



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT KISII
CIVIL CASE NO. 442 OF 2013

JANET OBURU ODHIAMBO PLAINTIFF

VERSUS

CATHOLIC DIOCESE OF HOMABAY T/A

ST. JOSEPH MISSION HOSPITAL MIGORI DEFENDANT

RULING

1. What is before me is the Notice of Motion application dated 4th November 2013 brought by the Plaintiff seeking the following principal orders:
 - a. **A mandatory injunction directing the defendant/respondent, their agents and/or servants to remove their padlock and grant access to the plaintiff/applicant to her business premises.**
 - b. **A mandatory injunction directing the defendant/respondent their agents and/or servants to remove their padlock and grant access to the plaintiff/applicant to her business premises until the matter pending at the Tribunal is heard and decided.”**

The Plaintiff’s application was brought on the grounds set out on the face of the application and on the supporting affidavit of the Plaintiff sworn on 4th November, 2013. In summary, the application was brought on the grounds that; the defendant leased a canteen within its hospital premises to the Plaintiff. The tenancy agreement between the Plaintiff and the defendant was controlled under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301, Laws of Kenya (hereinafter referred to as “**the Act**”).

2. In the month of June 2013, the defendant served upon the Plaintiff a notice to quit and vacate the said canteen on or before 1st September 2013. The said notice that was dated 14th June, 2013 was issued pursuant to the provisions of section 4 (2) of the Act. The Plaintiff filed a reference at the Business Premises Rent Tribunal (hereinafter referred to as “**the tribunal**”) on 26th June, 2013 in response to the said notice so that the tribunal can determine whether the grounds upon which the defendant had sought to terminate the Plaintiff’s tenancy were valid and whether the said termination was justified. While the Plaintiff’s reference was pending hearing and determination at the tribunal, the defendant through its agents and/or servants locked the Plaintiff out of the said canteen by putting another padlock on top of the Plaintiff’s own padlock that she had used to lock the premises thereby denying the plaintiff access to the said canteen. The defendant has refused to remove the said padlock even after being requested to do by the Plaintiff. The Plaintiff stands to suffer irreparable loss if the canteen remains locked. It is on account of the foregoing that the Plaintiff has sought the orders prayed for in present application. The Plaintiff has contended that it would be fair and just that the defendant be restrained from in any way interfering with the

