



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E208 OF 2020

MANUT MADUT ANEI MACHOT.....PLAINTIFF

VERSUS

GRACE WANGARI I KIMANI.....DEFENDANT

RULING

1. This is the Notice of Motion dated 29th October 2020 brought under section 13(4) of the Environment and Land Court Act, and Section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301 Laws of Kenya).
2. It seeks orders:-
 1. *Spent.*
 2. *Spent.*
 3. *Spent.*
 4. *That pending the hearing and final determination of this reference, the landlady/respondent and her agents be and are hereby restrained and prohibited from evicting, intimidating, threatening, harassing and/or in any manner whatsoever interfering with the tenant's/applicant's quiet enjoyment of the tenancy on Land Reference Number Nairobi/Block 3/303-High View Estate Phase 1.*
 5. *That the OCS Kenyatta National Hospital Police station be and is hereby ordered to ensure compliance with the orders and to ensure that peace and order prevail.*
 6. *That costs of the application be provided for.*
3. The grounds are on the face of the application and are set out in paragraphs (a) to (i).
4. The application is supported by the affidavit of Manut Madut Anei Machot, the plaintiff/applicant herein sworn on the 29th October 2020.
5. The application is opposed. There is a replying affidavit sworn by Grace Wangari Kimani, the defendant/respondent herein sworn on the 14th December 2020. There is also a supplementary affidavit sworn by Irene Wanjiru, a tenant on the suit property sworn on the 14th December 2020. There is also a preliminary objection dated 9th December 2020, raised by the defendant/respondent.
6. On the 14th December 2020, when the court with the consent of the parties directed that the preliminary objection and the Notice of Motion be heard together. It also directed that the parties do file written submissions.
7. On the 17th February 2021, the matter came up to confirm filing of submissions, the plaintiff's/applicant's counsel did not appear. The defendant's/respondent's counsel who was present confirmed that submissions on behalf of the defendant/respondent had been filed. The court gave a mention on 22nd March 2021 to give the plaintiff/applicant time to file his submissions. When the matter came up on 22nd March 2021, there was no appearance for the plaintiff/applicant. The court then gave a ruling date. As at the time of writing this ruling the plaintiff's/applicant's submissions are not on record.

The Defendant's/Respondent's Submissions

8. Section 2(1) of the Landlord and Tenant (Shops Hotels and Catering Establishments Act (Cap 301) states that a "controlled tenancy" means "a tenancy of a shop, hotel or catering establishment:-

"(a)....."

(b) which has been reduced into writing and which is for a period not exceeding five years or....."

The tenancy between the parties herein was created vide a tenancy agreement dated 5th March 2020, is a controlled tenancy. She has put forward the case of **Dhirajlal J Shah & Another vs Vijay Amritlal Shethia [2018] eKLR**. The Business Premises Rent Tribunal has original jurisdiction to hear and determine disputes in as far as they relate to a controlled tenancy.

9. The plaintiff/applicant as a tenant has a duty in law to pay rent to the landlord in exchange of quiet possession. He claims to have made good his rent payments but has failed to adduce any evidence in support of his averments. She has put forward, the cases of **Giella vs Cassman Brown & Co Ltd [1973] EA 358; Tecno Holdings Ltd & 5 Others vs NSSF Board of Trustees [2018] eKLR**.

10. The plaintiff/applicant has deliberately concealed material facts and has misled this court in a bid to invoke the sympathy to grant the reliefs sought. The plaintiff/applicant has failed to establish a prima facie case with a probability of success and is undeserving of the court's discretion. She prays that the application be dismissed with costs to the defendant/respondent.

11. I have considered the Notice of Motion and the affidavit in support, I have considered the affidavit in response and the preliminary objection herein. The issues for determination are:-

(i) Whether the preliminary objection herein is merited.

(ii) Whether the plaintiff's/applicant's application meets the threshold for grant of temporary injunction.

(iii) Who should bear costs?

12. The preliminary objection dated 9th December 2020 is based on the following grounds: -

1. This honourable court has no jurisdiction to hear and determine this matter.

2. Under section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, (Cap.301) Laws of Kenya, this Honourable Court has no jurisdiction to entertain the suit filed herein in that; the tenancy between the parties herein, which is the subject matter in this suit, is a controlled tenancy and thus the appropriate court to handle this matter is the tribunal established under the said Act.

3. A person with a complaint or grievance relating to or surrounding a controlled tenancy is obligated to go to the Tribunal established under Section 11 of the Landlord and Tenant (Shops Hotel and Catering Establishments) Act, (Cap.301) Laws of Kenya.

13. Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) Laws of Kenya defines "**Controlled Tenancy**" to mean, "**a tenancy of a shop, hotel or catering establishment –**

(a) which has not been reduced into writing; or

(b) which has been reduced into writing and which –

(i) Is for a period not exceeding five years; or

(ii) Contains provisions for termination, otherwise than for breach of covenant within five years from the commencement thereof; or

(iii) Relates to premises of a class specified under subsection 2 of this section..."

The tenancy between the plaintiff/applicant and the defendant/respondent herein was created through a tenancy agreement dated 5th March 2020.

14. I have gone through the said agreement and there is no doubt that it is a controlled tenancy. This therefore means that the matter falls within the jurisdiction of the Business Premises Rent Tribunal established under Section 11 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) Laws of Kenya.

15. In the case of **Dhirajlal Shah & Another vs Vijay Amritlal Shethia [2018] eKLR** the Court of Appeal made reference to the case of **Owners of Motor Vessel "Lilian" (S) vs Caltex Oil Kenya Ltd [1989] KLR 1** where Nyarangi JA held as follows:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....”

16. It is clear from the provisions of Section 13 of the Environment and Land Court Act that this court has no jurisdiction to determine matters arising out of a termination of tenancies. The Business Premises Rent Tribunal is properly seized to deal with this matter.

17. In a nutshell I find merit in the preliminary objection and the same is upheld. Consequently. The Notice of Motion dated 29th October 2020 and the entire suit are hereby dismissed with costs to the defendant/respondent.

18. Assuming this court had jurisdiction to entertain the notice of motion dated 29th October 2020 it would be guided by principles set out in the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358.**

It is the plaintiff’s/applicant’s assertion that he has been paying rent as and when it falls due. The defendant/respondent’s contention is that the plaintiff/applicant has defaulted on rent payments hence is not entitled to quiet possession of the suit premises. It was incumbent upon the plaintiff/applicant to prove that he had fulfilled his obligations as a tenant. He has failed to do so. I would still have found no merit in the Notice of Motion dated 29th October 2020 and the same is dismissed with costs to the plaintiff/respondent.

19. In conclusion, the preliminary objection herein is upheld. The notice of motion dated 29th October 2020 and entire suit are dismissed with costs to the defendant/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 10th day of June 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiff

Ms Kimani for Mr. Kinaro for the defendant

Phyllis - Court Assistant