



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 253 of 2007

ROBERT MAKOMERE.....PLAINTIFF

VERSUS

NATIONAL HOUSING CORPORATION.....1ST DEFENDANT

KENNEDY O. ASSEY.....2ND DEFENDANT

RULING

In his plaint dated 25th October 2007, the plaintiff seeks the following primary orders of the court:

- 1) A prohibitory injunction restraining the defendants from evicting the plaintiffs from the suit premises.
- 2) Orders of mandatory injunction compelling the 1st defendant to vacate the suit premises and restore door locks to the suit premises and hand the same to the plaintiff.
- 3) Damages for breach of contract.
- 4) A declaration that the plaintiff is the rightful tenant of the suit premises.

The foundation of the plaintiff's claim is that the plaintiff is a tenant of the 1st defendant by virtue of a lease dated 1st November 2006 for a term of two years with effect from the said date at a monthly rent of Kshs. 7,500/= and that during pendency of the said tenancy the 1st defendant unlawfully purported to lease the same premises to the 2nd defendant who unlawfully is attempting to evict the plaintiff from the suit premises which actions are in breach of the tenancy agreement between the plaintiff and the 1st defendant.

Simultaneously with the plaint the plaintiff filed the application which is now before me. The application has been brought under the provisions of Sections 3A and 63 (c) and (e) of the Civil Procedure Act and order XXXIX Rule 1 (a) and (b) of the Civil Procedure Rules. The application seeks two primary orders expressed as follows:-

“(3) That this Honourable Court do by order of temporary

injunction restrain/stop or in any way bar the 1st and 2nd defendants jointly and severally their agents and or servants from disposing, alienating, letting or assigning, and or be stopped, barred and or prevented from evicting the plaintiff in any way from the premises known as 11/1/1DR.8 within National Housing Corporation Rental Housing Estate Changamwe Mombasa or from letting, subletting, assigning or giving in occupation to the 2nd defendant or to any one whatsoever until the case is heard and finalized.

(4) That by an order of mandatory injunction this Honourable Court do order the 2nd defendant to leave, vacate or remove himself and his belongings from the premises known as 11/1/1DR.8 within National Housing Corporation Rental Housing Estate Changamwe and or open up, unlock the door of the said premises and leave it open.

The application is based on the following principal grounds:

(a) That the defendants have acted with flagrant disregard of the lease.

(b) That the plaintiff's personal effects and belongings are locked inside the house.

(c) That the plaintiff is experiencing very hard times having been locked out of his house with his wife.

The application is further supported by the plaintiff's affidavit. The affidavit elaborates the above grounds. In paragraph 1, it is deponed that the plaintiff is a tenant of the 1st defendant in terms of a lease dated 9th November 2006 for a term of two years with effect from the said date. It is also deponed in paragraph 5 that on or about 2nd September 2007, the plaintiff allowed the 2nd defendant to take refuge in one room of the suit premises at his request as he looked for his own premises. It is further deponed in paragraph 8 that the 2nd defendant wanted to sublease the said room but the plaintiff declined which provoked the 2nd defendant to report the plaintiff to the police. The plaintiff also swears in paragraph 9 that at the police station, he was instructed to return to the 2nd defendant Kshs. 10,000/= which the latter had paid as an inducement for the intended sublease. It is deponed in paragraph 12 that on 17th October 2007, the 2nd defendant gave him a copy of his own lease with the 1st defendant in respect of the suit premises. It is also deponed in paragraphs 17 and 19 of the affidavit that on 19th October 2007, the 2nd defendant changed the locks of the door thereby preventing the plaintiff from gaining access to the house. It is then deponed in paragraph 20 that the plaintiff's personal belongings are locked up in the suit premises. In paragraphs 21, 22 and 23 the plaintiff depones to the hardship he is going through.

The plaintiff appeared ex-parte before Hon. Serگون J on 26th October 2007 who certified the application as urgent but made no interim orders. The defendants were then served and filed replying affidavits. The 2nd defendant responded first. In his affidavit sworn on 6th November 2007, he depones, *inter alia*, that all the averments made by the plaintiff in his supporting affidavit are falsehoods. He further depones that since the year 2006, he had been a tenant of the 1st defendant in respect of house number 11/1/1/DR7 which is situated in the same estate as the suit premises. It is also deponed that pursuant to an agreement between the 2nd defendant and the plaintiff the former paid the latter Kshs. 10,000/= being part payment for the suit premises and took possession of one room of the premises as the plaintiff finalized arrangements to move out of the suit premises. The 2nd defendant further swears that the plaintiff refused to move out of the house and refused to take Kshs. 5,000.00 being the balance agreed for the house and instead demanded that the 2nd defendant vacates the suit premises. It is then deponed that the 2nd defendant lawfully applied to the 1st defendant to lease the suit premises which application was granted and the 1st defendant duly let the suit premises to the 2nd defendant. It is further deponed that the 2nd defendant locked the suit premises on being let the suit premises and his calls to the plaintiff to collect his items elicited no response from him.

