



REPUBLIC OF KENYA AT NAIROBI

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 562 OF 2010

**C P M WAITHAKA.)
ROSEMARY WAITHAKA)PLAINTIFF/APPLICANT**

VERSUS

C P M GICHUI. DEFENDANT/RESPONDENT

R U L I N G

The applicants/plaintiffs filed proceedings by way of a plaint on 22nd November 2010 through their advocate C N Kihara & Co. Advocate. On the same date, they filed a Chamber Summons. This is the Chamber Summons that is before me for decision today.

The application was filed under Order 39 rules 1, 2, 2A, 3, 4, 7(1) and 9 of the Civil Procedure Rules. The prayers in the application are six, one of which has been spent. They are as follows: -

1. (spent)

2. *The defendant by himself, anyone else, or anyone of his agents, servants, employees, and/or anyone taking title from him be restrained from evicting the plaintiff, its agents, employees, or servants, and be restrained from taking possession or attempting to take possession, entering or breaking into, violating peace or otherwise, or interfering with the plaintiffs tenancy or exercising proprietary rights as concern terminating or purporting to terminate the plaintiffs' possession of the premises or property known as Maisonette Block 773/75 situated at Buruburu until full hearing of the suit filed herein or further orders of this honourable court and/or the determination of the reference filed in the Business Premises Rent Tribunal – Nairobi, vide BPRT. No. 850 of 2010.*

3. *An interlocutory mandatory injunction be issued directing or ordering that the defendant by himself, any of the registered owners, all employees, agents or servants do forthwith deliver the part or any portion or premises and/or cease from interfering with the tenancy of the plaintiff, or entering, or interfering with the quiet and peaceable possession of the premises known as Maisonette Block 773/75 situated at Buruburu.*

4. *The plaintiffs personal belongings and/or domestic goods collected by the defendants agents, servants, and or employees on the 19th November, 2010 from defendants premises known as Maisonette Block 773/75 and to which the plaintiffs are in occupation be returned forthwith until the full hearing of this suit herein or further orders of this court.*

5. The plaintiffs do hereby give an undertaking to indemnify or compensate the defendant for any damages that he may lawfully suffer during the time of the interim injunction orders issued herein.

6. The costs of this application be provided for.

The application has grounds on the face of the Chamber Summons. It was filed with a supporting affidavit sworn by CPM Waithaka the 1st applicant. It was deponed in the said affidavit, inter alia, that the subject tenancy had been governed by a lease agreement on condition of the plaintiff paying rent which now stood at Ksh.20,000/- per month payable in advance on the 5th of every month; that tenancy was effective from 2006 and there was a renewal clause provided the tenant gave 2 calendar months notice in writing; that the tenants had been paying the rent save for the months of October and November 2010 when the defendant declined to accept rent with the aim of trying to evict the tenants; that by a letter dated 29th October, 2010 the defendant wrote a letter of termination of tenancy on 30th of November 2010 and seeking delivery of vacant possession on the same date; by a letter dated 15th November, 2010 the Advocates for the applicants wrote to the defendant expressing disapproval of the complaints contained in the defendant's letter, and also expressing an interest in continuing to rent the house, and the need to issue a valid termination notice as provided for by law; that the advocates for the applicants had advised that the relationship between the applicants and the defendant was that of a protected tenancy under Chapter 301 Laws of Kenya; that termination of tenancy could only be done under the provisions of the said Act; that the notice to terminate the tenancy was too short and that the plaintiffs were entitled to make a reference of the matter to the Business Premises Rent Tribunal; and that on the 17th November 2010 the plaintiffs filed a reference to the said Tribunal as case No. 840 of 2010; that that notwithstanding, the defendant has threatened eviction of the plaintiffs and has shown intention to carry out the threat as he has issued proclamation notices dated 3rd September 2010 and 1st October 2010.

The applicants also, through their counsel, filed written submissions on 10th December, 2010. It was contended that the notice given was too short and therefore unreasonable and issued in bad faith. It was merely a one month notice. It also did not follow the legal procedure required. Reliance was placed on section 4 (4) of the Landlord and Tenant Shops, Hotels, and Catering Establishments Act (Cap 301) (the Act). Counsel emphasized the provisions of the subsection, which states as follows: -

“4 (4) No tenancy notice shall take effect until such dates, not less than two months after the receipt thereof by the receiving party as shall be specified therein.”

