



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

Environment & Land Case 1841 of 2007

MARK WACHIRA & 11 OTHERS.....PLAINTIFFS/RESPONDENTS

VERSUS

**KENYA ROAD SERVICES LTD.....
DEFENDANT/APPLICANT**

RULING

By chamber summons dated 08.11.08 stated to be brought under Order XXXIX rule 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Cap.21, the defendant company applied for the following orders:-

1. That the orders of injunction issued on 16.06.06 be set aside/discharged.
2. That the costs of this application be borne by the plaintiffs.

The grounds upon which the application is based are:-

- i. That the plaintiffs have failed, refused and/or neglected to pay rent to the defendants and/or deposit the same in court.
- ii. That the defendant intends to develop the premises and development plan has already been approved by the relevant government authorities.
- iii. That the defendant continues to suffer loss and damage due to the orders of the court.
- iv. That the orders of 16.06.06 are causing hardship and prejudice on the defendant.
- v. That the defendant will be unable to develop the premises during the pendency and subsistence of the orders of the court.
- vi. That it is only fair and just that the orders sought granted.

The application is supported by the affidavit of Stephen Munene, Managing Director of defendant company sworn on 08.11.07. It is opposed through the replying affidavit of Mark Wachira, 1st plaintiff sworn on his own behalf and on behalf of the other plaintiffs on 13.02.08.

At the hearing of the application the defendant/applicant was represented by learned counsel, Mr K. Miriti

while the plaintiffs/respondents were represented by learned counsel, Mrs K. Wanjau. The parties proposed and were allowed to file skeleton arguments which they adopted on 05.11.08.

The defendant's/applicant's submissions may be summarized as under:- The plaintiffs were at no time stopped from paying rent to the defendant. The plaintiffs are bent on using the defendant's unit (suit premises) without paying rent as none has been paid since issuance of the restraining orders and even before. The defendant is intent on building a warehouse and that the same has been approved by the City Council of Nairobi. Plaintiffs were interested in the restraining orders as an end in themselves and have not prosecuted the references filed with the Business Premises Rent Tribunal to-date. Defendant is suffering loss, arising from the restraining orders. Plaintiffs should have expeditiously sought leave of the Tribunal to deposit money therewith if the defendant has refused to accept rent. The fact that there are matters pending before the Tribunal is no bar to this court vacating its restraining orders. Defendant/applicant is merely enforcing his rights in seeking the settling aside of this court's restraining orders.

Defendant's/applicant's counsel urged this court to grant the orders sought in the application.

On the other hand, the plaintiffs'/respondents' submissions may be summarized as follows:-

Plaintiffs/respondents opposed the application. Proceedings of the Business Premises Rent Tribunal annexed to the applicant's supporting affidavit to the application show that the Tribunal Chairman appreciated the fact that the landlord/applicant company is entitled to the fruits of its investment but noted that the tenants/respondents were willing to pay rent of Kshs.1,000/= per month each, which the landlord refused to accept and that the Tribunal decided it has to resolve the issue of how much rent should be payable. The Tribunal never made any order for depositing of the disputed rent but ordered that it (Tribunal) first establishes how much the landlord is entitled to per month. The respondents/tenants closed their cases in May, 2006 and that the respondents moved to court in 2006 because the landlord refused to accept rent and was bent on removing them from the suit premises. Respondents' counsel pointed out that the respondents filed references in the Business Premises Rent Tribunal under section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap.301 for purposes of having their complaints relating to their tenancy, which they maintain is a controlled tenancy, investigated and that after closing their cases in May, 2006 the landlord/ defendant company has not moved its side of the Tribunal case forward.

Respondents' counsel noted that in the Tribunal case the defendant company's termination notices seek to terminate the tenancy on the ground that it wants to put up a multi – storey building on the suit premises. It was the contention of the respondents herein that the defendant company has a duty to prove that the statutory notices are genuine for the Tribunal to allow them to take effect. Respondents' counsel herein relied in this regard on Auto Engineering Ltd -vs- M. Gonella & Co. Ltd [1978] KLR 248. He pointed out that the landlord has not set down the Tribunal case for hearing since the tenants closed their case in May, 2006 and that the tenants' cases filed in the Tribunal on 10.02.06 are still pending because the landlord has not called evidence to enable the Tribunal to make a determination. Counsel for the respondents herein, who are the tenants on the suit premises, pointed out that the Tribunal has original jurisdiction to hear the tenants' complaints and make a determination, leaving the High Court with appellate jurisdiction over the matter. Counsel pointed out that the notices issued by the defendant company as landlord required the respondents herein to file Objections or References before the Tribunal if the said respondents opposed the notices to vacate and that the said respondents did so under section 6 of the Act and that upon the References being filed in the Tribunal, they act as an order of stay of operation of the notices.

