



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT SUIT NO. 131 OF 2011

ANTONY MAINA

MUHORO.....PLAINTIFF

V E R S U S

**ANNA NYIMBA (sued as administrator of the Estate of H. F. Nyimba,
Deceased).....DEFENDANT**

R U L I N G

The Plaintiff is the Defendant's tenant in **L. R. No. 1/584, Ngong Road in Kilimani, Nairobi. The lease is for a term of 6 years commencing 1st May, 2009 and is governed by a Tenancy Agreement dated 2nd September, 2009.**

On 1st November, 2010 the Defendant served the Plaintiff a notice to terminate the tenancy. This notice was subsequently withdrawn.

On 27th January, 2011 the Defendant served the Plaintiff another notice of termination. The Plaintiff has pleaded that this second notice of termination was also subsequently withdrawn by the Defendant. The Defendant disputes this.

The Plaintiff then came to court by a **plaint dated 6th April, 2011**. He seeks the main relief of a permanent injunction to restrain the Defendant from interfering with his quiet possession of the suit premises until expiry of the lease.

The Defendant duly entered appearance and filed defence in which she has denied the Defendant's claim.

Together with the plaint the Plaintiff filed a **notice of motion dated 6th April, 2011** in which he seeks a temporary injunction to restrain the Defendant from "harassing, interfering with the quiet possession of,

and/or evicting” the Plaintiff from the suit premises pending disposal of the suit. The application is brought under **Order 40, rules 2(1) and 3** of the **Civil Procedure Rules** (the **Rules**).

The grounds for the application are:

1. That there were meetings held between the Plaintiff and the Defendant in the Defendant’s lawyer’s office and presence where it was agreed that the notice of termination of lease be withdrawn.
2. That it is in the interest of justice that the application be allowed as no prejudice would be occasioned to the Defendant.

The application is supported by the Plaintiff’s affidavit in which the factual basis for the grounds for the application are given and a number of documents annexed.

The Defendant has opposed the application as set out in the **replying affidavit filed on 6th May, 2011**. The grounds of opposition emerging from that affidavit are as follows:-

1. That there was no ulterior motive in serving the Plaintiff with notice of termination and that the notice was on account of breach of certain clauses of the tenancy agreement.
2. That the notice of termination was not withdrawn as alleged.
3. That the Defendant has not been in breach of any clause of the tenancy agreement.
4. That the Plaintiff has come to court with dirty hands.

There is a supplementary affidavit sworn in answer to a replying affidavit.

I heard the application on 26th May, 2011. I have considered the submissions of the learned counsels appearing, including the authorities cited.

There is a serious issue of fact in this suit. That issue is whether or not the second notice of termination of tenancy issued on 27th January, 2011 was subsequently withdrawn. That issue can only be fully and properly determined at the trial of the action on tested evidence. It cannot be fully and properly determined at this stage upon untested affidavit evidence.

In respect to that issue, the Plaintiff has deponed in the supporting affidavit that a meeting was on the 3rd March, 2011 held at the Defendant’s lawyer’s office in the presence of the Plaintiff, the Defendant and one **Justice Nyimba**. The Plaintiff has further deponed that it was agreed at that meeting that the notice of termination should be withdrawn, and that the lawyer should write a letter to that effect, and also to warn the said Justice Nyimba to stop interfering with the Plaintiff’s tenancy.

A letter dated 3rd March, 2011 written by Mutuli Kamande & Co, Advocates and addressed to Elijah Nyimba is annexed. In this letter a demand is made that the said Nyimba do forthwith cease interfering with the tenancy of the Plaintiff as he is neither the landlord, nor does he have any basis for interference. He is warned that his visit to the premises would constitute trespass and that if he persists legal action would be taken against him. The letter also contains the following paragraph:-
“This letter supersedes all alleged termination notices given to the tenant including the last one dated 27.1.2011.”

The letter is copied to the Plaintiff, the Defendant and “estate members.”

In the replying affidavit the Defendant does not deny that a meeting as deponed by the Plaintiff took place on 3rd March, 2011; nor does she deny that Mutuli Kamande & Co. were her advocates in matters concerning the tenancy.

In regard to withdrawal of the notice of termination, the only thing that the Defendant says is that only

she could have made the decision to withdraw the notice, and that the purported withdrawal of the same is not signed by her.

It will be noted that the notice of termination dated 27th January, 2011 written by the Defendant to the Plaintiff is copied to Mutuli Kamande & Co., Advocates. This is the notice in contention. The earlier notice dated 1st November, 2010 which, the parties agree was withdrawn, was similarly copied to Mutuli Kamande & Co.

So, in all likelihood, Mutuli Kamande & Co. were indeed the Defendant's advocates in matters relating to the Plaintiff's tenancy. One previous notice having been withdrawn by consent of the parties, it is not improbable that a subsequent notice could be similarly withdrawn.

The Plaintiff has also deposed in the supplementary affidavit that he made payment of KShs. 300,000/00 in respect of rent for the months of May to November, 2011. A bank deposit slip in the name of the Defendant is annexed. This payment of rent has not been denied by the Defendant. If indeed the Defendant has accepted rent for a period after the notice of termination of tenancy (which was to take effect on or about 27th April, 2011), this would constitute further evidence of withdrawal of the notice of termination.

If, then, the notice of termination dated 27th January, 2011 was indeed withdrawn, the Plaintiff is, *prima facie*, entitled to enjoy the entire term of his tenancy, subject only to the covenants contained in the tenancy agreement.

I am therefore satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success.

Regarding irreparable loss, the Plaintiff's tenancy still has over 4 years to run. He says he has already invested about KShs 25 million in the premises and goods of trade. It may not be possible to calculate what his loss might be in terms of profits and goodwill lost during that period should he be evicted, and subsequently succeeding in his suit. I am therefore satisfied that he stands to suffer irreparable loss. That being my view of the matter, I find merit in the application. The same is allowed as prayed in prayer 3 thereof. The temporary injunction shall subsist until disposal of the suit. The temporary injunction is granted upon the following conditions:-

1. The Plaintiff shall file an appropriate undertaking as damages within 14 days of delivery of this ruling.

1. The Plaintiff shall move expeditiously to prosecute his suit, and in this regard parties to have liberty to apply.

2. Costs of the application shall be in the cause.

Those shall be the orders of the court.

DATED AT NAIROBI THIS 23RD DAY OF JUNE 2011

H.P.G. WAWERU
JUDGE

SIGNED AND DELIVERED THIS 24TH DAY OF JUNE, 2011