REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 154 of 2012

1. VINCENT W. KIETI

2. LWIZOUR A. RAJAB

3. MARGARET OKWON & 80 OTHERS…….……PLAINTIFFS

VERSUS

1. THE BOARD OF TRUSTEES TELEPOSTA PENSION SCHEME

2. LLOYD MASIKA LIMITED…….……RESPONDENTS

Coram:
Mwera J.

Bundotich for Plaintiffs

Gichana for Respondents

Furaha Court Clerk

RULING

The three plaintiffs plus eighty or so others filed the notice of motion dated 24th August, 2012 under Order 40 rules 1, 2 of Civil Procedure Rules and sections 1A, 1B, 3A, 63 (c) of Civil Procedure Act for the orders:

(i) that the defendants be restrained from levying distress for rent or interfering with the applicants' quiet occupation of premises on plot LR No. IX/118 MBA; and

(ii) that the defendants be restrained from parting with possession of the said plot No. IX/118.

The reasons given for the above prayers included a claim that the defendants unilaterally increased rents to unreasonable levels without carrying out improvements on the premises, which were purchased/bought with proceeds from the applicants' pension contributions. That the applicants had been retrenched from employment, possessed modest means and now the defendants were scheming to throw them out of the premises.

The 1st plaintiff swore the supporting affidavit on his own behalf and on behalf of the others. He averred that he was once an employee of the defendant Kenya Posts & Telecommunication Corporation which was split in 1999 and as a result the 1st plaintiff with the others, was retrenched. All the plaintiffs had been residents on the subject plot at a place called Makande paying rents through check-off system when they were in employment.

In 2006 the 1st defendant appointed M/S Gimco Limited as its property managing agent. Gimco raised rents from Shs. 1,800/= to Shs. 2,700/=. This sum was further increased in June, 2010 to Shs. 5,000/= unilaterally and without improvement on the premises. The 1st defendant then slapped a service charge of Shs. 1,500/= and a condition that each tenant pay two months deposit in rents. Thus the plaintiffs saw this as a scheme by the 1st defendant's intent on profiteering from the whole deal. The premises were bought by the applicants' pension contributions. At some point the 1st defendant offered to sell the subject Makande properties and offers were made to the applicants (annexure VWK6). There were exhibited a sample of the tenancy agreements between the plaintiffs and the 1st defendant (annexure VWK3), a notice that the tenancies would expire on 30th June, 2012 (annexure VWK4). The notice informed the plaintiffs, *inter alia*, that the 1st defendant was in the process of refurbishing the premises and would offer tenancies to the occupants but on new rates and terms because of the prevailing market rentals and the costs of the said refurbishment. The notice/offer dated 28th May, 2012 was to be accepted by signature and return of the letter. Also appended (annexure VWK6) the deponent/1st plaintiff was offered and he confirmed on 4th August, 2004 that he would buy the flat he occupied at a sum provisionally set at Shs. 750,000/=.

In the replying affidavit sworn by one David Machua a director of the 2nd defendant, current managing agent of the 1st defendant's subject property at Makande, it was stated that the reasons for increasing rents was conveyed by the letter dated 28th May, 2012 operative for thirty days taking in regard refurbishment and prevailing market rates. That of the 100 tenants, 28 accepted the offer. The plaintiffs did not sign the offers but through their lawyers M/S Obara & Obara Advocate indicated that they had no problem entering in fresh agreements except that they be given more time to consider and respond (annexure: DKM2). That letter was replied to (annexure DMK3). That was the end of communication and the plaintiffs did not accept the new tenancy offer. Then they came to court. Evidence was annexed (annexure DMK4) that prior to the increment of rent, the plaintiffs had even defaulted on the old rents e.g. Kieti Wambua V. seemingly the deponent of the supporting affidavit, owed Shs. 10,281/- in rent arrears as at 12th September, 2012 for Flat B3 he occupies at Makande, while Lwizour Akinyi Rajab (2nd plaintiff) owed Shs. 179,700/= for Flat C10 and Margaret Okwon (3rd plaintiff) owed Shs. 43,900/= for Flat C17.

Machua added that the 1st defendant was not obliged by law to consult the tenants when raising rents. Improvements had been carried out on the subject premises. The rent increases were reasonable and fair. The defendants were not scheming to edge the applicants out of the premises at all. There was no evidence of this or that the defendants were about to dispose of the flats. That the plaintiffs had come to court with unclean hands and did not disclose material facts. Both sides submitted.

At this point all that the plaintiffs need to do is demonstrate that they have a prima facie case with probability of success at the end. Not so much evidence need be adduced as to require the court to scrutinize it in depth as if it is undertaking a trial in order to grant/refuse a temporary injunction as sought here. The court appreciated the material placed before it and came to the conclusion that an injunction is not deserved. And before rendering the reason for that conclusion, may the court hasten to add that even had the plaintiffs exhibited evidence that the defendants were about to dispose of the subject property, which evidence was not tendered, this court could be disinclined to restrain the defendants from selling Makande Flats. This is the property of the 1st defendant and that is not denied. It has the right to use/abuse it the way it wants. It can rent, sell, give for free, etc. the flats in issue. The 1st defendant has that legal and commercial right to exercise over its property. It can even let the flats remain vacant and nobody can question that in a court of law.

Having said that, the plaintiffs did not disclose to this court that the levy of distress for rents was for the

arrears accumulated even before the offer of new lease. That they must pay or the landlord moves as the law permits it. Making it appear as if the levy for distress was after the proposed rent increment was not proper. It was not true. The offer to take up new leases appears in order. It can be taken up or declined. Here it is said that M/S Obara & Obara Advocates for the plaintiffs intimated to the 1st defendant that they required more time to consider the offer. If the plaintiffs are not keen on taking up the offers it is not a breach of contract or something the court can intervene in. It is the right of each tenant whether to accept the new tenancy or leave. The plaintiffs will be exercising their individual choices and properly so. But then whoever does not accept the offer may make alternative accommodation arrangements.

The plaintiffs quoted clause 4 (iv) of their apparently present tenancy agreement. But even without restating it here, it appears not helpful to the plaintiffs/tenants. That provision says that if the tenant wishes to renew tenancy he will notify the landlord (1st defendant) in two months before the expiry of intention to renew. And if the landlord agrees, the two will negotiate terms. Not that the offer by the landlord to take up fresh tenancies will be subject to negotiation.

In sum, the prayers sought in the present application are refused with costs.

Dated/Delivered on 11th December, 2012.

J. W. MWERA

JUDGE