- Plaintiff's business until the matter at the tribunal is heard and determined. The Plaintiff annexed to her affidavit, a copy of the notice to terminate tenancy that was served upon her by the defendant and a copy of the reference that she filed at the tribunal on 26th June, 2013.
3. The Plaintiff's application was opposed by the defendant. In response to the application, the defendant filed a replying affidavit sworn by Sister Beatrice Claire Osire on 15th November 2013. In the said affidavit, the defendant contended that; the defendant leased to the Plaintiff the canteen the subject of this dispute (hereinafter referred to as "**the canteen**") on 25th September 1999 and that it was a term of the said lease that the Plaintiff would only sell at the said canteen, shop goods, tea, *uji* (porridge), soda's, snacks and fruits to the patients of the defendant. It was also a term of contract between the Plaintiff and the defendant under the said lease that the canteen would not be used to serve meals and that the Plaintiff had contravened the aforesaid terms of the lease. It was a further term of the said lease that the Plaintiff would pay rent for the canteen half-yearly and that the defendant reserved the right to terminate the lease at any time by giving one month notice to the Plaintiff. The defendant contended that since the beginning of the lease, the defendant has persistently failed and/or delayed in paying rent for the canteen as had been agreed. On 14th June, 2003, the defendant decided to serve upon the Plaintiff a notice to terminate the Plaintiff's tenancy because, first, the defendant wanted to put the canteen to its own use and, secondly, the Plaintiff had persistently failed to pay rent as and when the same fell due. Following the service of this notice, the Plaintiff on the defendant's invitation held a meeting with the defendant on 23rd September 2013 at which meeting, the Plaintiff agreed to vacate the canteen by 31st October 2013. Pursuant to the said agreement, the Plaintiff on 1st November 2013 vacated the canteen but refused to hand over the key to the kitchen and store to the defendant. The defendant wanted the Plaintiff to vacate the canteen so that the defendant may use the same as a TB diagnostic clinic and since the defendant vacated the same, the defendant has renovated it and the same is now fully operational as a clinic. In conclusion, the defendant contended that the orders sought herein have been overtaken by events.
 4. The Plaintiff's application came up for hearing on 18th November, 2013 when Mr. G.M. Masese, advocate appeared for the Plaintiff while Mr. Abisai, advocate appeared for the defendant. In support of the application, Mr. Masese submitted that; it is not in dispute that the Plaintiff was a tenant of the defendant and that the defendant had issued the Plaintiff with a termination notice of her tenancy that was to take effect on 1st September 2013. It is also not in dispute that the Plaintiff filed a reference to the tribunal in response to the said notice which reference is pending hearing and determination by the tribunal. Mr. Masese submitted that the defendant blocked the Plaintiff from accessing the canteen by placing its own lock on top of the Plaintiff's lock on 1st November, 2013. On that day, the Plaintiff went to the canteen and found it locked and was turned away by the watchmen.
 5. Mr. Masese urged the court to grant the orders sought so that the Plaintiff may continue with the business pending the determination of the reference by the tribunal. He contended that the defendant's replying affidavit does not deny the existence of the tenancy between the Plaintiff and the defendant. The defendant has also not denied the existence of a reference lodged at the tribunal by the Plaintiff. He submitted that the matters raised in the replying affidavit are matters that will be considered by the tribunal when deciding whether to terminate the tenancy between the Plaintiff and the defendant or not. He submitted further that the defendant had placed nothing before the court to show that the parties had agreed that the tenancy should come to an end. He submitted in conclusion that this is an appropriate case for the orders sought to issue.
 6. In his reply to Mr. Masese's submissions, Mr. Abisai for the defendant relied on the replying affidavit sworn by Sister Beatrice Claire Osire and submitted that the Plaintiff's application has been overtaken by events. Counsel submitted that the canteen was handed over to the defendant by the Plaintiff and that the defendant has proceeded to convert the same to a clinic. Counsel submitted that there is no evidence that the plaintiff found a padlock on the door of the canteen. Counsel submitted that this was a long standing dispute between the parties which they agreed to sort out amicably due to the Plaintiff's inability to pay rent to the defendant. Counsel submitted that this is not an appropriate case where an interlocutory mandatory injunction should be granted. He submitted that the premises have been altered substantially and as such the Plaintiff's recourse should be in damages. He urged the court to dismiss the Plaintiff's application with costs.

