



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. E361 OF 2020

JOHN WAGACHA.....1ST APPLICANT

MAGGIE WANJIRU GACHAU.....2ND APPLICANT

-VERSUS-

ERDEMANN PROPERTY LIMITED.....1ST RESPONDENT

SEB ESTATE LIMITED.....2ND RESPONDENT

ICON AUCTIONEERS.....3RD RESPONDENT

RULING

The applicant filed an application dated 8th September, 2020 which application was amended the following day on 9th September, 2020. The application seeks the following orders:-

- 1. THAT a temporary injunction be hereby issued to the 3 Respondent restraining them from selling or otherwise disposing of the personal effects and all others goods of the Applicants on Wednesday 9th September, 2020 retained at the Pangani Police Station on account of the Unlawful Proclamation Notice issued on 13th August 2020 by the 3rd Respondent.**
- 2. THAT the 1st and 2nd Respondents be cited for contempt on account of the Orders issued on 18th June, 2019 by the chairman of the Rent Restriction Tribunal Honorable K. Korir and the Orders issued on 27th August, 2020 by the Deputy Chairman of the tribunal in Rent Restriction Assessment Case No. 10 of 2018 John Wagacha, Maggie Wanjiku Gachao Vs Edermann Property Limited & Another.**
- 3. THAT the 1st and 2nd Respondents be ordered to make payment of damages to the Applicants for illegal distress and eviction pursuant to Section 26 of the Distress of Rent Act, Chapter 293, Laws of Kenya for damages associated with the trauma caused by the illegal distress and/or eviction.**
- 4. THAT the Respondents be ordered to refund/compensate the Applicants for the goods damaged while illegally levying the distress on rent/evicting the Applicant on account of their negligence.**
- 5. THAT a declaration be issued that the additional rental fee of Kshs 3500 set aside by the Rent restriction tribunal dated 18th June, 2019 in Rent Restriction Assessment Case No. 10 of 2018 John Wagacha. Maggie Wanjiku Gachao Vs Edermann Property Limited & Another is not due and owing to the Applicant.**
- 6. THAT a declaration be hereby issued that the Applicant is not in any rent arrears of Kenya Shillings Three Hundred and Fifty-Three Thousand, Three Hundred and Ninety Shillings (Kshs. 353,390) and the purported distress for rent is null and void.**
- 7. THAT there be an Order suspending any proceedings in the Rent tribunal in Rent Restriction Assessment Case No. 10 of 2018 John Wagacha, Maggie Wanjiku Gachao Vs Edermann Property Limited & Another and the Chief Magistrates Court at Thika in Civil Suit No, 538 of 2018 John Wagacha. Maggie Wanjiku Gachao Vs Edermann Property Limited & Another until the case herein is heard and determined.**

The application is supported by the affidavit of the second applicant. The respondents filed a replying affidavit sworn by EDWIN GITAU. The respondent also filed a Preliminary Objection dated 14th September, 2020 and this ruling is in relation to the Preliminary Objection.

The Preliminary Objection is based on the following grounds:-

1. **THAT this matter is *sub judice* and offends the provision of Section 6 of the Civil Procedure Rules 2010**
2. **THAT the substantive issues brought before this Court being issues arising out of rent payment and assessment/valuation of rent are ongoing before the Chief Magistrate Court Kiambu Civil Case No. 538 of 2018 and the Rent Restriction Tribunal RRA Case No. 10 of 2018 respectively.**
3. **THAT the Applicants are blatantly abusing the Court process in praying that this honourable court interfere with and/or suspend the proceedings in the aforementioned courts notwithstanding that those courts have jurisdiction to hear and determine the matters.**
4. **THAT this honourable court lacks jurisdiction to hear and determine this matter since the same raises issues which are before the Chief Magistrate Court in Kiambu Civil Case No. 538 of 2018 and before the Rent Restriction Tribunal RRA No. 10 of 2018**
5. **THAT the application has been brought in bad faith, is frivolous, vexatious and an abuse of the Court process which ought to be dismissed with costs.”**

Parties agreed to determine the preliminary objection by way of written submissions.

