



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

Civil Suit 212 of 2007

ABDILLAHI SHAIYA AHMED T/A CHANIA BUTCHERY....1ST PLAINTIFF

PETER GICHOHI THIONGO.....2ND PLAINTIFF

VERSUS

DR. J.F.C. MUNENE.....1ST DEFENDANT

MUNICIPAL COUNCIL OF THIKA.....2ND DEFENDANT

RULING

The Plaintiffs have come to this Court vide their plaint dated 1st March 2007 and filed on the same date of 1st March 2007 brought against the Defendants herein.

The averments relevant to this ruling are paragraphs 4,5,6,7,8,12,13 and 14. The salient features of the same are that the first Defendant is the registered or beneficial owner of the suit property, the two Plaintiffs and another are tenants in the said premises and have been so for a period exceeding 30 years. The proceedings herein have been sparked off by the second Defendant purporting to give a statutory notice to the first Defendant to carry out repairs of a portion of the rented premises which had gotten burnt down. Following this action on the part of, the 2nd Defendant the first Defendant purported to issue a statutory notice to the Plaintiffs to vacate the premises for repairs. They content that the said notice had been issued by the 1st Defendant in collusion with the 2nd defendant purposely to wrongfully get them out of the premises. In consequence thereof the Plaintiffs have come to this court seeking a Permanent Injunction restraining the Defendants jointly and severally by themselves, their servants or agents from interfering with or/in any other way disturbing the Plaintiffs peaceful and quiet possession and occupation in respect of their respective tenancies in all the property known as plot No.4953/92 Thika, a Permanent Injunction restraining the Defendants jointly and severally by themselves, their servants and or agents form evicting or/in any other way removing the Plaintiffs from all that property known as Plot No.4953/92, Thika, Damages and costs of this suit.

This Plaint is accompanied by a Chamber Summons brought under Section 3 A of the Civil Procedure Act and Order 39 of the Civil Procedure Rules seeking an injunction to restrain the Defendants jointly and severally by themselves, their servants and/or agents from interfering with or in any way disturbing the Plaintiffs peaceful and quiet possession and occupation of their respective let portion of all that property known as plot No.4952/92, an injunction to restrain the Defendants jointly and severally by themselves, their servants, agents or otherwise howsoever from evicting the Plaintiffs from all that property known as Plot No.4952/92 with costs.

The first Defendant has filed a notice of Preliminary Objection to the effect that this court does not have jurisdiction in this matter. The reason advanced is that this being a tenant and landlord relationship the proper forum for the dispute is the Business Premises Tribunal under Cap.301 of the Laws of Kenya is their stand that Section 15 of the said Act ousts the jurisdiction of this Court.

The Plaintiff applicant has responded to the said objection by saying that indeed they concede the existence of Landlord and tenant relationship. They argue Section 4 of Cap.301 has been violated. They have come to Court to seek an injunction as they wait to comply with Cap.301. It is their stand that it is only this Court which can grant an injunction. They rely on Nairobi CA 205/95 NARSHIDAS AND COMPANY LTD VERSUS NYALI AIR CONDITIONING AND ANOTHER.

This Court has heard both parties on this Preliminary Objection. It is not disputed that the proceedings relate to a landlord and tenant relationship where by the Plaintiff has complained that Section 4 of Cap.301 Laws of Kenya has been violated. Section 4 is the shield and sword for the protected tenant. A landlord who wants to avail himself of the protection of this Section is required to give statutory notice in the prescribed form. Any tenant who wishes to oppose the landlord's move has to do so by giving the landlord notice in the prescribed form. There is a requirement that the tenancy notice takes effect after two months. There is a requirement that the notice specify the reasons for termination. A party who is aggrieved by the notice like the Plaintiffs herein is mandated to file a reference to the relevant tribunal before the expiry of the notice period. Upon receipt of the notice the time for the notice stops running until the matter is finally determined by the tribunal.

The powers of the tribunal are set out in Section 6 and 9 of the said Act which provides:-

“6(1) A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under Section 4(5) of this Act that he does not agree to comply with the tenancy notice may, before the date upon which such notice is to take effect, refer the matter to a tribunal, where upon such notice shall be of no effect until, and subject to the determination of the reference by the tribunal:

provided that a Tribunal may for sufficient reason and or such conditions as it may think fit permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this Section.

(2) A tribunal to which a reference is made shall within the seven days after the receipt thereof give notice of such reference to the requesting party concerned.”

Section 6 of the Act gives general supervisory powers. It is framed on the understanding that Landlords are expected to behave in an angelic manner and obey the law and not move to get an upper hand over the tenant. Section 6 of the Act does not provide a remedy for a tenant who is threatened with dispossession by a landlord who does not want to obey the law.

