



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 200 OF 2013

RUMBA KINUTHIA T/A RUMBA KINUTHIA & CO. ADVOCATES.

JOSEPH KARANJA WAMUGI T/A BARLANY SERVICES & BONUS TRAVEL

JOSEPH OLOO KENYAGAH T/A MILLENIUM INSURANCE BROKERS

(Suing on their behalf and on behalf of 16 others.....PLAINTIFFS

VERSUS

NAIROBI CITY COUNTY.....DEFENDANT

R U L I N G

By the Notice of Motion dated 19th day of June, 2015 and filed in court the same day, the Plaintiffs/Applicants seeks for orders inter alia that:-

- a. Upon hearing the Application inter partes this Honourable court be and is hereby pleased to reinstate and re-issue temporary injunctive orders to prevent the Defendant/Respondent either by itself, its agents, servants and/or employees from evicting and/or interfering with the Applicants' occupation of their respective offices within the City Hall Annex Building pending the hearing and determination of the suit herein.
- b. Costs of the Application be provided for.

The Application was filed under Certificate of Urgency and it came up before the court on the 22nd June, 2015 when Hon. Justice Aburili Certified the same as urgent and ordered that it be mentioned before Justice Onyancha on the 25th June, 2015 for further directions/orders as he would deem fit to grant. It would appear, the matter was not listed on the 25th June, 2015 when it was scheduled to come up for hearing.

The Application came up in court again on the 2nd June, 2015 when among other orders the Honourable Judge ordered for the maintenance of status quo. On the 13th July, 2015 interim orders were extended and with the orders of Justice Onyancha, prayers 1 and 2 of the Application were spent and the only prayer pending before the court is prayer 3.

The Application is based on the grounds set out on the body of the same and its supported by the Affidavit of Rumba Kinuthia Advocate sworn on the 19th day of June, 2015 and its expressed to be brought under Orders 40 Rules 1 and 2, 51 Rule 1 of the Civil Procedure Rules (2010) and Sections 1A, 1B 3A and Section 63 (c) and (e) of the Civil Procedure Act.

The summary of the Plaintiffs/Applicants case as captured in the Affidavit in support is that, the firm of Rumba Kinuthia & Co. Advocates together with the other Applicants are tenants occupying and having their respective businesses and offices within the City Hall Annex Building which building belongs to the Respondent's predecessors, the City Council of Nairobi.

That some of the tenants/applicants have plied their respective businesses from the office spaces as early as 1980's to date during which time they have diligently and religiously met their tenancy obligations without default, leave alone keeping their said respective office spaces in good and tenable conditions. The Defendant's law firm has occupied the premises continuously since the year 1988.

On the 29th May, 2013, the Applicants herein moved the court by way of Notice of Motion, under Certificate of Urgency for temporary injunctive orders to prevent the Defendant either by itself, its agents and/or servants from evicting and/or interfering with their occupation of their respective offices within City Hall Annex pending the hearing and determination of the suit.

The said application was made following issuance of notices to vacate the premises and upon hearing the application Hon. Justice Onyancha on the 11th February, 2014 granted the Applicants temporary injunctive orders on condition that the two suits Nos. HCCC 266 of 2011 and HCCC 200 of 2013 be concluded within 9 months of that date failing which the temporary injunctive orders would lapse.

The said orders subsequently lapsed as the suits were not prosecuted within the time ordered by the court.

The Applicants/Plaintiffs blame the delay in prosecuting the matter on congestion and clogging of the court's diary as a result of which they were not able to get a hearing date for the suit. The Applicants also apportion some blame on the Defendant and deposes that when the matter came up for pre-trial directions on 28th May, 2015, whereby the Applicants had complied, the Defendant/Respondent had not. The Defendant sought leave to comply but to date they have not.

The Applicant's fears are that the Defendant is planning a pre-emptive, swift and hostile eviction of the Applicants owing to the expiration of interlocutory injunctive orders.

The Applicants aver that such eviction would render the current pending suit nugatory and a mere academic exercise. It would also greatly inconvenience them and render them destitute since they have nowhere else to go and restart their businesses/practices and further that reinstatement of the interim orders would not prejudice the Defendant in any way as they have plenty of unutilized spaces in the same building.

The Applicants have hence sought the protection of this honourable court and states that it's only fair and reasonable that the orders are reinstated.

The Application is strenuously opposed by the Defendant/Respondent vide a Replying affidavit filed in court on the 10th July, 2015 sworn by Karisa Iha who has described himself as the Director of Legal affairs of the Respondent herein wherein he has summarized the Defendant's Case as hereunder. He deposes that the Application by the Applicants is an abuse of the court process, maliciously brought and it is an attempt by the Applicants to subject the Respondents to economic losses.

He deposes that the orders sought in this Application are the exact orders that were sought by the Plaintiffs in their Applications dated 9th August, 2011 in HCCC No. 266 of 2011 and on 29th May, 2013 in HCCC No. 200 of 2013 which orders were granted in both Applications.

Despite the court order to the Plaintiffs/Applicants to prosecute this matter within 9 months failing which the interim orders would lapse, the Plaintiffs have not done so to-date. The injunctive orders were vacated on the 19th November, 2014 and that notwithstanding, the Plaintiffs have been unwilling to either vacate the Respondent's premises and/or set down the case for hearing. The Plaintiffs have benefitted from the temporary injunctive orders for a period of over three (3) years despite the fact that neither of the suits has

ever proceeded to the trial.