It was also contended that the notice of termination of tenancy was issued maliciously. Counsel contended that evidence available had demonstrated that there were no arrears of rent, except that in October and November, 2010 the defendant refused to receive rent. It was counsel's contention that the earlier outstanding rent of Ksh.110,000/- had been paid, but the defendant still went ahead and issued instructions for levy of distress.

Counsel contended further that this court had jurisdiction in accordance with section 165 (3) (a) (e) (6) of the Constitution which gives the High Court unlimited original jurisdiction to deal with civil matters. It was contended that this tenancy was a tenancy protected by Chapter 301 of the Laws of Kenya as defined under section 2 thereof. The said definition reads as follows: -

“2. Tenancy – means a tenancy created by a lease or under lease, by an agreement for a lease or under lease, by a tenancy agreement or by operation of law, and includes a sub tenancy but does not include any relationship between a mortgagor and mortgagee as such”

It was contended that the applicant were a tenants in occupation. It was contended also that the only way that the defendant could terminate the tenancy under section 6 (1) of the Act was through filing a reference in the Business Premises Rent Tribunal. In addition, it was contended that there was now in existence a case in the Tribunal as Tribunal Case No. 840 of 2010. By virtue of section 6(1) of the Act,

there was an automatic stay of any action until the matter in the Tribunal was finalized.

Specifically, on the issue of the jurisdiction of this court to entertain this matter, reliance was placed on the case of **CALENDONIA SUPERMARKET LIMITED versus KENYA NATIONAL EXAMINATIONS COUNCIL (2002) 2EA 357**, where the Court of Appeal stated, inter alia: -

“(The Landlord and Tenants, Shops, Hotels and Catering Establishments Act Cap 301) was passed to protect tenants from eviction and exploitation and if an acquisition of the property was subject to tenancy, in order to terminate the tenancy, the appellant had to comply with section 4 of the Act.....Even if the respondent had lost his status as a protected tenant, the appellant was still obliged by law to issue a proper notice to terminate which it had not done.”

The application was opposed. A replying affidavit sworn by the defendant on 2nd December, 2010 was filed. It was deponed in the said affidavit, inter alia, that the applicants had defaulted in paying rent on due dates resulting in levy of distress; that by 6th April, 2010 the applicants had been in arrears of rent to the tune of Kshs.101,000/-; that the applicants did acknowledge and apologise for this default; that the distress for rent levied by Ostrich Lion Kenya Limited Auctioneers was due to that default; that as at the time of swearing the affidavit, the applicants were in arrears of rent in the sum of Ksh.49,000/- ; that the tenancy herein is not governed by the provisions of Chapter 301 and therefore the termination notice could not be given under section 4 of the said Act. That the notice of one calendar month was sufficient and lawful as rent was paid monthly; and that the proceedings purportedly filed by the applicants in the Business Premises Rent Tribunal were an abuse of the court and tribunal’s process.

The defendant, through counsel Wanjama & Company Advocates, on 14th December 2010 filed written submissions to the application. It was contended that the tenancy herein was for a residential house and not for commercial premises as alleged by the applicant. It was further contended that such tenancies for residential premises were governed by the respective tenancy agreements, and the common law. As there was no valid written tenancy agreement, this tenancy was governed by the common law. Therefore since rent is payable from month to month, termination notice period is one month.

It was contended that the applicants do not deserve to be granted injunctive orders which were equitable orders. It was contended that the applicants had come to court with unclean hands because they had failed to pay rent on due dates. Secondly, the applicants have not satisfied the requirements enumerated in the case of **GEILLA VS CASSMAN BROWN [1973] EA 358**. They had not demonstrated a prima facie case with probability of success. They have relied on the wrong provisions of the law. It was submitted that the notice to terminate the tenancy was not too short. It was within the law, and served on the applicants in the first week of the month of November 2010. The applicants had in any case, not raised a complaint in their response to the notice, that the notice was not received by them.