The strength of the powers of the tribunal is found in Section 9 of the Act. The Tribunal as a creature of statute has no alternative but to stick and confine itself to exercising jurisdiction in accordance with what has been donated to it by the creating statute. The relief that a tribunal can give to any aggrieved party is what is set out in Section 9(1) and 9(2) of the said Act. That Section provides

“9(1) upon a reference a tribunal may, after such inquiry as may be required by or under this Act, or as it deems necessary –

(a) approve the terms of the tenancy notice concerned either in its entirety or subject to such amendment or alterations as the Tribunal thinks just having regard to all circumstances of the case or

(b) order that the tenancy notice shall be of no effect and in either case

(c) make such further or other order as it thinks appropriate

(2) *Without prejudice to the generality of this Section a Tribunal may, upon any reference –*

(a) *determine or vary the rent to be payable in respect of the controlled tenancy having regard to the terms thereof and to the rent at which the premises concerned might reasonably be expected to be let in the open market, and dis regarding-*

(i) *any effect on rent of the fact that the tenant has or his predecessors in title have, been in occupation of the premises;*

(ii) *any good will attached to the premises by reason of the carrying on thereat of the trade business or occupation of the tenant or any such predecessor.*

(iii) *Any effect on rent of any improvement carried out by the tenant or any such predecessor otherwise in pursuance of an obligation to the immediate landlord.*

(b) *terminate or vary any of the terms or conditions of the controlled tenancy, or any of the right or services enjoyed by the tenant upon such condition, or any as it deems appropriate.*

(3) *where a tribunal has made a determination upon a reference, no further tenancy notice shall be given in respect of the premises, concerned, which is based on any of the matters affected by the termination.*

(a) *in the case of an assessment of rent, until after the expiration of two years; or*

(b) *in any other case, until after the expiration of twelve months, after the date of the determination, unless the tribunal, at the time of the determination, specifies some shorter period.*

It is clear from the reading of the provisions in section 6 and 9 of Cap.301 that granting of an injunction is not one of the reliefs that a tribunal can grant. This is a special jurisdiction conferred on to the High Court by Order 39 Civil Procedure Rules Order 39(1) reads “*where in any suit proved by affidavit or otherwise*

(a) *that any property in dispute in a suit, is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree... the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purposes of staying and preventing the wasting, damaging, alienating, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders”*

There is a suit in place on which the interim application is properly anchored. The landlord wants his premises back. The action of the landlord falls under alienation which is one of the ingredients under order 39 which entitles the Court to grant an injunction. The applicant has also cited Section 3A of the Civil Procedure Act which empowers the Court to do all that is necessary to ensure that ends of justice met and to prevent abuse of the Court’s due to process. The applicant moved to the High Court to seek an injunction because the tribunal could not grant him one. It is a preservative order which is necessary because of the special circumstances that exist in a landlord and tenant relationship. Once the status quo is disturbed regaining it might be only possible through a mandatory injunction. The plaintiff opted to forestall the anticipated change of status quo through a temporary injunction rather than wait for the change of status quo to occur and then apply for a mandatory injunction.

The question that this Court has to answer is whether the Plaintiff can access, the intended relief or not. This being a ruling in respect of a preliminary objection this court is not in a position to determine the merits or the demerits of the interim application. All that this Court needs to establish is that, it has jurisdiction to hear that application. The answer to this question is found in the case cited of NARSHIDAS & COMPANY LTD VERSUS NYALI AIR CONDITIONING AND REFRIGERATION SERVICES LTD. NAIROBI C.A.205/1995. At page 3 paragraphs 2 and 3. The Court of Appeal had this to say “*what does a controlled tenant confronted with an illegal threat of forcible eviction? He*

cannot go to the Business, Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. That tribunal has no jurisdiction to do as was held by High Court in the case of the REPUBLIC VERSUS NAIROBI BUSINESS PREMISES RENT TRIBUNAL & OTHERS EX PARTE KARASHA, (1979) KLR 147 RE; HEBTULLA PROPERTIES LIMITED,(1979) KLR 96.

The learned Judge was therefore in our view clearly wrong in holding that the superior Court had no jurisdiction to hear the matter before him. There was clearly jurisdiction to hear the matter before him. There was clearly jurisdiction to deal with the matter.”

Applying the Court of Appeal reasoning to the present preliminary objection, it is clear that the correct position in law is that the superior court’s jurisdiction is ousted in so far as it touches on matters specifically provided for to be within the mandate of the tribunal as provided for in Section 6 and 9 of the said Act Cap. 301 Laws of Kenya. Jurisdiction of the Court is not ousted in matters of injunction, where those injunctions relate to matters in which a landlord and tenant is involved. It is a Court of Appeal decision and it is binding on this Court. It has gone further and fortified this courts findings that granting of an injunction is not within the mandate of the tribunal under cap.301 Laws of Kenya. That being the case any party subject to Cap.301 wishing to avail himself of that relief has to turn to the Civil Procedure Act and rules made there under. A Court thus invoked has no jurisdiction to decline jurisdiction to hear the matter.

In view of the reasoning above the court rules that the High Court has jurisdiction to entertain the application for an injunction between a landlord and tenant as presented. The Preliminary Objection is dismissed with costs to the Plaintiff applicant.

DATED READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF MARCH 2007.

R. NAMBUYE

JUDGE