

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 813 of 2005

OMAR MWANGI GATIBUI
.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI
.....DEFENDANT

R U L I N G

Under and by virtue of an Agreement dated the 18th June 1959 (“the Lease”) and made between the City Council of Nairobi, the Defendant in this case, of the one part and Saleh Bin Ali (“the Deceased”) of the other part, the Defendant let to the Deceased Shop Number 19 (together with the dwelling accommodation belonging thereto) situate at Shauri Moyo Estate, Nairobi, (“**the suit premises**”) at the rent and subject to the terms and conditions more particularly set forth in the Lease.

Omar Mwangi Gatibui, the Plaintiff herein, alleging that the Defendant had threatened to evict him from the suit premises on the 28th June 2005 and claiming to be the beneficiary of the estate of the Deceased and thereby entitled to the benefit of the Lease, instituted this suit on the 1st July 2005 seeking a permanent injunction to restrain the Defendant from evicting him from the suit premises as well as a declaration that the Plaintiff is the lawful owner thereof.

Simultaneously with the filing of the Plaintiff, the Plaintiff took out a Chamber Summons dated the 30th June 2005 (the subject of this Ruling) under Order 39 of the Civil Procedure Rules (but without stating the rule or rules thereof pursuant to which he was moving the court) and Section 3A of the Civil Procedure Act seeking a temporary injunction to restrain the Defendant from evicting him from the suit premises until the determination of the suit. The application is made upon the three grounds stated therein and is supported by the Plaintiff’s own affidavit sworn on the 30th July 2005. The Defendant opposed the application on the affidavit of Adan Racho, its Acting Director of Social Services and Housing, made on the 27th July 2005.

In his submissions, Mr. S.O. Owino, learned counsel for the Plaintiff, contended that the Plaintiff is the beneficial and lawful owner of the suit premises by virtue of being the son of the Deceased and that he is therefore accorded protection against eviction from the suit premises pursuant to orders of this court granted on the 18th March 1980 and the 28th February 1991 respectively in HCCC No. 422 of 1980. In conceding that the Plaintiff is in arrears of payment of rent, Mr. Owino however argued that the Defendant cannot lawfully demand payment as the arrears of rent have accumulated as a result of the wrongful actions of the Defendant.

In reply, Mrs. G.W. Ngala, learned counsel for the Defendant, submitted that the Plaintiff has no *locus*

standi in the matter as having failed to take out Letters of Administration of the Deceased's estate, the Plaintiff lacks the legal capacity to institute these proceedings. Further, Mrs. Ngala took the view that the Plaintiff was not in any event entitled to the orders sought as he was in arrears of payment of rent.

With respect, I would agree with the submissions of learned counsel for the Defendant for a number of reasons. First, there is no evidence before me that the Plaintiff is the personal representative of the Deceased or that he is beneficially entitled to the suit premises by virtue of being a son of the Deceased as he alleges. Secondly, and even assuming (but without deciding) that the Plaintiff is the beneficial owner of the suit premises, Clause 3(b) of the Lease provides that the right to peaceably hold and enjoy the same without any interruption by the Defendant is conditional upon payment of rent and the observance and performance of all the stipulations and obligations therein contained. The Plaintiff has admitted in the Plaintiff that he owes rent and has further stated on oath in paragraph 11 of his affidavit sworn on the 30th June 2005 —

“ 11. THAT the said confusion has led to accumulation of rent arrears which I have agreed on without prejudice basis to clear.”

The Defendant, in the Replying Affidavit of Adan Racho sworn on the 27th July 2005, puts such arrears at K.sh.309,500/= which the Plaintiff has not disputed nor has the Plaintiff deposited the same (or the arrears he admits) into court pending the hearing and final determination of the suit. The Plaintiff has also failed to show that the injunction orders granted in HCCC No.422 of 1980 aforesaid are still subsisting and do affect the suit premises. The Order of Simpson, J (as His Lordship then was) dated the 18th March 1980 was a **“temporary injunction pending the hearing and determination of the suit subject however to the right of the Defendant to terminate any tenancy agreement for non-payment of rent subsequent to the date hereof . . .”** The Plaintiff, being clearly in default of payment of rent, cannot benefit from this Order even if he had established that the Deceased was a party to that suit and that a perpetual injunction was granted at the determination of the suit (which the Defendant has in any event failed to do). Finally, the Defendant at paragraphs 5, 6 and 7 of the said Replying Affidavit of Adan Racho sworn on the 27th July 2005 states —

“5. THAT the Applicant was evicted on 23rd March 2005 for defaulting in rent and was in arrears of rent amounting to K.shs.309,500/=.”

“6. THAT the Applicant returned to the premises and was re-evicted on 26th May 2005 and a new Tenant took possession of the premises.”

“7. THAT it is not true that there were any threats of eviction on 28th June 2005 as the Applicant had already been evicted on 23rd March 2005 and re-evicted on 26th May 2005 hence he has concealed to this court material facts and is not in clean hands.”

These averments of the Defendant have not been denied and it would appear that the Plaintiff may not have disclosed all material facts to the court.

For these reasons, I do not consider that the Plaintiff has established a *prima facie* case with a probability of success for the granting of the orders he seeks. The Chamber Summons application dated the 30th June 2005 therefore fails and it is accordingly ordered that the same be and is hereby dismissed with costs to the Defendant. It is further ordered that the temporary injunction granted herein in terms of prayer No. 2 of the application be and is hereby discharged and vacated.

Dated and delivered at Nairobi this Tenth day of March 2006.

P. Kihara Kariuki

Judge