent to the Plaintiff on the understanding that the Plaintiff would deposit it in the owner's bank account. He further averred that JPM did not use the premises at 1 o'clock and on Sundays only as stated by the Plaintiffs but that they used the premises throughout. He further swore that due to concerns JPM experienced while occupying the premises such as leakages on the roof of the premises, toilets and electricity, the Church Board held a meeting and agreed that JPM discontinue payment of rent until all issues with the Plaintiff and the Landlord are sorted out. He further stated that in January 2011, he came to learn that Chako Training Centre were not the caretakers of the 4th floor as they had alleged but were tenants of the 3rd floor only. He further stated that he was referred to the advocates for the owners of the building namely M/s Vishnu Sharma & Company Advocates to whom he explained his predicament concerning JPM's occupation of the premises. He stated further that the said advocates were shocked by the claim of Chako Training Centre that they had a right to rent out the premises. He further stated that the said advocates talked to the landlord who stated he had never been paid any money by the Plaintiffs and he did not know there was anyone renting 4th floor of his building. He stated further that the Advocates requested for copies of the receipts issued by the Plaintiff upon payment of rent. He stated that the said advocates advised JPM not to pay any further rent until it got the go ahead of the Landlord to do so. He stated further that the advocates instructed him to ask the Plaintiffs to refund all rent monies paid to them so he can sit with the Landlord and discuss a lease. He stated further that he wrote to the Plaintiff demanding to be refunded the sum of Ksh. 280,000/- he had paid to them as rent. He stated further that instead of receiving the refund, they received threats which purported to be anonymous but which they reported to the police. He stated further that the letters appearing on the Plaintiff's list of documents purporting to emanate from JPM are all forgeries. He also indicated that the Plaintiffs' suit was unfounded and lacked merit and ought to be dismissed. He also stated that this is not a case for summary judgment and he should be allowed to defend the suit to the end.

The Plaintiffs filed a further affidavit by Phoebe A. Omondi sworn on 12/3/13 in which she indicated that there is no single time they held themselves out as the caretakers of the premises and that the Defendant/Respondents was allowed to occupy the premises not as a tenant but as a licensee. She further stated that the monies received by the Plaintiffs from the Defendant/Respondent were among other charges for the facilities he was using at the time of conducting church services. She further swore that the premises occupied by the Defendant/Respondent was not the 4th floor as claimed by him but was an open space above 3rd floor. She further indicated that the Landlord had always wanted the

Defendant/Respondent to leave the premises. She further stated at no time was she and her co-applicants summoned to any police station to record a statement for purported threats issued to the Respondent. She also stated that the suit premises has a caretaker by the name Mr. Okumu who was well known to the Respondent and who kept the key to the premises. She also indicated that the Respondent made a payment of Ksh. 210,000/- for the services rendered and not Ksh. 280,000/- as alleged by the Defendant/Respondent in his affidavit. She also stated further that the Defendant/Respondent always held himself out as the founding director of JPM and that the letters referred to were not forgeries.

Both the counsel for the Applicants and for the Respondent filed their written submissions and highlighted the same. These have been read and taken into consideration.

The Applicants have filed this application for Summary Judgment under the authority of Order 36 Rule 1 (1)(b) which states as follows:

“In all suits where a Plaintiff seeks judgment for recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired...where the defendant has appeared but not filed a defence the Plaintiff may apply for judgment for the amount claimed...or for recovery of the land or rent or mesne profits”.

In this matter, the applicants are not seeking judgment for a liquidated amount nor are they seeking recovery of land. Further, the Plaintiff/Applicants have on their own admission indicated that they are not the landlords of the premises the subject matter of their application. Accordingly, their application does not qualify to be brought under the provisions of Order 36.

Summary Judgment may only be granted where a particular defence does not raise any triable issues. See ***Jacobs v Booths Distillery Company [1901] L.t. 262 H.L.*** This particular suit raises numerous triable issues which need to be ventilated at a full hearing of the suit. These include the issue of the Plaintiff/Applicants status or standing as far as the suit premises is concerned, the issue of the ownership of the suit premises namely who is entitled to lease out the suit premises, whether the space occupied by JPM lies on 3rd floor or 4th floor, whether the correct parties have been sued, among others. All these issues remain undetermined at this juncture. This is therefore not a clear case in which Summary Judgment maybe entered.

In view of the foregoing, this court hereby dismisses this application with costs to the Defendant/Respondent.

SIGNED AND DELIVERED AT NAIROBI ON THE 21ST

DAY OF JUNE 2013.

MARY M. GITUMBI

JUDGE