Counsel for the respondents submitted that the current miscellaneous application is *sub judice* and offends the provisions of Section 6 of the Civil Procedure Rules which states:-

"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, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed".

Counsel referred to the case of **REPUBLIC –VS- REGISTRAR OF SOCIETIES KENYA & 2 OTHERS EX Parte MOSES KIRIMA & 2 OTHERS (2017) eKLR** where it was held:-

“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

Counsel for the respondents contend that on 30th October 2018 the applicants filed an application before the Kiambu Chief Magistrate's Court in CMCC No 538/2018 seeking to stop the respondents from levying distress. The applicants were granted interim orders. The application was dismissed in a ruling delivered on 28th May, 2020. The respondents continued living in the premises and accumulated rent arrears and this made the respondent to levy distress. The amount recovered as a result of the distress was not sufficient to cover the rent arrears and the respondents applied to have the applicants vacate the premises. Counsel contend that while the matter before the Kiambu Chief Magistrate's Court was pending another matter was filed before the Rent Restrictions Tribunal, vide case No. 10 of 2018 seeking assessment of rent. The applicants were granted 60 days to carry out their independent assessment but failed to do so. The applicants did not appeal against the ruling of the Migori Chief Magistrate's Court. The dispute involves payment of rent and the applicants have been filing multiple suits. Counsel refer to the case of **NYANZA GARAGE –V- ATTORNEY GENERAL, Kampala High Court Civil Case No. 450 of 1993** where the court stated:-

"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid multiplicity of suits.”

On their part, Counsel for the applicants submitted that the applicants have been the 1st respondent's tenants for sixteen (16) years. They paid the rent dutifully. The rent was increased from Kshs.15,000 to 30,000 over the years. The respondent dug a borehole and increased the rent by a further sum of Kshs.3,500. The borehole was closed due to failure to comply with NEMA regulations. The current suit only seeks to have the 1st and 2nd respondents ordered to make payment of damages to the applicants for illegal distress and eviction pursuant to Section 26 of the Distress for Rent Act, Cap 293 Laws of Kenya, it further seeks damages associated with the trauma caused by the illegal distress and/or eviction and also seeks a refund or compensation for the goods that were damaged as a result of the illegal distress and eviction.

Counsel for the applicants contend that the case before the Kiambu Chief Magistrate's Court, No.538 of 2018 granted ex-parte eviction orders and the applicants were evicted from the premises. The applicants had no choice but to withdraw the suit. Therefore, there is no suit pending before the Chief Magistrate's Court and that court is *functus officio*.

Regarding the case before the Rent Restrictions Tribunal, the same has been dealt with and the Tribunal noted that it did not have jurisdiction to proceed with the matter as far as evaluation of the premises is concerned. Also, that suit is overtaken by events as the applicants have been evicted due to the *ex parte* eviction orders. Counsel relies on the case of **THIKA MIN HYDRO CO LTD –V- JOSPHAT KARU NDWIGA (2013) eKLR** where Justice Olao stated:-

"It is not the form in which the suit is framed that determines whether it is *sub judice*. Rather it is the substance of the suit and looking at the pleading in both cases."

It is further submitted for the applicants that the controversy in the present matter can only be conveniently and properly adjudicated upon in this suit as no claim for damages has arisen in the previous suits. Further, all other causes of action have been overtaken by events. Counsel urged the court to condemn the respondents to pay costs.

