



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E211 OF 2020

ABDIFTAH MOHAMED ABDI.....PLAINTIFF

-VERSUS-

AL-SAWAE MOHAMED ABUDLQADER A.HASSAN.....DEFENDANT

RULING

1. This ruling relates to two applications, the one dated 29.10.2020 filed by the Plaintiff seeking temporary orders of injunction against the Defendant, while the other application is dated 15.1.2021 filed by the Defendant seeking orders inter-alia, to strike out the suit.

Application dated 29.10.2020

2. The Plaintiff/Applicant contends that he is in occupation of the two shops Nos. B011 and B012 on Land Registration No. 36/VII/451 in Eastleigh as a tenant. That the suit premises were purchased by the Defendant from the previous owner (Borah Developers Limited) who by a letter dated 21.8.2020 informed all the tenants to pay their monthly rent to the Defendant effective from 1.9.2020.

3. The Plaintiff duly paid rent of Kshs 21,600 for the month of September 2020 for both shops and Ksh. 60,000 for October 2020 but Defendant declined to issue him with a receipt. That on 20.8.2020, Defendant unlawfully issued the Plaintiff with a 3 months' notice to vacate the suit premises.

4. The Plaintiff further avers that on 27.10.2020 he lodged a complaint at the Business Premises Rent Tribunal (BPRT) but there was no Chairman hence the filing of this suit.

5. The Plaintiff contends that he is a protected tenant within the meaning of the **Landlords and Tenants (Shops, Houses and Catering Establishments) Act Cap 301 Laws of Kenya** and that he has invested all his resources and finances on the said business.

6. In his supplementary affidavit dated 16.11.2020, the Plaintiff avers that the Defendant had welded his Shop No. B11 on 3.11.2020 denying him entry into the said shop and that this was a flagrant disobedience of the court order of 5.11.2020 as Plaintiff had duly paid rent.

7. In opposition to the application, Defendant filed a replying affidavit dated 15.1.2020 (*he must have meant 2021*) where he avers that he is the registered owner of the suit premises having purchased the same from the previous owner Borah Developers Ltd. Through his advocates, Defendant informed the tenants that all rent was to be paid to him and he prepared tenancy agreements to that effect which were duly signed by the tenants. It is then that Defendant realized that Plaintiff was not one of the tenants, but he is one of the people who had illegally sublet the units. Defendant contends that the tenancy agreements have a clause (1b) which expressly forbids sub-letting of the units.

8. Defendant confirms that he did issue a notice dated 20.8.2020 informing all his tenants of his intention to carry out renovations on the property hence the 3 months' notice to vacate the suit premises.

9. He further avers that the Plaintiff obtained the interim orders fraudulently by withholding material facts from the court and the said orders have prevented the Defendant from carrying out renovations and he is not earning any income.

10. On 11.11.2021, the court gave directions for the application to be canvassed by way of written submissions of which the Plaintiff was to file his written submission by 25.11.2021 while Defendant was to file his by 10.12.2021. I found no such submissions in the court's CTS platform.

11. The issue for determination is whether the orders of injunction sought by the Plaintiff are merited. The first point of call is to determine the nature and extent of the relationship between the two parties. The Plaintiff contends that there is a tenancy relationship in the nature of a

controlled tenancy between the two parties. The averment has been denied by the Defendant who avers that the Plaintiff was sub-letting the premises.

12. It is not in dispute that the Defendant became the owner of the suit premises sometime in August year 2020. The letter of 21.8.2020 by advocates of the previous owner indicated that as from 1.9.2020 the rent was to be paid to the new owner of the suit premises who is the Defendant. Can that letter be termed as establishing a tenant landlord relationship between the two litigants? The Defendant has stated that once he took over as the owner of the suit premises, the existing tenants executed a fresh tenancy agreement of which the Applicant was not one of the said tenants. That is when the Defendant realized that the Plaintiff was an illegal sub-tenant. The Plaintiff has not refuted this averment.

13. Further, the receipts availed by the Plaintiff cannot by themselves be termed as establishing the controlled tenancy as they were between the Plaintiff and a different entity known as Borah Developers. There is nothing to indicate that the new owner of the property was obliged to inherit the existing tenants. The letter of 21.8.2020 is certainly not a binding agreement that the Defendant was bound to follow.

14. Finally, I find that in terms of the provisions of **Section 6 of the Landlords and Tenants (Shops, Houses and Catering Establishments) Act Cap 301 Laws of Kenya**, the Plaintiff did challenge the notice issued to him by lodging his complaint with the tribunal vide **Tribunal Case No. 856 of 2020**. He now states that the Tribunal has no Chairman. This is however just a sweeping statement with no supporting documents.

