



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 351 of 2008

NATIONAL FUND FOR THE DISABLED

OF KENYA REGISTERED TRUSTEES.....PLAINTIFF/ JUDGMENT-HOLDER

VERSUS

KENNETH NG'ANG'A MUNGAI T/A

MUNGAI & GAKURU ADVOCATES.....DEFENDANT/JUDGMENT-DEBTOR

RULING

The Plaintiff filed an application under Order 22 Rule 30(1) and (3) of the Civil Procedure Rules dated 8/11/2011 seeking an order of eviction to issue to evict the Defendant out of the suit property owned by the Plaintiff, namely the offices located at 5th Floor, Rehema House, L.R No. 209/4540, Mama Ngina Street/Kaunda Street within the City Centre of Nairobi, and order that the Officer Commanding the Central Police Station be ordered to provide security to the Court Bailiff and to maintain law and order during the execution of the said the said eviction order.

The application is premised on and supported by an affidavit sworn on 8/11/2011 by Annie Mugambi the Chief Executive Officer of the Plaintiff. The Plaintiff avers that the Defendant was its tenant at the suit premises but is now a trespasser occupying the premises without its consent. That the Defendant refused to sign a formal lease and accumulated rent arrears resulting to the Plaintiff filing suit seeking eviction of the Defendant from the premises and also recovery of the rent arrears. By a Court Order of 1/7/2009, the Defendant was ordered to pay rent arrears and to also vacate from the suit premises and to give vacant possession. That despite the Defendant settling the rent arrears, he has been accumulating others and has ignored the notices served upon him refused and/or declined to vacate from the suit premises in disobedience of the Court Order. Further that the filed a Notice of appeal on 18/12/2009 but has since not filed the appeal, and has not prosecuted the application for Stay pending appeal despite filing the same on 15/7/2010 and that there is no Stay of Execution in place.

The application was opposed. The Defendant swore a Replying Affidavit dated 9/8/2012 and alleged that the Plaintiff's application has been made in bad faith and that it is discriminatory against him. The Defendant deponed that he has been a tenant in the Plaintiff's premises for close to 30 years and has accumulated goodwill and he therefore stands to suffer substantial and irreparable loss if the application is allowed as his law practice stands to be affected. The Defendant deponed that he has paid all the rent arrears sought by the Plaintiff and that he has continued to dutifully pay to the Plaintiff monthly rent. Further, that he has on severally tried to negotiate with the Plaintiff on the terms of a new lease agreement but that the Plaintiff is not keen to offer him a new lease. The Defendant averred that he is ready and willing to sign a formal lease with the Plaintiff on such terms and conditions as may be mutually agreed

between the parties and that there is no reason whatsoever for the Plaintiff to seek to evict him from the premises.

The application was heard *inter-partes* on 10/10/2012. The Plaintiff reiterated the contents of the application and added that despite sending several letters upon the Defendant asking him to vacate, 3 years after Judgment was entered (1/7/2009) in favour of the Plaintiff and wherein the Defendant was ordered to pay the rent arrears and vacate, the Defendant has declined to vacate rendering the Judgment of the Court useless. With respect to the Replying Affidavit, the Plaintiff submitted that it did not raise any legal argument but moral arguments and asked the Court to disregard the same.

The Defendant also reiterated the contents of his Replying Affidavit that the nature of his business, being a law firm will suffer irreparably if the application is allowed. The Defendant also submitted that he met all the conditions stated in the Plaintiff and that by the Plaintiff accepting rent after Judgment was entered, can be assumed that the Plaintiff was intimating the intention of entering into a new lease. The Defendant reiterated that he is paying rent and that the Plaintiff will not suffer any prejudice.

In response, the Plaintiff submitted that entering into a new lease was an alternative prayer to the Defendant giving vacant possession, and therefore by the Court granting the order for vacant possession, entering into a new lease was thus overtaken by events. The Plaintiff also submitted that as a matter of law and procedure, it required to come to court and make a formal application for eviction even when Judgment had been entered, for purposes of getting a specific order for eviction by the Court.

I have considered the pleadings and submissions made by the Parties herein, and the main issue is whether this is an appropriate case for eviction orders to issue. It is not disputed that the Plaintiff filed a Plaintiff dated 31/7/2008 seeking orders *inter-alia* that:

- a) The Defendant be ordered to vacate from and/or give vacant possession of the Plaintiff's said premises.
- b) Alternatively:
 - i) The Defendant be ordered to sign, execute and return to the Plaintiff the Formal Lease Agreement forwarded to him on 16/3/2007 in order to facilitate the registration of a valid lease agreement.

The Defendant entered appearance and filed a Defence dated 18/9/2008. Subsequently, the Plaintiff filed a Chamber Summons application dated 31/10/2008 seeking orders *inter-alia* that the entire Statement of Defence be struck out and judgment be entered in its favour, including judgment for the arrears accumulated subsequently after 31/7/2008. From the record, the parties agreed that the application dated 31/10/2008 would be heard on 1/7/2009. Counsel for the Defendant did not appear in court on the said date, and the Plaintiff proceeded to prosecute its application which was granted by this Court on that date, and the Defence filed was struck out. The Defendant then filed a Chamber Summons application dated 9/7/2009 seeking to set aside the orders of the Court of 1/7/2009. In a ruling dated 17/12/2009 this Court in determining whether to set aside the orders entered on 1/7/2009, observed that the Defence did not appear to have an arguable defence, and such declined to set aside the said orders.

The Defendant subsequently filed a Chamber Summons application dated 15/7/2010 seeking stay of execution of the decree dated 1/7/2009 pending the hearing and application of the application and intended appeal. By consent of both parties, it was agreed that the application shall be canvassed by way of written submissions. Parties filed submissions, and in the meantime, the Plaintiff filed Bill of Costs. It was thereafter agreed that the Defendant's application dated 15/7/2010 be stayed pending the disposing off of the Plaintiff's Bill of Costs. Parties filed written submissions to canvass the Bill of Costs and a ruling thereof was delivered by the Deputy Registrar on 26/7/2011. From the record, it appears that the Defendant did not pick up on prosecuting his application for stay dated 15/7/2010.

In effect, the Plaintiff has obtained Judgment against the Defendant, which orders are in a decree issued on 17/3/2010, as follows: "*that the Defendant be and is hereby ordered to vacate from and/or give vacant*

possession of the Plaintiff's said premises." Order 22 rule 29(1) and (3) of the Civil Procedure Rules makes provision for the execution of a decree for immovable property as follows:

"(1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(3) Where possession of any building or enclosure is to be delivered, and the person in possession being bound by the decree does not afford free access, the court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of her community to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession."

The Plaintiff has therefore properly moved this Court to issue an eviction order on the basis of the decree issued on 17/3/2010. The prayer sought by the Defendant that this Court directs the Plaintiff to offer him a formal lease as prayed in the Plaint is one which cannot be granted by this Court as it is overtaken by events and is *res judicata*. It is therefore the orders of this Court that the Defendant be evicted from the suit property owned by the Plaintiff, namely the offices located at 5th Floor, Rehema House, L.R No. 209/4540, Mama Ngina Street/Kaunda Street within the City Centre of Nairobi, and that the Officer Commanding the Central Police Station be provides security to the Court Bailiff to maintain law and order during the execution of the said eviction.

The Defendant shall meet the costs of the application.

Signed at Nairobi this ____19th____ day of ____November____, 2012.

P. NYAMWEYA

JUDGE

Dated, signed and delivered in open court at Nairobi this ____19th____ day of ____November____, 2012.

P. M. MWILU

JUDGE