The 1st defendant's replying affidavit has been sworn by one David N. Ngugi, its officer-in-charge. It is deponed in the affidavit, *inter alia*, that the lease between the plaintiff and the 1st defendant had provision for termination and re-entry upon the plaintiff sub-letting or transferring the suit premises. It is also deponed that the plaintiff illegally sublet the suit premises to the 2nd defendant prompting termination of the tenancy between him and the 1st defendant. It is further deponed that on the said termination the 1st defendant leased the suit premises to the 2nd defendant.

The application was debated before me on 31st July 2008. Counsel reiterated the averments in their client's respective affidavits and so did the 2nd defendant.

I have considered the application, the affidavits filed both for and against the application and the submissions of counsel. Having done so, I take the following view of the matter. The principles for the grant of both prohibitory and mandatory injunctions are now well settled. With respect to the grant of a prohibitory injunction, the pre-requisites were laid down in the case of **Giella – v – Cassman Brown & Company Limited [1973] EA 358**. These are as follows:-

- 1) An applicant must show a prima facie case with a probability of success at the trial.
- 2) An interlocutory injunction will not normally be granted unless an applicant can show that he would suffer

irreparable loss if the injunction is not granted.

3) If the court is in doubt it should decide the application on a balance of convenience.

The affidavit evidence adduced before the court demonstrates that the 1st defendant has already executed a lease in respect of the suit premises in favour of the 2nd defendant who has taken possession of the same. Indeed it has emerged that the 2nd defendant obtained possession of one room of the suit premises even before he executed a lease with the 1st defendant in respect of the suit premises. In the premises, it would appear that the prohibitory injunction sought by the plaintiff is now not available to him.

As stated above, the principles for the grant of a mandatory injunction are also well settled. The locus-classicus would appear to be the case of **Locabail International Finance Limited – v – Agroexport and others [1986] 1 All ER 901.** In that case the principles were stated as follows:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

These principles have been applied by our courts. See **Kenya Breweries Limited – v – Okeyo [2002] 1EA 109** which is a decision of the Court of Appeal. See also **Maison Limited – v – Yaya Towers Limited [HCCC No. 2225 of 1992 (UR)]** which is a decision of the High Court.

In addition to the above principles, being an equitable remedy, the application for a mandatory injunction will not be granted if it appears inequitable to do so.

On the affidavit evidence availed to the court, the plaintiff's case at this stage cannot be described as clear and incontrovertible. See **Malindi Air Services and Another – v – Abdnoor Hassan C.A. No. NAI 202 of 1998 (UR)**. It is noteworthy that the plaintiff has not filed a supplementary affidavit in response to the averments made by the defendants, particularly the 2nd defendant, in the replying affidavits. The 2nd defendant has deponed that he initially entered the suit premises pursuant to an agreement made between him and the plaintiff and not due to the charitable conduct of the plaintiff. He has also deponed that he was, before being invited by the plaintiff to the suit premises, a tenant of the 1st defendant in his own right with respect to different premises owned by the 1st defendant. He further swears that he procedurally entered into a tenancy agreement with the 1st defendant in respect of the suit premises and is therefore lawfully in possession. He has exhibited the relevant lease. All these factual and legal averments have not been challenged in a subsequent affidavit by the plaintiff. In the absence of any response by affidavit from the plaintiff, it cannot be said that the 2nd defendant is attempting to steal a match from the plaintiff or that he is trying to obtain a position of advantage that he obtained through a planned and blatant unlawful act.

The plaintiff has been out of the suit premises since October 2007. The hardships described by the plaintiff in his supporting affidavit are in my view no longer urgent. At the time of making the affidavit, the plaintiff stated that he was preparing candidates for exams. He further alleged that he was begging from friends and relatives for his upkeep and had no money to pay for transport to National Housing Corporation Nairobi. He was also attending to his ailing mother-in-law. All those allegations were denied by the 2nd defendant. In the absence of a further or supplementary affidavit by the plaintiff, it is difficult to appreciate those hardships almost one year since the allegations were made.

The basis of the plaintiff's application is the alleged unlawful and high handed actions of the defendants. A determination of the merits or demerits of that basis cannot in my view be made conclusively on the material availed to the court. It cannot also be said that the mandatory injunction sought is directed at a simple and summary act which can be easily remedied.

In the premises, I am not persuaded that the plaintiff has demonstrated any of the circumstances discussed in the Locabail International case. A case for a mandatory injunction has therefore not been made out at this stage.

The upshot is that this application is declined. In view of the prayers sought by the plaintiff, I direct that the parties urgently dispose of pre-trial proceedings and a hearing date be given for the main suit on priority basis by the registry.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF AUGUST 2008.

F. AZANGALALA

JUDGE

Read in the presence of:-

Wameyo holding brief for Hayanga for the plaintiff and Ojode holding brief for Chesaro for the defendants.

F. AZANGALALA

JUDGE

27TH AUGUST 2008