



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

Civil Case 611 of 2003

1. Land & Environmental Law Division
2. Subject of Main Suit - TORT
 - a) Negligence
 - b) Relationship Tenant/Landlord
 - c) Perimeter walls swept and collapsed by river
 - d) Damage to house & items therein.
 - e) Tenant claims special damages of Ksh.2,009,000/-
 - f) Landlady demands rent
 - g) Damage to wall and house not made correct.

Landlady threatens to evict tenant from premises

- h) Tenant applies for an injunction to restrain Landlady from selling house.

3. Application of 9 June 2006.

- i) Injunction to restrain defendant No.1 from transferring suit premises L.R. 330/620

Kunde road Lavington.

4. In Reply – An act of God.

5. Held Prayer actually seeking attachment of property before judgment

Injunction application dismissed

6. Case Law

Giella v Cassman Brown & Co. Ltd.

7. Advocates

M. M Muthaura instructed by Ayugi Njonjo & Co. Advocates for the Appellant/plaintiff - Present

D.K.. Musyoka for Onesmus Githinji & Co. Advocates – Advocates for the Respondent - Present

MARYANNE NJOKI KINA.....PLAINTIFF

VERSUS

JACQUELINE NJOKI NJOROGE.....1ST DEFENDANT

GEORGE KILONZO.....2ND DEFENDANT

RULING

1. Background to Application dated 9 June 2006

1. The relationship between Maryanne Njoki Kina the Plaintiff herein and Jacqueline Njoki Njoroge the 1st Defendant herein is that of Tenant/Landlady. The 2nd Defendant is an agent and ought not to be sued where the principal has in effect been sued.
2. The Plaintiff entered into a tenancy agreement for two years as of 1 May 2005 to 30 April 2007 paying a monthly rent of Ksh.70,000/- per month on a suit property known as LR 330/620 Kunde road Lavington, Nairobi. This property borders a river known as Thirikwa ndogo river. It appears to be a seasonal river. The property boundary has a wall constructed by the Landlady.
3. It is alleged by the Plaintiff that on 7 April 2006 a storm occurred that caused the river to burst its banks and fell the wall surrounding the property. Damage by the river was experienced to the plaintiff property. A second storm and flooding occurred on 4 May 2006. By now the landlady had written a letter threatening to distress for rent as the plaintiff who had asked for the repairs and damages to be made good and if she may use the rents to do this, was requested to pay rent regardless.
4. The plaintiff filed suit in the High Court of Kenya
limani. This was not a commercial court case. The then duty Judge transferred the case to the centrals registry to be determined. The case was subsequently placed before the Land & Environmental Law Division. In effect the main suit really deals with TORT. The land lady is alleged to be negligent in not constructing a proper wall to ensure there is no flooding to the premises.
5. The defendants defense claim was that the damage was done by “an act of God” She was therefore not liable.
6. The status of this case is that the lease has now expired. The tenant is still in possession of the suit premises awaiting the outcome of this case. She wants special damages to be paid to her as a result of the storm and negligence by the 1st defendant. All this is part of a trial to be heard at a later state.
7. From the pleadings, I am aware that there was a similar suit filed by another previous tenant being HCCC265/2004 whereby the same experience of the river bursting its banks and damaging the tenants property arose. The landlady distressed for rent of kshs.60,000/- per month. I believe this suit may be still pending.

II: Application 9 June 2006

8. The landlady resides in the United States of America. The advocate for the Plaintiff/Applicant was of the view that an injunction should issue against the landlady only (1st Defendant) to restrain her from selling the said property LR 330/620 Kunde Road Lavington. This is because the plaintiff is claiming a fairly large amount of damages against her. The landlady “may” sell the said property and as a result defeat the purpose of the suit as there would be no assets to attach sell and recover the sum owed.

9. I was indeed surprised at this prayer. What I had expected was an injunction restraining the landlady from evicting the plaintiff from the suit premises pending the determination of the suit.

10. What the applicant is seeking is to ensure that if her case is successful that she will be able to recover her claim from known assets as the landlady resides in the United States of America how to execute against her would be difficult to get any tangible assets.

11. In reply to this, the advocate for the respondent informed the court that the defendant is back to Kenya nonetheless as the damage to goods was an “act of God” the plaintiff has no case which would be successful. What the applicant plaintiff should applied for is attachment of the assets before judgment under order 38 civil procedure rules and not to pray for an injunction.

12. The applicant stated that Order XXXIX Civil Procedure Rules can suffice.

II. Findings

13. I do not think the Orders for an injunction can suffice herein to restrain the plaintiff from transferring the suit premises or selling the same so as not to pay the intended claim by the plaintiff if successful. There is no sale agreement by the parties and the issue herein does not arise to the ownership of the property.

14. The applicant really requires a prayer of attachment of assets before judgment the fear being that the defendant would leave and indeed has left to go to the United States of America.

15. In the circumstances of the case Order XXXIX civil procedure rules is not available to the plaintiff or the prayers sought. I accordingly dismiss the application for injunction that really is praying for attachment of property before judgment.

16. I award costs to the defendant/respondent.

Dated this 30th day of May, 2007 at Nairobi.

M.A. Ang’awa

JUDGE

30.5.2007

Advocates:

Ad

M.M. Muthaura instructed by Ayugi Njonjo Co. Advocates for the Applicant/plaintiff - Present

D.K.. Musyoka instructed by Onesmus Githinji & Co. Advocates for the Respondent/defendant - Present