The said orders had been granted following an eviction notice issued to the Plaintiffs by the Defendant which notices the Plaintiffs have disputed.

He depones that it is in bad faith for the Plaintiffs to continue to seek and enjoy interim orders before this Honourable Court without discharging the obligation bestowed upon them so as to justify the issuance of such orders.

I have read, understood and considered the Application herein, the Affidavit in support, the Replying Affidavit and the oral submissions made by both counsels for the respective parties. The submissions reiterate the contents in the Affidavits.

On his part, counsel for the Plaintiffs submitted that following the issuance of injunctive orders by Justice Onyancha that the matter be prosecuted within 9 months, it came up for the pre-trial directions on the 28th May, 2015 and while the Plaintiffs had complied with order 11, the Defendant had not and consequently the delay in prosecuting the same was partly caused by the Defendant.

That the Plaintiffs are apprehensive that the Defendant is planning a pre-emptive and hostile eviction of the Plaintiffs which will render the main suit nugatory and further that the eviction if issued will render the Plaintiffs' businesses closed.

It was his submissions that the reinstatement of the orders will not prejudice the Defendant in any way as there are an unused places in the same business premises in the same building.

He told the court that the delay in fixing the matter for hearing was not occasioned by the Plaintiffs or the Advocate and that the matter is now almost at the hearing stage and failure to reinstate the orders will cause more prejudice to the Plaintiffs.

On his part, the Counsel for the Defendant submitted that, the Plaintiffs were granted interim orders in the two separate suits before they were consolidated and they have enjoyed the orders since 2011. The said orders were terminated on 19th November, 2015 when the matter came up for hearing when the Plaintiffs sought to adjourn the matter.

He submitted that the Plaintiffs failed to prosecute the matter within the 9 months period granted by Justice Onyancha. The Application before the court was filed 7 months after the interim orders had been vacated. He argued that granting the orders will not be in accordance with the overriding interest of the Civil Procedure Act Sections 1A, 1B and 3A.

He submitted that the notice to vacate issued to the Plaintiffs has not been impugned in any way but what the Plaintiffs have sought to do is to depone that they have been in the premises since the 1980's which length of time does not take away the Respondent's proprietary rights to the premises. According to him the Plaintiffs have not established a prima facie case which, they could only establish, by showing that the notice is illegal or bad in law which they have not.

With regard to irreparable loss, he submitted that it has not been shown in what way the Appellants are going to suffer irreparable loss incapable of being compensated by way of damages.

On balance of convenience, he argued, the defendant having metamorphosized to the Country Government of Nairobi and due to its enhanced mandate, there is need for more space by its staff who have since doubled and that it is not in the interest of justice that the County Government rent offices while the Plaintiffs pay peanuts as rent. He concluded by submitting that the Application is an abuse of the court process.

The Plaintiffs herein have sought interlocutory injunctive orders. The conditions for grant of such orders are well settled in East Africa in the celebrated case of **Giella Vs Cassman Brown & Co. Ltd (1973) I**

EA 358.

First, an Applicant must show a prima facie case with a probability of success.

Secondly, interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt, it will decide an Application on a balance of convenience.

I agree with the counsel for the Defendant that the Plaintiffs are tenants who do not have proprietary rights over the rented premises but their occupation of the same is based and recognized by the law and their rights have to be protected but at the same time, this court also recognizes that the Defendant also has rights that have equally to be protected by the same law.

Having made the aforesaid observation, this court in balancing the interest of the parties herein has to consider the balance of convenience. The Plaintiffs herein have been in occupation of the premises for over twenty years.

The court at this point will have to consider if by dismissal of the Application it has rendered a fair trial impossible as the court rightly observed in the case of **Abdirahman Abdi Vs Safi Petroleum Products Limited & 6 others (2011) eKLR, Civil Application Nai. 173 of 2010** where Notice of Appeal was served on the Respondent out of time and without the leave of the court and the court being asked to strike it out observed that

“The overriding objective in Civil Litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.”

In the days long gone, the court never hesitated to strike out a Notice of Appeal if it was showing that it had been lodged out of time regardless of the length of the delay. The Enactments of Sections 3A and 3B of the Appellant Jurisdiction Act and later Article 159 (2) (a) of the Constitution of Kenya 2010 changed the position.

The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the prejudice to the parties, should the court exercise its discretion in favour of one party. In short the court has to weigh the wider interest of justice before coming to a decision.

Article 159(2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however, to say the procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the offending party if the court grants the orders sought. The court in that regard exercises judicial discretion.

The counsel for the Plaintiffs submitted that if the orders are not granted, the main suit shall be rendered a mere academic exercise and that they will be evicted from the suit premises where they have carried out their businesses for the last 20 years. The balance of convenience tilts more on the Plaintiffs than on the Defendant and for those reasons, I grant the following orders: -

a. Temporary injunctive orders issued by Justice Onyancha on 11th day of February, 2014 be and are hereby reinstated pending the hearing and determination of the suit herein.

b. The suit be prosecuted within 120 days in default of which the injunctive orders herein shall automatically lapse.

c. Costs of the Application shall abide the outcome of the main suit.

Orders accordingly.

Dated and delivered at Nairobi this 5th day of November, 2015.

.....

LUCY NJUGUNA

JUDGE

In the Presence of

..... for the Plaintiffs.

..... for the Defendant.