



RE PUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 155 OF 2012

MOHAMED NOOR ADEN1ST PLAINTIFF

AKIDA ABDULHAKIM2ND PLAINTIFF

(BOTH trading as Nyali Integrated Academy)

- V E R S U S -

BARRACK ALLAN ABUTO DEFENDANT

RULING

[1] The applicants filed this application on 24th August 2012 and prayed for the following orders:-

1. *That this application be certified as urgent and service thereof be dispensed in the first instance.*
2. *That the defendant/respondent, their employees, agents and/or servants be restrained from evicting or in any other way interfering with the Tenants/Applicant's quiet possession and enjoyment of the suit premises namely Plot No. 6609/1/MN pending the inter partes hearing of this application.*
3. *That the defendant/respondent, their employees, agents and/or servants be restrained from evicting or in any other way interfering with the Tenants/Applicant's quiet possession and enjoyment of the suit premises namely Plot No. 6609/1/MN pending the hearing and determination of this suit.*
4. *That the orders issued be served upon Nyali Police Station to ensure compliance.*
5. *That the costs of this application be provided for.*

The basis of the applicants application is that the respondents by letter dated 10th July, 2012 and 30th July, 2012 gave the Appellants notice to vacate plot N. 660/1/MN by 30th August, 2012 and that the respondents demand Kshs. 42000 as arrears of rent while the applicants claim they paid Kshs. 322000 into the respondents bank account as full settlement of rent. The applicants claim that they have fully paid Municipal Council rates for and on behalf of the respondents. They argue that they are only obliged to settle ground rent after the respondent has updated the ground rent up to December 2009. The applicant

argues that the respondent is in current occupation of a substantial portion of the suit premises and uses a lot of electricity for his own purposes including welding of motor vehicles. The applicants are apprehensive that, if those orders are not granted the defendant/ respondent may at any time enter into the premises and evict the applicants. The apprehension of the applicants is supported by the affidavit of one Mohammed Nur Abdullahi sworn on 24th August 2012. The affidavit sets out the reasons for making this application.

[2] The respondent on the other hand filed his reply on 6th September 2002. The respondent said that at the time of swearing the affidavit, the applicants were month to month tenants. They argued that the notices issued to the applicants were valid and legal and were based on the implied and express terms of the lease as agreed between the parties. The respondent disputed the payment of rates to the Municipal Council of Mombasa. The respondent said the money paid by the appellants were a backlog of outstanding rent and Municipal rates on 31st July, 2012.

The respondent admits there was always a garage in the premises where he parks his vehicle but denied the consumption of electricity. He denied that the tenancy falls under the landlord and Tenant (shops hotels and catering establishments) Act Cap 301. He insists that the lease is still in force and relied on Section 60 of the Land Act 2012.

The applicant uses the premises as a school. He says he has classes from KG 1 to Standard 8. By the time he swore his affidavit he had 13 KCPE Candidates. Mr. Gikandi Learned Counsel for the applicants told the court that there are very many young Kenyans studying there. He argued that the appellants have invested on the students. He further argued that the balance of convenience tilts in favour of the applicants.

[3] I have perused, the prayers in the plaint which are as follows:-

(a) *A declaration that the Notices dated 10th July, 2012 and 30th July, 2012 issued to the Plaintiffs by the Defendant to vacate the Plot No. 6609/I/MN are irregular and unlawful.*

(b) *An injunction order to restrain the Defendant from evicting or in any other way interfering with the Plaintiffs' quiet and peaceful occupation of the Plot No. 6609/I/MN.*

(c) *An order that the Defendant pays the Plaintiffs for the electricity and water consumed by the Defendant on part 4 Plot No 6609/I/MN.*

(d) *Costs of this suit plus interest thereon.*

The prayers in the application are the same as the prayers in the plaint. If I were to decide the prayers sought in the application I will be deciding the suit without giving the parties an opportunity to tender their evidence and to have that evidence challenged under cross-examination. This would occasion injustice on the parties.

The main issue here is rent and whether the same is paid or is in arrears. This is obviously an issue that can easily be sorted out by compensation of money once the suit is decided. There is no allegation that the applicants will be unable to pay.

Relying on the famous case of ***Geilla -vs Cassaman Brown***¹ the balance of convenience tilts in favour of the applicants. This is a school, any disruption of the institution of the suit premises will affect many young students and their parents who are not parties to this dispute. This will result to a situation which is not desirable.

The applicants will however be well advised to continue depositing all due rents to the respondents account pending the hearing of this suit.

The end result is that the application dated 24th August 2012 is allowed as prayed in prayers 2,3, and 4

of the same.

Each party shall bear their own costs.

Dated and delivered in open court at Mombasa this 23rd day of August 2013.

S.N. MUKUNYA

JUDGE

In the presence of:

Gikandi Advocate for the plaintiffs

Abuto (in person) for the defendant

1 [1973] E.A. Page 358