



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 83 of 2008

S. N. VALLI t/a BABY STEPS KINDERGARTEN..... PLAINTIFF

VERSUS

HASHAM LALJI PROPERTIES LTD & ANOTHER.....DEFENDANT

RULING

The plaintiff/applicant has come to this court vide a plicant dated 13th March 2008 and filed on the same date. The reliefs being sought are:-

- (1) A permanent injunction restraining the defendant jointly and severally by themselves, their servants, agents and or workmen from levying distress against the plaintiff and or interfering in any manner whatsoever with the plaintiffs quiet enjoyment of the suit premises L.R. No. 1870/V/15/1
- (2) Costs of the suit.

The plaint is accompanied by an interim application brought by way of chamber summons sought under order 39 rules 2, 3 and 9 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act seeking an order that, an order, of injunction, do issue restraining the respondents/defendants by themselves, their agents, servants and or workmen from levying distress on the applicant/plaintiff chattels or in any manner whatsoever from interfering with the applicant/plaintiff's quiet possession and enjoyment of the suit premises L.R. No. 1870/V/15/1, Mvuli Road, Nairobi, costs of the application be provided for. The grounds are set out in the body of the application, grounds in the supporting affidavit, annexures, oral submissions, in court as well as case law.

The respondent on the other hand has opposed the application on the basis of the grounds set out in the replying affidavit, oral submissions in court and case law.

It is common ground that the disputants had a lease agreement for 72 months (6 years) from 1st September 2001 to 31st August 2007.

- (2) Rent was 30,000/= per month from the first half of the said life of the said lease, graduating to 40,000.00 in the last half of the said lease. Rent was payable quarterly in advance.
- (3) The tenant was also to pay land rent, and ground rate.
- (4) At the time the lease ended the applicant plaintiff was allegedly in rent arrears of 52,725.10 as tabulated in paragraph 3 of the replying affidavit.

(5) It is common ground that when the old lease was about to expire the plaintiff applicant tenant wished to stay on and entered into negotiations with the respondents land lords with a view to signing another lease in his favour.

(6) It is however evident from their deponements that there is a disagreement on the amount of rent due from the applicant to the respondent upon expiry of the old rent. The applicant says that the old rent still applies where as the land lord respondent says that the new proposed rent applies.

(7) It is common ground that in view of the matters stated in number 6 above, a dispute arose as regards rent payable for the suit premises, as at the end of the expiry of the old lease.

(8) It is also common ground, that the respondent land lord vide their letter dated 30th July 2007 notified the plaintiff applicant that the lease ends 31st August 2007 and he was expected to move after due repair to any damaged areas.

(9) It is also common ground that the plaintiff applicant held on after the expiry of the old lease hence according to him the tenancy became controlled tenancy and could not be terminated by will as shown by the content of their letter marked J in their bundle of annexures. The letter is dated 5th November 2007 written by applicants' counsel and addressed to counsel for the respondent.

(10) The applicant moved to the business premises rent tribunal and filed a reference vide tribunal case number 536 of 2007 opposing the notice of termination served. The date stamp on the reference form indicates that the form was received at the said tribunal on 5th November 2007.

(11) During the pendency of the said tribunal proceedings the respondents instructed auctioneers vide their letter dated 28th February 2008 to distrain for rent to the tune of Kshs.8125,450.20 as per annexure R1 to the supporting affidavit. The said distress was levied vide proclamation dated 29.2.2008 annexure as R2 to the applicants affidavit.

(12) This action prompted the applicant to move to court to file the current suit accompanied by an interim application subject of this ruling.

(13) The applicants' assertion is that there is no rent arrears. What is purported to be rent arrears is what the respondent has declined to accept in terms of the old rent insisting on the payment of the new rent which is in dispute. It is his stand that he is ready and willing to tender the old rent either to the tribunal or in court pending the tribunals' decision on the matter.

