REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 162 of 2012

1. DAVID MUNGAI

2. SAUMU REHANI

3. KENEDY OUMA JALANGO (both suing in their capacity as

elected representative of the tenants of the Defendant occupying

the Defendant's flats in Bombolulu Estate, Mombasa)**…….PLAINTIFFS**

VERSUS

REGISTERED TRUSTEES OF TELPOSTA PENSION SCHEME…….....DEFENDANT

Coram:
Mwera J.
Odongo for Plaintiffs
Bundotich for Defendant
Furaha Court Clerk

R U L I N G

The plaintiffs filed a notice of motion dated 7th September, 2012 under Order 1 rule 8, Order 40 rule 2 of Civil Procedure Rules and sections 1A, 1B, 3, 3A, 63 (e) of the Civil Procedure Act with prayers:

(i) that they bring the suit on their on behalf and on behalf of other tenants at Bombolulu Estate;

(ii) that the defendant pension scheme be restrained from enforcing terms contained in a letter dated 28th May, 2012 which would interfere with the plaintiffs occupation of the said flats for which they were paying undisputed rents.

In the grounds it was contended that the defendant was bent on employing auctioneers to enforce the terms in the said letter dated 28th May, 2012 to recover some disputed balance of rent by levying distress – a thing that would cause the applicants irreparable loss. That that threat was unlawful and intended to coerce the applicants to pay fictitious rents put at arrears of Shs. 250,000/= per tenant since 2005. They paid their rents by check-off system and the undisputed rents had been paid up to August, 2012.

The three plaintiffs swore a joint supporting affidavit regarding the two prayers set out above. That they and other fellow tenants in Bombolulu Flats were issued with letters of offer dated 28th May, 2012 whose terms the applicants did not accept.

Going in some history of the occupation of the said flats, the applicants averred that they once belonged to the Telkom and Postal Corporation. The applicants were allocated the flats by virtue of being employees of that corporation. The corporation carried out some retrenchment in 2009-10 and some of the retrenchees remained in occupation on condition of paying rent via an agent, without fail. Some retrenchees vacated the flats and some outsiders took over. All formed a community group to organize/attend to matters of common concern e.g. sanitation, water, security, etc. Then M/S Gimco Limited managing agent left and M/S Lloyd Masika Limited came in. It raised rents to Shs. 7,000/= per month with effect from July 2011. Later, that was raised to Shs. 12,500/= per month by the letter of 28th May, 2012 with service charge deposit of Shs. 3,000/= for two months (annexure "B"). That the tenants saw this as an exorbitant increase which the managing agent put in place and was not open to discussing the same. That prompted instructing lawyers and seeking the orders as prayed, since if left as the situation is, the auctioneers may move in to recover the disputed rents and their arrears, in some cases being as high as Shs. 295,000/= (see Francis Muthoka Mutava). The supporting affidavit was accompanied by a large mass of documents. Equally, the replying affidavit was a large bundle.

In the replying affidavit, Peter Rotich, administrator of the defendant fund argued that the supporting affidavit was incurably defective by being joint contrary to the Oaths & Statutory Declarations Act. That out of the 88 occupiers of the flats at Bombolulu only 41 had moved to court. And that the managing agent merely intimated to the applicants that rent arrears could be recovered by a levy for distress and that was no threat at all. That indeed some tenants had fallen in arrears even as per the previous rates (annexure PKR 6, 7). That rents were raised to Shs. 7,000/= per month per tenant and then to Shs. 12,500/= per month after taking in regard prevailing market rates and improvements on the premises. That the plaintiffs have not sought audience with the defendant to resolve the matter. There was no rebuttal to the claim that the plaintiffs owed rent arrears even before the disputed new rents were proposed. Either side submitted.

The plaintiffs maintained their stand and added that they rejected the offer of 28th May, 2012 not only because of the increase of rent but even the way the rents were increased – speedily and without according the tenants a chance to negotiate. The agent was adamant that new rents be paid or the plaintiffs seek accommodation elsewhere. That that stand forced the plaintiffs to seek court protection. Reference was made to the previous agreement that provided for the renewal option but not rents payable on renewal. That it was wrong for the agent to proceed the way it did in this matter. It was added that this was a representative suit following leave granted by the court. The applicants did not see the default in payment of rents by some/all of them as a basis of this cause but that this matter was centred on enforcement of the letter of offer herein. Indeed it was added that even the alleged rent arrears were not accurate, citing the case of Francis Muthoka Mutava (above) who took over the flat that was once occupied by one Lydia Maganga who had been a tenant since July, 2005 and rent arrears had accrued to Shs. 295,000/=. That the plaintiffs were not challenging the rent increment but the way it was unilaterally increased. They were not intending to leave the premises at all. That the balance of convenience tilted in favour of the plaintiffs and so the orders sought ought to be granted.

The defendant's reaction to the application was more or less on the lines as stated in the replying affidavit (see above) including the aspect that rent increments were in line with prevailing market rates and the defendant was managing Bombolulu Flats for the benefit of its retired/retrenched members. That in all Shs. 15,620,172/= was owed by the plaintiffs, plus other tenants not party to this suit. Rent arrears had accrued since 2005. That the plaintiffs were not protected tenants, and so the Law of Contract governed the tenancy relationship between them and the defendant – whether by lease or on month-to-month basis. And the defendant was justified to levy distress for any rent arrears. The plaintiffs had not shown a prima facie case with probabilities of success to deserve injunction orders as prayed. Now follows the court's determination.

Order 40 rule 2 Civil Procedure Rules reads:

"2.(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for

a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an injury as to damage, the duration of the injunction, keeping an account, giving security of otherwise, as the court may deem fit." (*underlining supplied*)

From the supporting affidavit and the submission on behalf of the plaintiffs what they feel is the crux of their case is thus put in the submission:

"My Lord, the issue here is not that of default in payment of rent as the Defendant tries by its Replying Affidavit to make it appear, more so in paragraph 9 of the said affidavit, but that of enforcement a letter of offer which is legally unenforceable."

To this court's understanding, a letter of offer is not a contract in any way or as envisaged in Order 40 rule 2 Civil Procedure Rules (above). It is just an offer from one party to another intending to form a basis upon which a contract may be concluded if the parties agree. It has terms and conditions which the party to which such a letter is addressed may accept, vary or even reject. Unless the variation (counter-offer) is agreeable to the offering party, then the two will not conclude a contract. Such letter of offer cannot be enforceable or unenforceable in a court of law at all. Only a resulting contract can and that contract is what the court can consider to grant/refuse an injunction order if it is alleged that the defendant is about to breach it. And even such a claim must be backed by the applicant making out a prima facie case with probabilities of success before a court is convinced that a temporary injunction is warranted. Accordingly, with the plaintiffs basing their case here on the letter of offer dated 28th May, 2012 and not a contract (tenancy) or such agreement, this cause is considered misconceived and the prayers sought cannot issue.

It should be added that even had the cause been properly grounded in a contract, which allegedly the defendant was about to breach or was breaching, this court would have been disinclined to grant the injunction sought on the basis that the plaintiffs or some of them like Francis Muthoka, owe rent arrears however they arose. The plaintiffs could be expected to clear all rent arrears in order to ask for the discretionary/equitable relief of injunction. Otherwise they could be considered to be approaching the court with unclean hands. If they owe rents as it appears to be, they should pay up or the landlord takes course to recover the same.

All in all the order to bring a representative suit having been granted earlier as the plaintiffs argued in their submission, the order of injunction is refused with costs.

Delivered on 13th November, 2012.

J. W. MWERA

JUDGE