15. In the case of **Dhirajal J Shah & Another v. Vija Amrittal Shetia (2018) eKLR**, the court had this to say in respect of the provisions of law touching on matters “Tenancy”:

“ We find nothing in the above provision vesting this Court with the Jurisdiction to determine matters arising from termination of tenancy notices. Nothing prevented Parliament from including them in the enumeration of matters that fell within the jurisdiction of the court when created. Exclusion of such disputes from the jurisdiction of the superior court could only imply that Parliament was satisfied that these were adequately catered for by the relevant Act namely, the Landlord and Tenant (Shops, Hotels and Catering Establishments)”

16. Finally, this court has keenly looked at the prayers sought in the main pleadings whereby the applicant is seeking the following orders;

a. A permanent injunction restraining the Defendant whether by himself, his agents, or servants, or Auctioneers from locking up the Plaintiff’s shops, evicting the Plaintiff, causing any form of nuisance, distressing for rent, harassing intimidating, interfering with the Plaintiff’s quiet and peaceful occupation on the suit property, being Shops No. B011 and B012 on Ground floor of the building known as Sawa Towers formerly Al-haqq Plaza on LR. No. 36/VII/451 Eastleigh, Nairobi.

b. A permanent injunction restraining the Defendant whether by himself, his agents, or servants, or Auctioneers from locking up the Plaintiff’s shops, evicting the Plaintiff, causing any form of nuisance, distressing for rent, harassing intimidating, interfering with the Plaintiff’s quiet and peaceful occupation on the suit property, being Shops No. B011 and B012 on Ground floor of the building known as Sawa Towers formerly Al-haqq Plaza on LR. No. 36/VII/451 Eastleigh, Nairobi pending the hearing and determination of the Business Premises Rent Tribunal Case 856 of 2020 at Nairobi filed by the Plaintiff herein on 27th October, 2020 under Section 12(4) of the Landlords and Tenants (Shops, Houses and Catering Establishments) Act Cap 301 Laws of Kenya.

17. On one hand, the Applicant is seeking orders in this court because nothing is going on at Business Premises Rent Tribunal (BPRT) while on the other hand, the final orders are sought herein awaiting the outcome of the suit at Business Premises Rent Tribunal. This is clearly an abuse of the court’s process.

18. In the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 Others ex-parte Law Society of Kenya (2020) eKLR**, the court had this to say on the issue of multiplicity of suits;

“ The court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused.....”

The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations: -

a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.

c. Where two similar processes are used in respect of the exercise of the same right.....”

19. In light of the foregoing analysis, I find that the prayers sought by the Applicant are not merited. The application dated 29.10.2020 is hereby dismissed with costs to the Respondent. The temporary orders issued on 5.11.2020 are hereby discharged.

Application dated 15.1.2021.

20. In the above mentioned Application, the Defendant prays that the interim orders of 15.11.2020 be discharged and that the application of 29.10.2020 and the suit be dismissed with costs. It is averred that the interim orders have assisted the Plaintiff to perpetuate an illegality, that both the application and suit offend the doctrine of *sub-judice* as a similar application and suit were filed in BPRT No. 856 of 2020 of which the matter is alive and the tribunal is sitting.

21. In response to this application, the Plaintiff vide his replying Affidavit dated 16.12.2021 averred that he has been paying rent to the Defendant since September 2020 but his shop has now been closed and he is now incurring daily losses amounting to Kshs 30,000 per day. The Plaintiff reiterated that there is a tenant – land lord relationship between the litigant as Plaintiff has been receiving rent for shops B011 and B012 on the suit premises.

22. I have keenly perused the replying affidavit of Plaintiff and nowhere has he refuted the claim by the Defendant that he (Plaintiff) had filed a similar application before the BPRT. Nowhere has he denied that the matters are alive. Having made a pronouncement in regard to the application of 29.10.2020, I consider the issues raised by the defendant relating to the application before the Business Premises Rent Tribunal as moot. The court will proceed to determine if the suit can be sustained.

23. The provisions of Section 6 of the Civil Procedure Act provides that:

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties.....”.

24. This court has again made a pronouncement on the issue of jurisdiction. Further, it is an abuse of the court processes for the plaintiff to file multiple suits in different forums. In the case of **R vs. Paul Kihara Kariuki, Attorney General & 2 Others , Exparte Law Society of Kenya (Supra)** the court had this to say on the subject;

“ Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.

24. A litigant has no right to pursue “*paripassu*” two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both.

26. This suit is certainly *sub-judice* in light of the existing suit at the BPRT. I therefore proceed to strike out the suit before this court with costs to the defendant.

27. Summary of the Final Orders

- 1. The plaintiff’s application dated 29.10.2020 is hereby dismissed with costs.**
- 2. The interim orders of injunction given on 5.11.2020 are hereby discharged.**
- 3. The defendant’s application dated 15.1.2021 is hereby allowed to the extent that this suit is struck out with costs to the defendant.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY, 2022

THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mary Wanjiku for the Plaintiff

M/S Tanui for the Defendant

Court Assistant: Eddel Barasa