(14) It is their stand that they are within the ambit of principles governing the granting of injunctions and they should be granted the same.

In addition to the common ground issues set out above, the respondent also stressed for the following:-

(1) the relief sought can not issue as the applicant is seeking a permanent injunction which can only be granted at the conclusion of the suit and not at this interim stage.

(2) They contend that an interim application cannot issue because none has been prayed for:-

(ii) Further none can issue to interfere with the land lords right to distress for rent.

(3) They contend that since the lease expired and the same was not renewed the applicants' rights became extinguished since he is not a protected tenant.

(4) The applicant was given an option for a new lease at the rate of 120,000. He did not reject the offer but held on and so he is obligated to pay the new rent.

(5) They maintain that the applicant has not come within the ambit of the principles governing granting of injunctions as they have not shown that they have a prima facie case with a high probability of success, they have not demonstrated that they will suffer damages which cannot be compensated for by way of damages. The balance of convenience does not tilt in favour of the applicant because the applicant who has invested in the premises and he is entitled to recoup himself from the rent proceeds. The levying of distress was justified. The court has no right to impose rent. They can only enforce its payment.

In reply to these submissions counsel for the applicant staged that since the application is brought under order 39 of Civil procedure Rules the same is clearly brought for an interim injunction.

(2) It is correct that the land lord has a right to levy distress but once that right is challenged, it has to be kept in abeyance until a determination is made on the complaint.

(3) They deny that they have come to court with unclean hands as it is the respondent who has refused to accept the rent.

(4) It is the tribunal which is the forum that can rule on whether the applicant is a protected tenant or not.

On case law the court was referred to the case of ELIZABETH WAIRIMU RICHARD VERSUS GRACE MUTHONI NDUNGU AND 2 OTHERS NYERI HCCC NO. 22 OF 2005, where the gist of the holding is that:-

“The applicant is seeking an equitable remedy but has not come to equity with clean hands. Distress for rent is a statutory right which the respondent is entitled to. There is prima facie evidence that the right has accrued to respondent as there is rent which is due and owing to the respondent from the applicant. There is therefore no justification for this court interfering with the exercise of that right.”

The case of MUREITHI VERSUS CITY COUNCIL OF NAIROBI [1981] KLR 333 where on an application for an injunction it was held inter alia that:-

(1) The power to grant or deny an application is within the discretion of the court, which discretion can only be interfered with by the appeal court if the discretion was not exercised judicially.

(2) The conditions for grant of an interlocutory injunction are existence of probability of success, likelihood of irreparable harm which would not be adequately compensated for by damages and balance of convenience.

(3) An injunction cannot be granted where damages would be an adequate remedy.

On the courts assessment of the facts herein, since the relief being sought is an equitable remedy of an injunctive relief, principles of law as well as case law require the applicant to demonstrate three things namely:-

(1) That the court has jurisdiction.

(2) That the relief is properly anchored on the pleadings.

(3) That the facts displayed demonstrate presence or satisfaction of ingredients for granting the said relief.

Issue of jurisdiction arises because it is common ground that the dispute arises from a tenant and land lord relationship which relationship is governed by the land lord, tenant, shops, hotels, and catering Establishment Act Cap 301 Laws of Kenya. It is trite law and this court has judicial notice of the fact that the said Act has an inbuilt dispute resolution mechanism to some extent. This mechanism does not cover disputes seeking such equitable reliefs. The court of appeal in its decision in the case of NARSHIDAS & COMPANY LTD VERSUS NYALI AIR CONDITIONING AND REFRIGERATION SERVICES LTD

NARIOBI CA 205/1995 where the central theme in the decision is that a controlled tenant confronted with an illegal threat of forceable eviction cannot go to the business premises rent tribunal established under the Act as that tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. The CA went on to state that the superior court has jurisdiction not only to entertain the application for the injunctive relief but also to grant the same. On that basis this court is satisfied that it is properly seized of the matter.

