



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 228 OF 2011

GEORGE KIARIE NGANGA.....PLAINTIFF

VERSUS

SAMWEL WATHANGA KARIUKI.....1ST DEFENDANT

WINFRED MUTHONI KARIUKI.....2ND DEFENDANT

JOHN MUTHEE NGUNJIRI T/A TANGO

AUCTIONEERS & GENERAL MERCHANTS.....3RD DEFENDANT

RULING

The Notice of Motion dated 24/8/2011 was brought by the plaintiff/applicant against Samuel Wathanga Kariuki, Winfred Muthoni Kariuki and John Muthee Ngunjiri t/a Tango Auctioneers and General Merchants, the 1st to 3rd respondents respectively. The applicant seeks the following orders:-

- 4. That a mandatory injunction do issue compelling and/or commanding the 1st and 2nd defendants to re-instate the plaintiff in the suit premises known as L.R. No. 1144/15 & 16 pending the hearing and determination of this suit;**
- 6. That a mandatory injunction do issue compelling and/or commanding the 1st and 2nd defendants to re-instate the plaintiff in the suit premises known as L.R. No. 1144/15 & 16 pending the hearing and determination of this suit;**
- 7. That the Court be pleased to grant a temporary injunction restraining the respondents whether by themselves, their agents and/or servants from evicting the plaintiff from the suit premises known as L.R. No. 1144/15 & 16 Mai Mahiu Building within Naivasha Municipality pending the hearing and determination of this suit;**
- 9. That the Court be pleased to grant a temporary injunction restraining the respondents whether by themselves, their agents and/or servants from taking over, constructing buildings, occupying, remaining thereon, carrying out any developments, selling, transferring and/or alienating the plaintiff's business premises known as L.R. No. 1145/15 & 16 Mai Mahiu building within Naivasha Municipality pending the hearing and determination of this suit.**

The application is based on grounds found in the body of the application and the supporting and supplementary affidavits sworn by the applicant, G.K. Nganga, on 24/8/2011 and 6/9/2011

respectively. The applicant deponed that he has been a tenant of the 1st and 2nd respondents in a building known as Mai Mahiu Building since the 1970s. The 1st and 2nd respondents are son and mother. The applicant contends that he has always paid rent when due and is not in any arrears. However, on 5/8/2011, the 1st and 2nd respondents instructed the 3rd respondent to levy distress against him which action was illegal and unlawful as the 1st and 2nd respondents had refused to accept rent for the months of June and July 2011; That the 3rd respondent proclaimed the goods (GKM1) which were carried away by a gang of men who damaged his property, the premises and destroyed various food stuffs. By then, the applicant was away and on being informed, rushed back to the premises, reported to the police as a result of which the 1st respondent was arrested as he did not have any court order authorizing him to evict the applicant. The 1st respondent had on 12/5/2011 filed Misc. Apl. 156/2011, seeking to evict the applicant and 2 others from the premises but the court declined to certify the matter as urgent and that application has not been heard to date. The applicant claims to have been threatened by the 2nd respondent that she would ensure he was evicted. The applicant claims that a total sum of Kshs.130,000/- was also stolen during the eviction. He annexed pictures and documents as evidence of the unlawful eviction.

In opposing the application, the 1st respondent swore a replying affidavit dated 1/9/2011. Mr. Mboga, counsel for the respondents urged that the applicant was in rent arrears and the respondent only levied distress for the arrears; that it was the applicant who removed the metal grills claiming them to be his and caused extensive damage to the building as a result of which the County Council of Naivasha issued a demolition notice dated 17/8/2011 (SWK2). It was also submitted that there is no longer any landlord/tenant relationship between the applicant and the 1st respondent and if this court to grants the orders sought, it would be tantamount to the court creating a contract between the parties and further that the orders would be barring the respondents from developing their property as directed by the Council. Mr. Mboga also submitted that the application is an abuse of the court process and there is no likelihood of success. Counsel relied on the decision of the case of **Aikman V Muchoki (1984) KLR 353**.

