



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 623 of 2003

MRS JEANNE ODHALO

THOMAS ABUOGA

SAMSON GACHANGO

BEN ASHIHUNDU

CHRISTOPHER NDICHU MBUGUA

WAHOME TIMOTHY GATHERU

ABRAHAM LISERO.....PLAINTIFFS

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

RULING

There are three applications before me all similar and dated the 2/11/2004, 16/11/2004 and 8/12/2004 respectively.

I will deal with them all together as the same point arises in each. The Applicants were tenants of the Defendant of premises in Woodley Estate and are members of the Woodley Residents Welfare Society.

In each case the Applicants were evicted from their respective homes by the Defendant on the ground of non-payment of rent. They complain that they were given neither notice to vacate nor a demand letter to pay outstanding rent.

The three applicants were made parties to the proceedings today and deny that they were aware of a court order of the 16/6/2004 in which Mr. Justice Lenaola in this matter made inter alia, the following orders: 2. THAT in the meantime all the 94 tenants represented by Ms Kihara & Company Advocates in this suit should pay their respective one (1) month rent plus arrears of rent equivalent to (2) two monthly rent with effect from 1st July 2004 until the final determination of this suit.

3. THAT in default of payment of rent in (2) two above the defendant shall have liberty to evict or exercise such other right as the landlord which is deemed lawful.

4. THAT rent so whereby in (2) above shall be received and receipted by the Defendant failure to which the Applicants shall have leave to deposit the rent in court. The Applicants seek the following orders:

2. THAT the Defendant by itself, officers, agents or employees in singular and/or the entire local authority be restrained from allocating selling, alienating, letting out House No. 142/31 Woodley Estate to any person and/ or from terminating the tenancy of the Applicant until this application is heard and determined.

3. THAT the Applicant be put in possession of House No. 142/31 Woodley Estate pending the hearing of this application.

Mr. Onchanda relied on the cases of **Wildlife Lodges Ltd t/a Landmark Hotel Ltd V Jacaranda CC 521 of 1999** in which Oguk J cited with approval a passage in the judgment of Shah J (in the case of **Gussi Mwalimu Investment Co. Ltd & 2 Others Vs Mwalimu Hotel Kisii Ltd C.A No 160 of 1995** in which he said:

“It is trite law that where the tenant consents or agrees to give up possession, the Landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession.”

Also in the case of **Kamau Mucuaia Vs Ripples Ltd CA No 186 of 1992** which referred to the famous case of **Thompson Vs Park (1944) 2 ALL E.R 477** in which the Court of Appeal in England held that it is fallacious for a person who forcibly and riotously enters premises to maintain that his occupation of these premises is the status quo which he maintained and not disturbed. In that case a mandatory order was made to evict the unlawful intruder.

Mr. Wambugu submitted that the order of Mr. Justice Lenaola of the 15/6/2004 applied to all three Applicants and that as they had failed to pay the outstanding rent the Defendant was entitled to evict the Applicants from their houses.

Mr. Ochanda maintained that as the Applicants were not parties to the proceedings at that time the order did not apply to them and that in any event they were unaware of the order. At that time, Mr. Kahora represented the Applicants and at the request of Justice Lenaola supplied a list of the members of the Woodley Residents Welfare Society which included the names of the Applicants.

The order in fact referred to the 94 members of the society which included the Applicants. I cannot accept that the Applicants were not aware of the order made. Despite it, even upto today they are still in arrears of rent for substantial amounts.

The remedy of an injunction whether mandatory or not is an equitable remedy. Had the Applicants complied with the order I would have had no hesitation in granting the remedy they seek. However, in my view it would be totally inequitable to put them back into possession of their houses when they owe substantial sums by way of rent.

It is debatable as to whether the order of Mr. Justice Lenaola gave an order for eviction in the event of non compliance with the order and if it did whether he had jurisdiction to make such an order. However, assuming he did not then in my view the Applicants are entitled to pursue an action for trespass and for damages but they are not entitled to the mandatory relief sought.

I therefore dismiss their applications with costs to the Respondents.

DATED and DELIVERED at Nairobi on 3rd February 2005

P.J RANSLEY

JUDGE