



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ELC CIVIL CASE NO. 554 OF 2009**

**BABS SECURITY SERVICES**

**LIMITED.....PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF**

**NAIROBI.....DEFENDANT**

**RULING**

The plaintiff is said to be a tenant in premises known as LR.No.209/14130 for a period of five years by a lease between itself and one Benson Irungu Mbaria who is said to be the beneficial owner of the suit premises. The said lease expires on 31<sup>st</sup> April, 2014.

By a plaint dated 30<sup>th</sup> October, 2009 the plaintiff alleges that the defendant has attempted to forcibly evict it on several occasions. As a result, there is now a prayer that a permanent injunction be issued against the defendant to restrain it, by itself, its servants, agents, employees or otherwise howsoever from interfering with the plaintiff's quiet enjoyment of the suit premises aforesaid.

Alongside the plaint, there was filed an application by way of Chamber Summons under Section 63 (c) and (e) of the Civil Procedure Act and Order XXXIX Rules 1,2 and 9 of the Civil Procedure Rules seeking interim restraining orders as set out in the plaint until this suit is heard and finalized.

The grounds upon which the said restraining orders are sought are;

**(a) The defendant has on 23<sup>rd</sup>, 24<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> October, 2009 trespassed upon the plaintiff's property and unlawfully attempted and threatened to forcibly evict the plaintiff from the suit property.**

**(b) No order has been issued by the court directing the defendant to take possession.**

**(c) Taking of possession without an order of the court constitutes a criminal offence of forcible entry.**

**(d) The plaintiff is a tenant of LR.209/14130 (the suit property) under a lease dated 1<sup>st</sup> July, 2009 from one Benson Irungu Mbaria.**

**(e)The said Benson Irungu Mbaria purchased the suit property in 1996 and has had possession since.**

**(f) The defendant stands to suffer irreparable loss unless the orders sought are granted.**

**(g)The plaintiff is ready to abide by any order as the court may give with respect to an undertaking as to damages.**

There is in support of the application, affidavits sworn by Isaac Macharia Wambui who is said to be the Managing Director of the plaintiff company.

Interim orders were issued by the court pending hearing *inter partes* and while the said hearing was pending, the defendant filed an application on 27<sup>th</sup> January, 2010 by way of Chamber Summons under Order XXXIX Rule 4 and Order VI Rule 13(d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders that the court be pleased to discharge and or set aside *ex-parte* orders of injunction issued on 2<sup>nd</sup> November, 2009 against the defendant herein. Upon the grant of such an order, the court be pleased to strike out the plaintiff's suit for being an abuse of the court process. The said application was based on the grounds set out on the face of the application and the affidavit sworn by one Karisa Iha. The grounds set out are as follows:-

- a. That there exists a ruling in HCC ELC No. 562 of 2008 Benson Irungu Mbaria – vs – City Council of Nairobi in which the court ruled that Benson Irungu Mbaria did not have a right over the applicant's suit property.**
- b. That Benson Irungu Mbaria did not have legal rights to pass to the respondent herein Babs Security Services Limited in form of a lease as alleged.**
- c. That Babs Security Services Limited has wrongfully sued and obtained an injunction against the applicant instead of suing Benson Irungu Mbaria.**
- d. That there exists no legal or any form of relationship between the respondent (Babs Security Limited) and the applicant herein.**
- e. That the applicant is illegally being denied the use of its institutional house by the existence of the injunction orders.**
- f. That there exists a ruling by a competent court over the subject matter herein and no appeal has been preferred against the said ruling.**

On 28<sup>th</sup> January, 2010 this court made an order that the two applications shall be heard together and both counsel agreed to file skeletal written submissions. Both learned counsel having complied and highlighted the said submissions, the court set the date for this ruling.

It is conceded there was a previous suit ***HCCC No.562 of 2008 between Benson Irungu Mbaria and the City Council of Nairobi*** wherein the injunction application was dismissed by Nambuye J. on 18<sup>th</sup> September, 2009. In that suit the contest between the two parties was about the title to the suit property.

In the instant case, the plaintiff does not claim title but his right is founded on the lease between it and the said Benson Irungu Mbaria, which tenancy is said to have been interfered with by the defendant, that is, the City Council of Nairobi. It will be noted therefore that, it has nothing to do with the title of the suit property. In the previous suit the present plaintiff was not a party. The said suit is still pending determination and therefore the issue of ownership is yet to be determined.

The principles for granting an injunction are well settled and one does not have to go far other than citing the case of ***Giella – vs – Cassman Brown Ltd. (1973) 358***. The applicant must show a *prima facie* case

with a probability of success and if that order is not granted it is likely to suffer irreparable loss that may not be adequately compensated by an award of damages. If the court is in doubt, it shall decide the application on a balance of convenience.

In the case of *Kenya Commercial Finance Limited – vs – Afraha Education Society (2001) 1 E.A. 86* the court held *inter alia* that, these conditions are sequential so that, the second condition can only be addressed if the first one is satisfied and when the court is in doubt the third condition can be addressed.

The courts have had occasion to address what a *prima facie* case is. In *Mrao –vs – First American Bank of Kenya Ltd (2003) KLR 125* the Court stated “a *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which on the material presented to court a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

I have gone through the submissions filed by both learned counsel for the parties herein and the cited authorities. The defendant cannot evict the plaintiff without securing a court order otherwise, it will be breaching the law and, Section 90 of the Penal Code addresses the issue with the penalties thereto. Indeed, if it is true that the defendant’s agents attempted to evict the plaintiff then, their actions are bordering a criminal offence. In *Beatrice Yagan – vs – Joseph Yator, Civil Application No. 367 of 1996* (unreported) the Court of Appeal held that eviction cannot be done without a court order and a suit for possession must be filed.

In finding against a party who attempted to evict the other, it was held; “He was obliged to file a possession suit against the applicant as the sitting tenant. He has not right under the law to invade the premises and drive the applicant out as he has done. Those are acts of hooliganism which no court of justice would countenance”.

The plaintiff has submitted that the defendant has issued it with a licence to conduct business on the suit premises. Even if the said Benson Irungu Mbaria does not own the said premises, the defendant recognizes the plaintiff as a legal tenant having licenced it to conduct business. A suit for vacant possession is therefore necessary. That no such suit exists by the defendant as against the plaintiff, no eviction can take place without a court order.

The defendant has submitted that this suit is *res judicata*. With respect, that cannot be the case. The parties in HCC ELC No. 562 of 2008 did not include the plaintiff herein. The rights of the plaintiff in that suit are different from the rights of the plaintiff in the present suit. The principle of *res judicata* cannot therefore apply in the present suit.

Having said so, I do not agree that the orders sought by the defendant to set aside the *ex parte* order should be granted. It follows from the foregoing that, the plaintiff having established a *prima facie* case with a probability of success cannot have its suit struck out as sought by the defendant because, the issues raised must go for a full trial.

In any case, courts are more inclined to sustain the suit rather than striking it out because, every party has a right to have his day in court. Consequently, the defendant’s application dated 27<sup>th</sup> January, 2010 is hereby dismissed while the plaintiff’s application dated 30<sup>th</sup> October, 2009 is hereby allowed with costs to the plaintiff. Orders accordingly.

***Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of November, 2010.***

**A. MBOGHOLI MSAGHA**

**JUDGE**