



No. 362

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 182 OF 2010

VIRIDIANA E. OMONDI & 34

OTHERS.....PLAINTIFF

-VERSUS-

**NATIONAL HOUSING CORPORATION
DEFENDANT**

JUDGMENT

Through **Messrs Anyango Ogutu & Co. Advocates**, the plaintiffs on 29th June, 2010 filed this suit against the defendant in Milimani Commercial Courts, Nairobi praying for an order of injunction, general damages, costs of the suit and interest.

The suit was found necessary because the 35 plaintiffs at all material times had been tenants of the defendant in their individual residential rental houses in Homa-bay Provincial Housing Scheme paying agreed monthly rent of Kshs. 500/= as a result of individual oral tenancy agreements with the defendant. On or about 14th June, 2010, the defendant issued to the plaintiffs notices to vacate their said houses which notices were received by the plaintiffs on 20th June, 2010. The notices and consequential threats to evict the plaintiffs from their residential houses aforesaid were illegal and irregular as they were given less than a month to vacate the houses as the notices were to take effect on 30th June, 2010. The notices too were illegal since some of the plaintiffs had already paid to the defendant their monthly rents for the month of June, 2010 and beyond. Therefore the plaintiffs would suffer irreparable and substantial loss, injury and damages if the threatened eviction by the defendant was allowed to go on.

Contemporeously with the filing of the suit, the plaintiffs took out a chamber summons application

under certificate of urgency seeking in the main a temporary injunction against the defendant pending the hearing and final determination of the suit. They also prayed for costs. The grounds and indeed the affidavit in support of the application were a replica of the history of the dispute as set out hereinabove.

In response, the defendant pleaded that the 35 houses were advertised for sale in the year 2007 with the occupying tenants being given first priority to purchase. However on 30th May, 2008, the plaintiffs moved to court seeking an order of temporary injunction to restrain the defendant from allocating the houses to other persons once they fail to meet the deadline to purchase the houses. When the application was heard inter-partes the court declined the injunction on the grounds that the advertised sale was on the basis of willing buyer and seller and the court could not come into an arena of a private contract. Since then the defendant had applied for the dismissal of the suit for want of prosecution. In response the plaintiffs cited delay in valuation report which they want the court to rely on to determine the value of the houses. It is therefore clear that the plaintiffs have reneged from invitation to treat and are keen to engage the defendant in endless litigation knowing very well that they are still in occupation of the suit premises. Indeed suit number 41 of 2008 had been dismissed for want of prosecution and this suit is meant to deny the defendant from dealing with its property and dispose it to a willing buyer. The notices to vacate were issued on 14th June, 2010 and some of the plaintiffs paid the advance rent on 25th June, 2010. This was an attempt to use rent payment to derail the defendant from disposing off houses which it has no need for.

On 29th June, 2010, when the application came up before **Muga Apondi J.** at the ex-parte stage, the judge directed that the suit be transferred to this court for hearing and final determination. The same fate faced the application for temporary injunction.

The application came before me for interpartes hearing on 2nd November, 2010. Parties agreed to canvass the same by way of written submissions. Subsequently those submissions were filed and exchanged. I have carefully read and considered them alongside cited authorities.

In an application of a temporary injunction such as this, it is required of the applicant to establish a prima facie case with probability of success, that if the injunction is not granted, he may suffer irreparable damage that is not compensatable by an award of damages and if the court entertains doubts with regard to the application, it will decide the same on the balance of convenience. See **Giella –vs- Cassiman Brown & Co. Ltd (1973) E.A 358**. Above all however, an injunction is a discretionary and equitable remedy. It will be denied where the applicant has deliberately misled the court, swears false affidavit with holds facts from the court or otherwise comes before court with unclean hands. See **Kitur and another – vs- Standard Chartered Bank & 2 others (2002) 1KLR 640**.

Given the history of the dispute between the plaintiff and the defendant I entertain no doubt at all that the plaintiffs have not been candid to the court and have withheld vital facts of the dispute. By their conduct they are undeserving of the equitable and discretionary remedy of a temporary injunction. In the application, the grounds in support thereof and the supporting affidavit, the plaintiff made no reference at all to the previous litigation between the parties i.e **Kisii HCCC No. 48 of 2008** and which has a direct bearing to this case. In that suit the plaintiffs had similarly sought to injunct the defendant from disposing the 35 houses but were unsuccessful. Apparently, the defendant was desirous of disposing the houses and offered the plaintiffs the first option to purchase the same. The plaintiffs accepted the offer and paid the required deposit. However, they were unable to meet the other terms of the offer. Faced with the possibility that the defendant may end up offering to sell the houses to other bidders, they rushed to this court for an injunction which was denied. In my view having failed to secure the injunction sought, the plaintiffs were well aware of the defendants desire to dispose off the houses and that desire has remained alive to date. The plaintiffs did not appear or attempt to set aside the order declining their prayers. Given the above scenario, I doubt whether the plaintiff can challenge the notice on the basis of Landlord Tenancy relationship. I think that the plaintiffs' behaviour of filing this suit not in this court as they had

done previously with **HCCC No. 48 of 2008** and instead rushed to Nairobi Milimani Commercial Court is a demonstration of the plaintiffs' lack of candour and good faith. It is a blatant abuse of the legal process and as correctly submitted by the defendants, it unveils an alarming scheme by the plaintiffs to frustrate the defendant. To my mind, the plaintiffs too apart from lack of candour in the application, have also failed on the same facts to demonstrate that they have a prima facie case with probability of success.

The plaintiffs agree that they occupy the defendant's houses. The defendant has all along been desirous to dispose them off. They were offered an opportunity to purchase. They failed to meet the terms. An injunction if granted will have the effect of denying the defendant from disposing of the houses for a long period of time until the case is heard or determined. It may take over 5 years for the suit to be heard. If the plaintiffs occupy the house as tenants as they claim, can it be said that they will suffer irreparable damages that cannot be compensated by an award of damages? I do not think so. Their loss can be computed and suitable damages awarded. In any event the plaintiffs are merely challenging the legality of the notice to terminate the tenancy. They are only asking that they be given 30 days notice from when they instituted this suit. Those 30 days required have long flown past. I do not think that the plaintiffs should hold the defendant hostage over its desire to dispose off its properties. For the plaintiffs to cling on what they cannot afford and use courts for injunction after the other, is in itself undesirable trend. The plaintiff will not suffer irreparable loss that cannot be compensated by an award of damages in the circumstances.

Finally, and for the same reason the balance of convenience tilts in favour of the defendant. The plaintiffs have had more than adequate notice from the year 2007 when the defendant put up the houses for sale. The defendant has acted fairly against the plaintiffs. If the injunction is granted it will stop the defendant from disposing off its property to willing buyers. The plaintiffs have not at all challenged the right of the defendant to sell the said properties.

Accordingly, I find no merit in the application. It is dismissed with costs to the defendant.

Ruling dated, signed and delivered at Kisii this 31st day of January, 2011.

ASIKE-MAKHANDIA

JUDGE