I have considered the application, documents filed, the submissions, and the law. There is no dispute that there has been a tenancy between the applicants and the respondent. There is however, a dispute as to whether that tenancy is for residential premises or for business premises. Already, distress has been levied and goods taken away by the respondent. The applicants had before coming to this court, filed a reference in the Business Premises Rent Tribunal. Those proceedings in the Tribunal are still pending. None of the parties has informed this court that those proceedings have been finalised or terminated.

The applicants have come to this court with this application seeking for a number of orders. The main prayers relate to interlocutory injunctive reliefs. The law on the parameters to be considered by the court in applications for interlocutory injunctions is well settled. In **GEILLA VS CASSMAN BROWN LTD [1973] EA 538**, the Court of Appeal for East Africa held that the applicant has firstly, to demonstrate a prima facie case with probability of success. Secondly, the applicant has to demonstrate that he will suffer irreparable loss if the interlocutory injunctive orders are not granted. Thirdly, if the court is in doubt, then it will decide the matter on the balance of convenience.

The applicants still appear to be occupying the subject premises. Therefore, even if the lease term has lapsed, they are prima facie holding over as tenants. At this particular stage of the proceedings, I cannot

determine whether this is a matter which is within the jurisdiction of the Business Premises Rent Tribunal. I have not been given facts and evidence that will make me do so substantively at this preliminary stage. In any event, the jurisdiction of the Tribunal can be challenged in that forum, and if one is dissatisfied with the decision of the Tribunal, then a further challenge in the High Court can be made.

None of the parties has come here to challenge the proceedings of the Tribunal except that the defendant states herein that those proceedings are an abuse of process, without more. With the facts placed before me and there being no dispute that the applicants have been tenants of the defendant, I am of the view that the applicants have demonstrated a prima facie case with probability of success. I also find that if injunctive orders are not issued at this stage, the applicants' proceedings herein will become of no purpose. They will be rendered useless. I will therefore grant injunctive orders, albeit conditionally.

The applicants have asked for orders of an undertaking to indemnify or compensate the defendant. I find no legal basis for granting those orders. I will not grant the same.

As this is an interlocutory application and the proceedings are still to be heard and determined, I will order that the costs of the application be in the cause.

For the above reasons, I allow the application and order as follows: -

1. An interlocutory injunction is hereby issued against the defendant by himself, or anyone of his agents, servants, employees, and/or anyone taking title from him restraining them from evicting the plaintiffs, their agents, employees or servants or entering or breaking into, violating peace or otherwise, or interfering with the plaintiffs' tenancy or exercising proprietary rights concerning the termination or purporting to terminate the plaintiffs' possession of the premises or property known as Maisonette Block 773/75 situated at Buruburu until full hearing and determination of the suit herein and the Business Premises Rent Tribunal – Nairobi Vide BPRT No. 840 of 2010, provided that the plaintiffs pay any existing arrears of rent within 4 days from today and continue paying rent without fail on due dates. Liberty for either party to apply.

2. An interlocutory mandatory injunction is issued directing or ordering the defendant by himself, any of the registered owners, or his employees, agents or servants to forthwith deliver the part or any portion of the premises and cease from interfering with the plaintiff's tenancy, or entering or interfering with the quiet and peaceable possession of the premises known as Maisonette block 773/75 situated at Buruburu, pending hearing and determination of this suit.

3. An interlocutory mandatory injunction, is hereby granted directing the defendant, his agents, servants and employees to return to the plaintiffs' belongings or domestic goods collected on the 19th November 2010 from the premises known and Maisonette Block 773/75 Buruburu to which the plaintiffs are in occupation until hearing and determination of this suit provided that the applicants in the meantime pay the defendant Ksh.15,000/- as interim Auctioneers Charges (which will later be subject to proof and, if need be, set of from rent).

4. Costs in the cause.

Dated and delivered at Nairobi this 21st day of February, 2011.

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GEORGE DULU
JUDGE

In the Presence

Ms Kaguri holding brief for Kamau for applicants/plaintiffs
C Muendo – court clerk