



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO. 200 OF 2020

MANTEL LIMITED.....PLAINTIFF

VERSUS

RANDOLPH TINDIKA t/a TINDIKA & CO. ADVOCATES.....DEFENDANT

RULING

1. By a notice of motion dated 30th October, 2020 and filed in court on 2nd November, 2020 under the provisions of order 40 and 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the plaintiff/applicant is seeking the following orders:

1. That this matter be certified as urgent and be heard ex-parte in the first instance.

2. That pending the hearing and determination of the suit filed herein, an order of mandatory injunction be issued compelling the defendant by himself, his workmen, servants and/or agents or otherwise howsoever, to vacate and hand over vacant possession of the plaintiff's property known as LAND REFERENCE NUMBER MOMBASA/BLOCK XXVI/144 situated off Kaunda Street within Kizingo area of Mombasa County and/or in the alternative, an order be issued that the defendant be evicted from the parcel of land known as LAND REFERENCE NUMBER MOMBASA/BLOCK XXVI/144 situated along Kaunda Street within Kizingo Area of Mombasa County should he fail to vacate therefrom.

3. That his Honourable Court be pleased to give direction and any other order on the hearing of this matter as it may deem fit.

4. That the costs of this application be provided for.

2. The application is supported by the supporting affidavit and supplementary affidavit sworn by Shahid Lalji and the grounds on the body of the motion. The applicant is the registered owner and entitled to possession of the property known as LAND REFERENCE NUMBER MOMBASA/BLOCK XXVI/144 (hereinafter referred to as the "suit property") which is developed. The respondent herein is in occupation of the suit property since 1st November, 2016 pursuant to a written lease dated 1st November, 2016 signed by the parties. Copies of the certificate of title, valuation report and the lease have been exhibited. The lease is for a period of 5 years and 3 months. The applicant avers that even though the said lease was not registered, the relationship between the applicant and the respondent is governed by the terms and conditions of the said lease. It is averred that when the respondent executed the lease and forwarded it to the applicant, he failed to pay the amount required for the registration of the lease in breach of express provisions of the same. Copies of correspondence have been annexed. That by a letter dated 1st November, 2017 addressed to the respondent by the applicant's advocates, the applicant gave the respondent three (3) months' notice of termination of the said lease and required the respondent to vacate the suit property by 1st February, 2018, but the respondent indicated that he was not willing to comply with the notice issued to vacate. The applicant avers that after expiry of the said notice and that once the notice of termination lapsed, the lease became terminated and the respondent was obligated to vacate and handover vacant possession of the suit property to the applicant, but he unreasonably refused to do so and has continued occupying the same to date, without paying rent in breach of the express terms and conditions of the lease concerning payment of rent and that he has always been in arrears of rent.

3. The respondent opposed the application through a replying affidavit sworn by himself and also filed a notice of preliminary objection dated 16th November, 2020. It is the respondent's contention that in so far as this matter concerns dispute between Landlord and Tenant, this court does not have the original jurisdiction to hear nor determine the suit nor the application herein. That the application and the suit herein have been filed in gross non-disclosure and concealment of all material facts known to the applicant, and that the application and suit are sub judice because there are similar proceedings pending before courts of competent jurisdiction to wit, CMCC No. 2012 of 2019 Mombasa, and HCCA Number E.14 of 2020, Mombasa between the same parties and/or the same subject matter/cause of action.

4. The respondent avers that he moved into the suit premises on 1st November, 2015 well after carrying out extensive repairs, to the premises for which he alleges he incurred more than Kshs. 3,000,000. The respondent avers that he continued to pay to the applicant rent through another tenant in the premises. He states that though he signed the lease, the same was never returned to him until the proceedings in the aforesaid suit were filed. The respondent's case is that he is effectively a protected tenant under the provision of the Landlord and Tenant (Shops, Hotels, & Catering Establishments) Act Cap 301 and therefore the alleged termination of tenancy had no legal effect as the same did not comply with the mandatory provisions of the said Act.

5. I have considered the application, the affidavits in support and against, the preliminary objection and the rival submissions. The first issue for determination is whether this court has jurisdiction to hear and determine this suit and the application herein. The dispute herein relates to the relationship between the applicant and the respondent as landlord and tenant and relates to the respondent's occupation as a tenant of the respondent's business premises.

6. Article 162 (2) (b) of the Constitution provides that "parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land". Article 162 (3) provides that Parliament shall determine the jurisdiction and functions of the court contemplated in Clause (2). In order to give effect to Article 162 (2) (b), Parliament enacted the Environment and Land Court Act, 2011 which under Section 4 thereof established the Environment and Land Court Act which shall be a superior court of record with the status of the High Court. The jurisdiction of the court is provided under Section 13 and Section 13(2) provides that in exercise of its jurisdiction under article 162 (2) (b) of the Constitution, the court shall have power to hear and determine disputes relating to the environment and land, including disputes relating to inter alia, rents. The dispute herein is over rent and no doubt, this court has the requisite jurisdiction to hear and determine the matter.

7. The application herein is seeking orders of mandatory injunction compelling the respondent to vacate and handover vacant possession of the suit premises or be evicted. The law as regards the principle to be applied when considering whether or not to grant mandatory injunction is higher than that in respect of prohibitory injunction. In the case of **Locabail International Finance Ltd -v- Agro Export & Another (1986) 1 ALL ER 901** it was stated:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff.

Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction."

8. In the plaint, the applicant prays for judgment against the respondent for an order of mandatory injunction to compel the respondent to vacate and handover vacant possession of the suit premises or be evicted; a declaration that the respondent's occupation of the suit property is unlawful and constitutes a trespass; and an order for payment of outstanding rent in the sum of Kshs.1,118,040/= as at 30th October, 2020 and monthly rent or mesne profits equivalent to monthly rent charged to the date of vacant possession plus interest thereon at 15% per annum. The court of appeal in the case of **Olive Mwihaki Mugenda & Another -v- Okiya Omtata Okoit & 4 Others (2016)eKLR** considered a persuasive decision of India on issuance of final orders at interlocutory stage and stated:

"2. Ashok Kumar Bajpai, AIR 2004, ALL 107, 2004 (1) AWC 88 at paragraph 17 the Indian Court expressed as follows:

i.....it is evident that the court should not grant interim relief which amounts to final relief and in exceptional circumstances where the court is satisfied that ultimately the petitioner is bound to succeed and fact situation granting such relief, the court may grant the relief but it must record reasons for passing such an order to make it clear as what are special circumstances for which such a relief is being granted to a party. "

9. In this case, the relationship between the applicant and the respondent is one of Landlord and Tenant. Whereas the applicant states that it has issued notice to terminate the lease, the respondent contends that he is a protected tenant and that the lease can only be terminated in accordance with the provisions of Cap 301. It is also apparent that there were other proceedings before the Magistrate's Court and the High Court.

10. Having carefully considered the material before me, I am not satisfied that the applicant has made out a clear case to warrant the grant of orders sought. The case is not unusually strong and clear as to allow me to grant the mandatory injunction prayed for. I cannot safely consider this a clear case that can be decided at once or in a summary manner.

11. The upshot is that the notice of motion dated 30th October, 2020 lacks merit and the same is hereby dismissed with costs to the respondent.

DATED, SIGNED and DELIVERED at MOMBASA this 17th day of March, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE