

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Case 144 of 2009

JOSEPH SEMBEI MUTUA..... 1ST PLAINTIFF

THOMAS NDUBI MAKENI T/A

MAKENI MUTUA & ASSOCIATES.....2ND PLAINTIFF

VERSUS

NATIONAL HOUSING CORPORATION.....

DEFENDANT

RULING

The plaintiffs, Joseph Sembei Mutua and Thomas Ndubi Makeni conduct a business in the name and style of Makeni Mutua & Associates. The plaintiffs were leased premises in the defendant's building erected on LR No.209/4293 known as NHC House, Aga Khan Walk, Nairobi. The plaintiffs were leased a space of approximately 837 square feet. The lease which commenced on 1st January 2007, was to subsist for a period of six (6) years. It appeared that the plaintiffs' business expanded. The plaintiffs requested the defendant to avail them additional space in the building. The defendant was unable to provide such additional space. The plaintiffs looked for bigger rental space elsewhere. On 17th December 2008, the plaintiffs were able to secure sufficient space measuring about 1,150 square feet at LR No. 209/5003, Ukulima Cooperative House, Nairobi.

Upon securing the said alternative premises, the plaintiffs issued notice of termination of the lease to the defendant pursuant to their letter dated 19th December 2008. The said letter gave a three (3) months notice. When the defendant received the notice, it refused to accept the notice insisting that the plaintiffs could not terminate the tenancy by reason of the fact that the lease agreement entered between the plaintiffs and the defendant did not contain a termination clause. By its letter dated 17th February 2009, the defendant informed the plaintiffs that the tenancy period was of a fixed term of six (6) years and was not capable of being terminated by either party. The defendant proposed that the only option available to the plaintiffs was to surrender the lease by, *inter alia*, introducing an alternative tenant who would continue with the lease under the same terms and conditions of the tenancy. The plaintiffs were unwilling to abide by the said terms imposed by the defendant. The plaintiffs reiterated that upon their issuing the requisite three (3) months notice, they were no longer required to remain in the premises which were not suitable for their business needs. Upon expiry of the three months notice period, the plaintiffs attempted to remove their property from the said demised premises. They were prevented by the defendant from removing their said property. The plaintiffs were aggrieved by the said refusal by the defendant to allow them to vacate the suit premises.

The plaintiffs filed suit, *inter alia*, seeking a declaratory order of the court that the terms imposed by the defendant upon the plaintiffs vide its letter dated 17th February 2009 was unreasonable, in breach of the terms of the lease and unconstitutional. Contemporaneous with filing suit, the plaintiffs filed a notice of motion pursuant to the provisions of **Sections 3A and 63(e)** of the **Civil Procedure Act** seeking orders of mandatory injunction to compel the defendant, by itself or its employees or agents to release to the plaintiffs, the plaintiffs' office equipment, furniture, files, records and other assets held in the demised premises pending the hearing and determination of the application. The plaintiffs further sought an order

of the court to restrain the defendant from attaching, distraining, selling or otherwise dealing with the office equipment, furniture, files, records and other assets of the plaintiffs pending the hearing and determination of the suit.

At the hearing of the application, I heard the rival submissions made by Mr. Ojiambo for the plaintiffs and by Mr. Mutua for the defendant. Having considered the argument made, it was clear to the court that the issue for determination was whether the lease agreement entered between the plaintiffs and the defendant in respect of the demised premises was terminable other than by effluxion of time. It was apparent that the defendant relied on the letter dated 20th November 2006 in which the defendant offered the plaintiffs a lease for the demised premises for a fixed period of six (6) years. The said letter of offer did not contain a termination clause. However, under clause 17 of the said letter of offer, it was provided that the terms and conditions of the lease would be on the basis of the defendant's standard lease agreement. It was a condition of the said letter of offer that in accepting the offer of lease, the plaintiffs were deemed to have accepted to be bound by the terms and conditions contained in the said defendant's standard lease agreement. A copy of the standard lease agreement was annexed to the affidavit in support of the plaintiffs' application.

Under Clause 5 (g) of the said lease agreement, it was provided that the lease would be terminable upon either party giving three (3) months notice of his intention to terminate the lease. It was common ground that the lease agreement that was signed by the plaintiffs and the defendant, was by the time the plaintiffs sought to vacate the suit premises, not registered. However, this court is of the view that the fact of non-registration of the said lease agreement did not imply or mean that the plaintiffs and the defendant were not bound by its terms and conditions. I am therefore not persuaded by the defendant's argument that the lease agreement did not contain a termination clause.

I hold that the lease agreement entered between the plaintiffs and the defendant contained a termination clause that required either party to give three (3) months notice before determining the lease. I further hold that even if it is later established by a higher court that the lease did not contain a clause determining the lease, then under **Section 111 (h)** of the **Transfer of Property Act**, a lease can be determined upon notice being given of the intention to quit by either party. Such notice is required to be a notice of a reasonable period of time. In the present application, it was clear that the plaintiffs issued a reasonable notice of three (3) months before they sought to give vacant possession of the suit premises.

Have the plaintiffs established a prima facie case as to entitle this court grant the mandatory injunction sought? This court is aware that it cannot grant an order of mandatory injunction unless special circumstances are established by the plaintiffs. Mandatory injunction can only be granted in exceptional circumstances. (See **Kenya Breweries Limited & Anor vs. Washington O. Okeyo CA Civil Appeal No. 332 of 2000 (Nairobi) (unreported)**). In the present application, it was clear that the basis upon which the defendant declined to accept the notice issued by the plaintiffs terminating the lease in respect of the demised premises had no foundation in law. The defendant had no right to detain the plaintiffs' property once the period of notice expired. The defendant could only detain the plaintiffs' property if there was rent arrears owing or if the plaintiffs failed to abide by the terms of the lease agreement that required them to redecorate the premises to its original state before the commencement of the lease.

It was for these reasons that the court granted the mandatory injunction sought by the plaintiffs on 18th March 2009 pending delivery of this ruling. The said order was granted conditionally; the plaintiffs were required to deposit with the defendant the sum of KShs.113,000/= before they could be allowed by the defendant to remove their property. This court confirms the said order of mandatory injunction earlier issued by this court. This court declares that the notice issued by the plaintiffs was a valid notice terminating the lease. The plaintiffs are required to abide by the other terms of the lease in regard to what is envisaged to take place in the event that the lease is determined. Upon the plaintiffs fulfilling what is required of them under the said terms and conditions of the lease, the defendant shall refund to the plaintiffs the said sum of KShs.113,000/= earlier ordered by the court to be deposited with the defendant.

In view of the peculiar facts of this case, I shall make no orders as to costs.

DATED at NAIROBI this 22nd day of APRIL, 2009.

L. KIMARU

JUDGE