The second question regards a determination as to whether the relief sought is properly anchored on the pleadings. The applicants pleading herein is a plaint whose sole prayer is a permanent injunction as well as costs.

The interim application as noted is brought under order 39 rules 2, 3 and 9 of the Civil Procedure Rules. Rule 2 provides, *“in any suit for restraining the defendant from committing a breach of contract or other injury of any kind whether compensation is claimed in the suit or not, the plaintiff may at any time after the commencement of the suit and action before or after judgment apply to the court for a temporary injunction to restrain the defendant from committing the breach of the contract or injury complained of or any injury of a like kind out of the same contract or relating to the same property right . . .”*

The central theme in the foregoing provision is that an aggrieved party is entitled to seek a relief of a temporary injunction where the opponent seeks to breach the contract between them.

A temporary injunction as this court knows it, and of which it has judicial notice of is that it usually has a life span either lasting pending hearing inter partes of the interim application, or a life span lasting till the disposal of the suit. The extent of the life span is usually indicated in the body of the substantive prayer being sought. Herein the interim order was granted in the first instance to last till the hearing inter partes. The said orders were granted on the 14th march 2008 and they are still in force pending ruling. The ruling is therefore to determine whether the interim injunction is to be confirmed to last till the disposal of the suit.

Prayer 2 which is substantive prayer in the interim application simply reads, *“an order of injunction do issue restraining the respondents/defendants by themselves, their agents, servants and or workmen from levying distress on the applicant/plaintiffs chattels or in any manner whatsoever from interfering with the applicant/plaintiff quiet possession and enjoyment of the suit premises LR. 1401870/V15/1 Mvuli Road, Nairobi.”*

As submitted by the defendant/respondents counsel, what is being sought is not an interim injunction but an order in finality. There is no mention that the said order is to last pending the hearing and disposal of the tribunal proceedings or the hearing and disposal of the current suit.

The net effect of the prayer being open ended is that

- (1) It means that the applicant will enjoy the injunctive orders indefinitely.
- (2) It will also mean that the suit will be compromised as nothing will be left for trial since the main substantive prayer in the main suit is an order for permanent injunction.
- (3) It is likely to oppress the respondent who will be prevented from dealing with the suit property as he deems fit.

The net result of the foregoing assessment is that the application has been faulted and as such it cannot be granted. The court was invited by the applicants counsel in response to the respondents' submissions that, the court should assume that what is being sought is a temporary injunction by virtue of the provisions under which the application is brought. Indeed this court can assume so. However it cannot ignore an important rule of judicial practice that the court has judicial notice of namely:-

- (1) That parties are bound by their pleadings.

(2) It is not the business of the court to re write pleadings for litigants.

(3) The duty of the court in so far as the resolution of the dispute is concerned is to confine itself to the four corners of the dispute as displayed by the pleadings of the disputants, facts presented in support of each sides assertion and the law.

The foregoing being the case, this court hands are tied. It cannot insert a clause in prayer 2 to clothe the said relief with a prayer for an interim relief. In fact this court is of the opinion that had the learned judge who granted the first interim orders scrutinized the said relief in prayer 2, the interim orders currently enjoyed by the applicant would not have been granted.

The framing of prayer 2 of the interim application having been faulted, the matter would have ended there. However since the merits were also argued, there is no harm in ruling on the same even if it means that the same is for purposes of jurisprudence only.

The interim relief being sought being one of an injunctive relief all that an applicant is required to do is to simply satisfy the ingredients for granting such a relief. These are now well settled in law:-

(1) The applicant has to show a prima facie case with a probability of success.

(2) He has to demonstrate that if the injunctive relief is not granted, he will suffer irreparable damage which cannot be compensated for by way of damages.

(3) He has to demonstrate that if No. 1 and 2 above are not applicable then the balance of convenience tilts in his favour.