Having carefully considered the rival arguments, it is apparent that as early as 22/1/2011, the respondent had issued a termination notice to the applicant. The notice part of (SKK5C) filed at the Tribunal indicated at paragraph 3, that the respondent intended to carry out renovations in compliance with the notice issued by the Municipal Council of Naivasha to renovate or demolish the premises. As a result of that notice, the Chairperson of the Business Premises Tribunal found that no reference opposing the notice had been filed by the applicant and the termination notice had taken effect under **Section 10 of Cap 301 of the Laws of Kenya**; that the chairperson also found that the Tribunal had no jurisdiction in the matter as the tenancy relationship had been terminated and the landlord (1st & 2nd respondents) should seek orders of eviction from the ordinary courts. The Tribunal made the order on 6/5/2011 after reminders to the applicant. There is no evidence that the 1st and 2nd respondents ever sought eviction orders from any court as directed by the Tribunal but instead the 1st and 2nd respondents instructed the 3rd respondent to levy distress for rent arrears of Kshs.20,000/- on 20/7/2011. in so doing that the respondent had ignored the notice that had been filed at the Tribunal and recognized the fact that there still existed a landlord/tenant relationship between the applicant and the 1st and 2nd respondents. Otherwise the respondent should have sought eviction orders as directed by the Chairman of the Tribunal. It seems therefore that there was still subsisting a tenant/landlord relationship between the disputing parties at the time the respondent purported to levy distress.

As pointed out earlier, as early as January 2011, the respondents wanted the applicant to vacate the premises. As per the notice of termination filed with the Tribunal, the reason for termination was for purposes of renovating the premises but not that rent was in arrears. The rent payable is only Kshs.6,500/-. The respondent has not indicated when the rent started falling due. This is because the applicant alleges that it is the respondent who declined to accept rent which explanation is believable taking into account the fact that the respondent had issued notice to terminate the tenancy in January 2011.

The respondents have exhibited a letter from the Council, dated 17/8/2011, which is a notice of

demolition. The respondents claim that this notice came as a result of the applicant destroying the premises on 5/8/2011 yet in January 2011 when the notice to terminate the tenancy was issued, the respondent gave the same excuse that the council had asked them to renovate or demolish the premises. The question is whether the notice dated 17/8/2011 is genuine or it was obtained to assist the respondent get the applicants out of the premises. From the conflicting statements from the respondents regarding the notice from the Municipal Council of Naivasha; it seems that the respondents were using the Council to get rid of the applicant from the premises.

The applicant seeks a mandatory injunction at an interim stage. When can a mandatory injunction issue? The test whether to grant a mandatory injunction or not is contained in **Vol. 24 Halsbury's Laws of England 4th Ed. Para 948** which reads:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff ... a mandatory injunction will be granted on an interlocutory application”.

That test was applied in **Locabail International Finance Ltd V Agroexport & Other (1986) 1 ALL ER 901** where it stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than was required of a prohibitory injunction”.

The court will only grant an interim mandatory injunction where the case is very clear or where the respondent wants to steal a match against the opponent. In the instant case, it is clear that the respondents wanted to steal a match against the applicant to have the applicant removed from the premises despite clear orders of the Tribunal that an eviction order be sought from the court. Law breakers should not be allowed to abuse the court process. The respondents are in flagrant breach of the law. This is a case that deserves the grant of a mandatory injunction to restrain the respondents from taking the law into their own hands and to protect the rights of the applicant by allowing him to stay in the premises till the matter is heard and determined. For the above reasons I grant prayers 4, 6, 7 and 9 of the Notice of Motion dated 24/8/2011. Costs to be in the cause.

DATED and DELIVERED this 22nd day of February, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Otieno for the plaintiff/applicant.

Mr. Mboga for the defendants/respondents

Kennedy – Court Clerk.