

REPPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 62 OF 2015

AFYA INVESTEMENTS CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF

VERSUS

JAMES KARIMI.....DEFENDANT

RULING

1. Before me is the Plaintiff's notice of motion dated 28th January, 2015. The motion was filed together with the plaint. The Plaintiff seeks orders that this court grants a mandatory injunction against the Defendant by himself, his agents, servants, employees and/or any other person claiming under them from remaining in possession or occupying and/or dealing in any way with the masionatte on the suit property comprised in Land Reference No. 1/124 Kamburu Drive Nairobi pending the hearing and determination of this suit. The Plaintiff also sought costs of this application.

2. The application is premised on the grounds on the body of the application and the supporting affidavit of Acent Mulela sworn on 28th January, 2015. The Plaintiff avers as follows; that it is the duly registered proprietor of land L.R. No. 1/124 Kamburu Drive Nairobi having leased the property from the Government of Kenya; that he erected on the said property a building known as Afya Maisonettes comprising of accommodation rented out to tenant on a lease basis; that for a term ending on 29th February, 2012, the Plaintiff leased out a maisonette No. 3 with 3 bedrooms, master ensuite, servant quarter and carport to the Defendant. He stated that it was an express term of the lease agreement that if the rent is in arrears, it shall be lawful for the Plaintiff at any time thereafter to enter and repossess the premises and that where rent is in arrears for twenty one (21) days or more whether legally demanded or not then such sum together with interest thereon at 18% per annum from the date of such default until payment in full shall be recoverable from the Defendant. He stated that the Plaintiff wrote a letter dated 29th February, 2012 to the Defendant inquiring whether or not he wished to have the lease renewed for a further term commencing on 1st March, 2012 and the Defendant duly accepted. He stated that it was agreed that the Defendant would pay KShs. 72,000/= per month.

3. It is the Plaintiff's assertion that from September, 2013 to date the Defendant defaulted on rent payment for fifteen (15) months amounting to KShs. 1,098,000/=. It was alleged that the Defendant had issued several cheques which have been dishonoured to the Plaintiff. That the Defendant by a letter dated 13th June, 2014 requested the Plaintiff for an extension of 3 days in which he will start payment of rent arrears of KShs. 738,000/= in three (3) instalments of KShs. 300,000/=, KShs. 200,000/= and KShs. 200,000/= but has since not paid any sum. That the Defendant further wrote a letter dated 31st December, 2014 indicating that he will begin payment of rent arrears from 5th January, 2015 in instalments of KShs. 250,000/= until payment in full and has since not paid the sums. The Plaintiff laments that the Defendant has refused to vacate the premises and continues to occupy the premises to the detriment of the Plaintiff despite a demand letter to that effect being issued.

4. Service of this application was effected on the Defendant but he filed no response to it. On the hearing of the application, the Plaintiff's learned counsel Mr. Onyancha sought to rely on the grounds on the body of the application and the supporting affidavit therein.

5. This being an interlocutory application for injunction, the court is concerned with the plaintiff showing *prima facie* case that he has a right to the property, that the property is at a risk of being disposed and that

the disposal shall occasion the plaintiff irreparable loss which would not be compensated by costs. In the event the court is in doubt, the application will be decided on a balance of convenience. See: **Giella v. Cassman Brown & Co. Ltd(1973) E.A.358.**

6. In deciding whether a prima facie case has been established, the court must not make definite findings of fact or law. **Black's Law Dictionary, 8th Edition** defines *prima facie* as “**sufficient to establish a fact or raise a presumption unless disproved or rebutted**”. This definition is fortified by the Court of Appeal's pronouncement in **Mrao Ltd v. First American Bank Ltd & 2 Others(2003) KLR 125** where it was stated:

“In civil cases, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

7. The Plaintiff in its affidavit annexed documents which prima facie show that he is the proprietor of the subject property and that the Defendant is in default of rent payment. The Defendant has on the other hand not filed any reply to the application. The facts in the supporting affidavit thereby are not rebutted. There is therefore prima facie evidence that the Plaintiff is the owner of the property and that the Defendant is in arrears. The Plaintiff is likely to suffer loss if the Defendant remains in occupation and or possession of the premises yet he is in arrears. The Plaintiff sought mandatory injunction. In **Kenya Breweries Ltd v. Washington Okeyo Civil Application No. 332 of 2000(UR)** it was held that for an interlocutory mandatory injunction to be issued, the applicant must demonstrate existence of special circumstance. The Plaintiff herein has satisfactorily prima facie demonstrated that the Defendant is in breach of the terms of tenancy and is still in such breach and that the Defendant's occupation of the suit premises prejudices it. Considering the foregoing coupled with the Defendant's failure to respond to the application, I am inclined to grant the order sought. I in the circumstances order mandatory injunction against the Defendant by himself, his agents, servants, employees and/or any other person claiming under them from remaining in possession or occupying and/or dealing in any way with the maisonette on the suit property comprised in Land Reference No. 1/124 Kamburu Drive Nairobi pending the hearing and determination of this suit

Dated, Signed and Delivered in open court this 8th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

Onyancha for the Plaintiff

N/A for the Defendant