7. I have considered the Plaintiff's application, the replying affidavit filed by the defendant in opposition to it and the respective submissions of the advocates for the Plaintiff and the defendant. This is the view that I take of the matter. It is not in dispute that the Plaintiff was at all material times a tenant of the defendant. It is also not in dispute that the Plaintiff's tenancy was a controlled one under the Act. It is also not in dispute that the defendant had served the defendant with a notice of termination of tenancy which was to take effect from 1st September, 2013. It is further not disputed that the Plaintiff filed a reference to the tribunal on 26th June, 2013 and asked the tribunal to investigate the said notice and determine whether lawful grounds exist for terminating the Plaintiff's tenancy. It is also not in dispute that the Plaintiff's reference before the tribunal is pending hearing and determination.
8. Section 4 of the Act provides that notwithstanding anything contained in any other law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated otherwise than in accordance with the provisions of the Act. The Act provides that a landlord who wishes to terminate a controlled tenancy must serve a notice to that effect upon the tenant and where the tenant wishes to oppose the notice, he shall refer the matter to the tribunal by filing a reference and when such a reference is filed with the tribunal, the notice of termination shall not take effect until the tribunal has determined the reference. The defendant herein served the Plaintiff with a notice under the Act of its intention to terminate the Plaintiff's tenancy. The defendant referred the said notice to the tribunal for determination. The Plaintiff claims that while the said reference was pending determination by the tribunal, the defendant proceeded to evict the Plaintiff from the canteen by locking up the same and refusing to open the same for the Plaintiff when asked to do so.
9. In the Court of Appeal case of, **Gusii Mwalimu Investment Co. Ltd. & 2 Others vs. Mwalimu Hotel Kisii Ltd, Civil Appeal No. 160 of 1995 (unreported)**, it was held that **"It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession"**. It follows from the foregoing that the defendant could only obtain possession of the canteen through the tribunal or the court unless the Plaintiff had agreed to give up possession. The defendant has claimed that the Plaintiff had agreed voluntarily to hand over possession of the canteen to the defendant and in fact proceeded to do so on 1st November, 2013. The Plaintiff has denied this contention. The onus therefore was on the defendant to prove the alleged agreement under which the Plaintiff had consented to vacate the canteen. The defendant did not put any material before the court in proof of this claim. I am therefore unable to agree with the defendant's contention that the Plaintiff had surrendered her lease over the canteen. I don't see how the Plaintiff could be said to have voluntarily vacated the canteen while she is said to have refused to hand over the keys for the store and the kitchen. The defendant has not denied in their affidavit in reply the Plaintiff's claim that the defendant had placed their padlock on top of the padlock that the Plaintiff had used to lock the canteen.
10. I am persuaded that the Plaintiff has demonstrated on a prima facie basis that she was unlawfully evicted by the defendant from the canteen. The defendant argued that the prayers sought herein have been overtaken by events because the defendant has committed the canteen to another use. The defendant argued further that the only recourse open to the Plaintiff is to claim damages from the defendant for unlawful eviction but not to seek reinstatement. In my view the Plaintiff was a lawful tenant of the defendant and as such tenant she was entitled to exclusive use and enjoyment of the canteen until her tenancy was terminated as by law prescribed. The defendant's act of entering into the said canteen and locking up the same amounted to trespass.
11. As was held in the case of **Aikman -vs- Muchoki [1984] KLR 353**, the defendant cannot be allowed to keep what it has unlawfully taken from the Plaintiff. It would only be fair that the parties revert to the status quo that was prevailing before the defendant's illegal entry and eviction of the Plaintiff from the canteen. In the case of **Kamau Mucuha -vs- The Ripples Ltd. (Civil Application No. Nai. 186 of 1992)(unreported)**, Justice Cockar, J.A (as he then was) stated that, **"A party, as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act....."**. In the case of **Jaj Superpower Cash and Carry Ltd. -vs- Nairobi City Council & 2 others, Court of Appeal at Nairobi, Civil Appeal No.111 of 2002(unreported)**, the court said this at page 10, **"this court has recognized and held in the past that it is a trespasser who should give way pending the determination of**

the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.” I am satisfied that the Plaintiff has met the conditions for granting a mandatory injunction. In the case of **Redland Bricks Ltd vs. Morris [1970] AC 652**, it was stated that jurisdiction to issue a mandatory injunction“ **is a jurisdiction to be exercised sparingly and with caution but in a proper case, unhesitatingly”**.

12. Due to the foregoing, I find the Plaintiff’s application dated 4th November, 2013 well merited. A mandatory injunction is hereby issued in terms of prayer 3 of the said application to last until the Plaintiff’s reference to the tribunal is heard and determined or until further orders by this court or the tribunal. For the avoidance of doubt, the order issued herein shall not relieve the Plaintiff of his tenancy obligations to the defendant under the tenancy agreement between the Plaintiff and the defendant dated 25th September, 1999. The Plaintiff shall have the costs of this application.

Delivered, dated and signed at KISII this 2nd day of December, 2013.

S. OKONG’O

JUDGE

In the presence of:

Mr. G.M.Masese for the plaintiff

N/A for the defendant

Mobisa Court clerk.

S. OKONG’O

JUDGE