



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 637 OF 2012

JULIUS KAMANDEPLAINTIFF/APPLICANT

VERSUS

FRANK MBURU NJOROGE..... 1ST DEFENDANT/RESPONDENT

GRACE WAIRIMU NJOROGE2ND DEFENDANT/RESPONDENT

MONICA MUKUHI NJOROGE.....3RD DEFENDANT/RESPONDENT

RULING

1. The application before this Court is amended Notice of Motion dated 12th October, 2012 brought under section 3A and 63 of the Civil Procedure Act and Order 40 Rules 2(1) of Civil Procedure Rules, 2010. The applicant seeks the following orders;
 - i. That the defendant/respondent be restrained from terminating/determining the lease entered into on 17th September, 2011 between the plaintiff/ applicant and defendant/respondent over that parcel of land known as Title Number Dagoretti/Riruta/S.207 pending the hearing and determination of this application and suit.
 - ii. That the Defendant/Respondents be restrained from taking possession of , evicting or in any other way from interfering with the plaintiff's /applicant's possession of that parcel of land known as Title Number Dagoretti/Riruta/S.207 pending the hearing and determination of this application and suit.
 - iii. That this Court makes such other and further orders as it may deem fit.
 - iv. That costs of this application be provided for.

2. The application is based on the sworn affidavit of Julius Kamande dated 26th September, 2012 and in the grounds that;
 - a. The defendant/respondent have written to the plaintiff/,applicant indicating that they have terminated the lease entered into between the said parties on account of an alleged breach
 - b. The termination is unlawful as the Defendants/Respondents did not give the Plaintiff/Applicant notice to remedy the breach as required by law.
 - c. That unless the Defendant/respondents are restrained from terminating/determining the lease entered between the Plaintiff and defendants, the plaintiff will suffer irreparably.
 - d. It is necessary that the defendant/respondents be compelled to rescind the intended

termination of the lease agreement entered into between the defendant and the plaintiff over that parcel of land known as Dagorretti/Riruta/S.27.

3. Brief background of this matter is that ; the applicant entered in a lease agreement with the respondent for the lease of Title Number Dagoretti/Riruta/S.207b for a period of 10 years from 17th September 2011 to 17th September 2021. As per the respondent in their affidavit dated 8th October 2012 the applicant was to construct semi-permanent houses for rental purposes but the applicant in fundamental breach constructed permanent house in the leased parcel and occupied part of the said parcel of land contrary to the lease agreement.
4. The applicant claims that adjoining his plot was another parcel which was 7 feet high and only constructed a one stone room to prevent water draining into his parcel. The defendant on 21st November 2012 he was informed by the defendant that his lease had been terminated and they sought to exercise their right of forfeiture. He was requested to vacate the suit parcel by 17th November, 2012. He demolished the stone room to avoid further breach. The applicant claims that he was never served with a notice to remedy the breach and therefore could not exercise the right to forfeiture or terminate the lease and hence the lease was still subsisting. The applicant claims he stands to suffer irreparably as he had already expended a sum of over 3.5 million having constructed 24 rooms and installed electricity and water. The respondent claims that the applicant's application does not meet the thresh hold for orders sought and as such the same is fatally defective and should be dismissed. He deponed that the applicant has deponed that he has invested Kshs. 3.5 million and hence his damages if any could be ascertained; that the applicant came to Court with soiled hands as he was the one in breach of the terms of lease and seeks equitable orders and being a Court of Equity the orders sought should not be granted to him. That the applicant has also failed to demonstrate he has a prima facie case with high chances of success.
5. Parties filed written submissions. The applicant submitted that the agreement was entered into on 17th September 2011 and the new Land Act no. 6 came into effect on 2nd May 2012 and that the Land registration Act no. 3 of 2012 which came into force on the 2.5.2012 same repealed the Indian transfer of property Act1982, the GLA Cap 280, the RTA Cap 281 and Land Titles Act Cap282. He submitted that the defendants/lessors have no right in law to exercise forfeiture under the Land Act. He further drew the Court's attention to the Registered Lands Act Section 58 and section 75 and argued that both in the repealed Act Cap 300 and New Land Act it is provided that for a lessor to exercise forfeiture for the breach of any agreement or condition in a lease whether express or implied, he must have served on the lessee a notice of not less than thirty days; specifying the particular breach, if the breach is capable of remedy, requiring the lessee to remedy the breach within such reasonable period as is specified in the notice ; that the respondent did not give the applicant notice nor require him to remedy the breach but rather proceeded to terminate the lease; that on receiving the said termination letter the applicant demolished the said one stone house which was the basis of complaint and capable of being remedied and that the respondent are only trying to justify their reasons to terminate the lease. It was submitted that the applicant having invested Kshs. 3.5 million in the said premises stands to suffer irreparable loss as he has tenants therein and that the balance of convenience tilts in the applicant's favour as they are the ones in possession of the parcel of land and urged the Court to allow the application as the applicant had satisfied the requirements for granting an injunction as laid down in ***Giella vs Cassman Brown [1973] E.A .358.***
6. The respondent submitted that the applicant's application should be dismissed as he was in breach of fundamental breach and this gave them the right to determine the lease and that the trust between the parties had also irretrievably broken down. It was further submitted that any damages can be quantified in damages Counsel relied on the case of ***Agip K. Ltd -vs- VORA [2000] KLR 2***, where the respondents had failed to stock enough fuel on the lease premises had committed a fundamental breach of contract, the appellant's determined the lease and the same was held as lawful termination. The respondent further submitted that the applicant relies on the doctrine of '*ex dolo malo Oritum*' – an action cannot arise out of fraud; that the applicant was in occupation of one of the houses contrary to the lease agreement. The respondent further relied on the case of

Heptolia –vs- Noor Mohammed [1984] KLR 580 where it was held that; no Court ought to enforce an illegality especially where the person is invoking the aid of the Court. In conclusion he submitted that the applicant failed to fulfill the requirements as laid down in the case of **Giella – vs- Cassman Brown [1973] E.A.**

7. I have considered the affidavits and submissions made by the parties. It is not in dispute that there is a lease agreement entered into on 17th September, 2011 by the parties for a period of 10 years and set to expire on 17th September 2021. The plaintiff on the strength of the said lease agreement proceeded to construct the said semi-permanent houses at a cost of Kshs. 3.5 million which is a substantial amount which the plaintiff may lose should the said lease agreement be terminated. I find that the breach complained of by the defendants has since been rectified by the plaintiff by demolishing the alleged stone building. In my view having remedied the breach the plaintiff should be given a chance to continue with the existing term of the lease. However the defendant is not barred from terminating the lease as required in law governing the lease in the event of a breach of the said lease agreement occurs . I find that the applicant’s application has merit and grant him the following orders;

i. that the defendant/respondent is restrained from terminating/determining the lease entered into on 17th September, 2011 between the plaintiff/ applicant and defendant/respondent over that parcel of land known as Title Number Dagoretti/Riruta/S.207 pending the hearing and determination of this suit.

ii. That the Defendant/Respondents is restrained from taking possession of , evicting or in any other way from interfering with the plaintiff’s /applicant’s possession of that parcel of land known as Title Number Dagoretti/Riruta/S.207 pending the hearing and determination of this suit. Costs shall be in the cause.

Orders accordingly

Dated, signed and delivered this **4TH** day of **November** 2014.

R.E. OUGO

JUDGE

In the presence of:-

.....**For the Plaintiff/Applicant**

.....**For the Defendants/Respondent**

.....**Court clerk**