Counsel for plaintiffs/respondents herein pointed out that he filed Statement of Issues and List of Documents in this case on 27.05.08 but the defendant/applicant herein has not done so. Plaintiffs'/respondents' counsel drew attention to paragraph 9 of the replying affidavit of Mark Wachira, 1st plaintiff sworn on 13.02.08 deponing that the plaintiffs herein have in the past fixed this case for hearing but that during call-over this case and other matters filed after 2003 could not be confirmed for hearing due to pressure of work on the courts and that this deposition has not been denied in the

defendant's/applicant's supplementary affidavit sworn on 11.08.08.

Plaintiffs'/respondents' counsel urged this Court to dismiss the application with costs and order that the matters pending for hearing be heard expeditiously.

I have given due consideration to the rival arguments of the parties before this court.

The proceedings before the Business Premises Rent Tribunal which are annexed to the chamber summons application under consideration show that the Chairman of the Tribunal appreciated the fact that the landlord, who is the applicant herein, is entitled to the fruits of his investment in the suit premises but noted that the tenants, who are the respondents to the application herein, were willing to pay Kshs.1,000/= per month each but that the landlord had refused to accept the offered rent. The Tribunal, therefore, decided to hear evidence in order to resolve the issues before it. The Tribunal proceedings show that the tenants closed their case before the Tribunal on 12.06.06 and the matter was put off for the respondent's (landlord's) case to 05.07.06. The next entry in the Tribunal proceedings is, however, for 13.04.07 when the matter could not proceed because the tenants' counsel was reported to be held up in a criminal case at Kibera. The landlord's counsel had no objection to the Tribunal matter not proceeding that day. The Tribunal directed the proceedings to be typed and fixed the matter for mention on 10.05.07. No other proceedings of the Tribunal are recorded and no explanation has been placed before this Court by the landlord, who is the defendant/applicant company herein, as to why it has not called evidence in support of its case before the Tribunal. The Tribunal proceedings are still pending and the issues subject matter of the said proceedings have yet to be adjudicated upon by the Tribunal.

The Ruling delivered by this Court on 16.06.06 which the present application seeks to have set aside stated in its penultimate paragraph, *inter alia*, as follows:

'On the evidence available to this Court, I hold that there is a dispute whether or not the plaintiffs'/applicants' tenancy in the suit premises is a controlled tenancy; that Ripco Auctioneers purported to levy distress upon the plaintiffs'/applicants' goods in the suit premises; and that the purported levy of distress was carried out during the pendency of references and complaints regarding the termination of the plaintiffs'/applicants' tenancy of the suit premises. Since the matters in dispute are before the Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, the Tribunal must be given the opportunity to adjudicate over them as the Tribunal is empowered so to do under the Act ...'

No new evidence or valid grounds have been placed before me to warrant any departure from the above Ruling. If anything, the Tribunal proceedings annexed to the defendant's/applicant's own application now before me points to the defendant/applicant company as the one dragging its feet over the Tribunal proceedings. If indeed the defendant/applicant company herein is incurring financial loss because the dispute regarding tenancy of the suit premises has remained undetermined, the defendant/applicant company herein seems to be the author of the delay and the alleged resultant loss. There was nothing to stop the defendant/applicant herein as landlord from accepting the offered rent of Kshs.1,000/= per month from his estranged tenants on a WITHOUT PREJUDICE basis to mitigate its loss in rent while awaiting the outcome of the case before the Tribunal. Alternatively, the applicant could have urged the offered rent to be deposited with the Tribunal, again WITHOUT PREJUDICE.

In my overall evaluation of the application now before Court and the opposition thereto, I have no hesitation in accepting the plaintiffs'/respondents' opposition as the more meritorious. In the result, I find no merit in the chamber summons application dated 08.11.08 and the same is hereby dismissed with costs.

Orders accordingly.

Delivered at Nairobi this 11th day of December, 2008.

B.P. KUBO

JUDGE