This court has applied the above ingredients to the facts demonstrated herein and finds that the relationship sought to be protected is one of a land lord and tenant relationship. This court has judicial notice of the fact that there are two ways of creating such a relationship namely:-

(1). By lease agreement for either a definite period or an indefinite period.

(2). By conduct of parties whereby they understand their positions as tenant and land lord and one pays rent which the other accepts thus creating a month to month relationship.

It therefore follows that in order for the applicant herein to satisfy the ingredient of a prima facie case, the applicant has to show that he is either a tenant by virtue of either a lease or by conduct. It is common ground that the lease that had created the said relationship had expired by effluxion of time. Negotiations for a new lease collapsed but the applicant held on. Disagreement between them arose due to the fact that the respondent wanted rent to be paid at the new rate which had formed the basis of the new proposed lease. Where as the applicant wanted to have the old rent to be the one to be paid. The stalemate led to the filing of the reference which is still pending.

Although there was no offer and acceptance of agreed rent after the expiry of the formal lease, the very fact that the respondent moved to distrain for rent can be construed to conclude that he recognizes the existence of a month to month tenancy – that is tenancy by conduct of the parties. This conclusion would then mean that him, plaintiff/applicant was entitled to move to the High Court to seek injunctive orders. However the framing of the same should have been done in such a way so as to retain its temporary nature either by praying that they do remain in force till the determination of the tribunal proceedings or the current suit. Failure to so frame the relief robbed it of its temporary nature. It was also necessary for the plaintiff applicant to disclose in the body of the plaint that he is a month to month tenant, that he is entitled to continue paying rent at the old rate, and that that position should be protected until the end of either the tribunal proceedings or the court proceedings are determined.

In the absence of such pleading the plaintiff is simply asking for the injunctive relief in a blanket form which is likely to give him an unfair advantage over the landlord who will be enjoined from interfering

with the said relationship whatsoever for an indefinite period. Without asserting in the main averments in the plaint, that a month to month relationship exists, that he was entitled to pay rent at the old rate, the applicant has not demonstrated a right which is threatened to be infringed and for which interim protection is necessary. In the absence of such a pleading there is no demonstration of a prima facie case with a probability of success. Hence this ingredient has not been satisfied.

As for the second ingredient, since the issue concerns rent, the excess value can be computed and recovered as damages. The exception to this can only arise where it can be shown that the defendant respondent has acted in an oppressive and unfair advantage over the applicant. The action on the part of the defendant respondent, complained of is one of distress for rent. Distress for rent is a right exercisable by a land lord where there is proved outstanding rent arrears. Herein there is no dispute that rent arrears have arisen due to disagreement as to whether the correct rent payable is the old rate or the new rate. When the dispute arose, the applicant did not rush to the tribunal to seek and determination of the rent payable. He therefore opened an avenue for the defendant/respondent to distrain for the new proposed rent. More over there is no averment in the plaint or a declaration that the new proposed rent on the basis of which the distress was levied is unlawful and the defendant is not entitled to it as such. For this reason, high handedness and oppression on the part of the landlord has not been demonstrated so as to oust the cardinal principle that where damages are adequate an injunction will not issue.

As for the balance of convenience, in the absence of a pleading that:-

- (1) There exists a month to month tenancy by conduct of the parties.
- (2) That the applicant is entitled to pay rent at the old rate.
- (3) That the defendant/respondent is not entitled to charge rent at the new rate.
- (4) That the defendant/respondents move to charge rent at the new rate and then move to terminate the tenancy on that account is in itself highhanded and oppressive, the balance of convenience does not tilt in favour of the applicant.

For the reasons given in the assessment. The interim application dated 13th March 2008 and filed on 14th March 2008 be and is hereby dismissed with costs to the defendant/respondent.

- (2) The interim orders granted on 14.3.2008 be and are hereby ordered to be discharged.

DATED, READ AND DELIVERED AT NAIROBI THIS 23RD DAY OF May 2008.

R. N. NAMBUYE

JUDGE