In the case of **MUIRURI –V- KIMEMIA [2002] KLR 677** the Court of Appeal held *inter alia*:-

"A preliminary objection is in the nature of a demurrer in that it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

The core issue for determination is whether the issue is *sub-judice*. According to the ruling delivered by HON W. RADING on 28th May, 2020, the applicants herein had filed the application dated 30th October, 2018 seeking the following orders:-

- 1. A temporary injunction to issue restraining the Defendant/ Respondents their agents, servants from attaching the Plaintiffs/Applicants goods pending the hearing of this suit.**
- 2. A temporary injunction restraining the defendants/ Respondents, their agents, servants from harassing and intermeddling with the tenant quiet possession pending the hearing and determination of this suit.**
- 3. An order that the expenses in fixing the door locks and the cost of the items."**

The applicants' application was dismissed and on 3rd September, 2020 the Kiambu Court further issued the following orders:-

- 1. THAT the Respondents are hereby granted seven (7) days to voluntarily leave failure to which the Applicants are granted liberty to evict the Respondent from the suit premises known as House No. B2, Windsor view Apartments.**
- 2. THAT the Police Officer Commanding Kiambu Police Station is hereby ordered to oversee the enforcement of the eviction orders.**
- 3. THAT the Respondents bear the costs of this application.**

According to the applicants, the eviction orders were granted *ex-parte*. The respondent maintain that the orders were effected and the applicants were evicted as the attached goods had been sold but did not yield enough funds to settle the rent arrears.

In the current miscellaneous application, the applicants are seeking damages for illegal distress or eviction, citation of the respondents for contempt on account of the orders issued by the Chairman of the Rent Restriction Tribunal. Injunction restraining the respondents from selling or disposing the applicants' personal effects and other goods, declaration that the additional rent of KShs.3,500 was set aside by the Tribunal, Refund or Compensation for damaged goods and suspension of proceedings in Kiambu CMCC No 538 of 2018 and Rent Restriction Tribunal Assessment case No. 10 of 2018. It is stated in the application that the applicants have not accumulated rent arrears totaling KShs.353,390 and the purported distress for rent is null and void.

From the pleadings herein, I do find that the cornerstone of the claim before the Kiambu Magistrate Court, the Rent Restriction Tribunal and this court is the issue of rent. The Ruling by Hon Rading dwelt with the issue of rent arrears and noted that rent reconciliation had been done and a notice to clear the arrears was issued. It is also noted that the applicants had failed to pay KShs.50,076/79 electricity bill. The ruling by Hon Rading partly states as follows:-

"I have considered all that is before this Honourable court which is the rival affidavits and submissions, to my mind, by the time of coming to this honourable court and obtaining the orders it was very clear that the applicant was in default of rent and has thereby not continued to pay up what they are owing. As the applicant is seeking an equitable remedy: that is not conduct of an applicant with clean hands." (emphasis added)

The Kiambu Court concluded that the applicants were in rent arrears. The same Kiambu Court granted the applicants seven (7) days to voluntarily leave the premises or be evicted. The applicants did not leave the premises and were subsequently evicted from the premises. The Kiambu Police Station OCS was ordered to oversee the eviction.

It is my finding that since the applicants were evicted through a court order, they cannot challenge that order by filing another suit seeking damages for illegal distress or eviction. They also cannot seek damages on the pretext that the distress or eviction was illegal. It is upto the applicants to go back to the Kiambu Magistrate's Court and seek to set aside the eviction orders. The suit at the Kiambu Court was filed by the applicants and if they decided to withdraw it and file this suit, the orders granted in that suit still exist and were effected. I do find that all the prayers in the current application have been dealt with. The respondents are covered by the orders issued by the Kiambu Court. The orders issued by the Rent Restriction Tribunal on 18th June, 2019 cannot be the basis for contempt of court as fresh orders were issued by the Kiambu Court over one year later on 3rd September, 2020. The issue as to whether the additional rent of KShs.3,500 was lawful or not can be dealt with by the Rent Restriction Tribunal. The applicants cannot seek a prayer suspending the proceedings in both the Kiambu Chief Magistrate's Court and Rent Restrictions Tribunal and at the same time allege that the Kiambu Court is *functus officio* as the case was withdrawn. No withdrawal notice was filed.

The upshot is that the preliminary objection is merited and is hereby allowed. The suit is hereby struck off with no orders as to costs

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF MARCH, 2021

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S. CHITEMBWE

JUDGE