



NO.141

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
E & L CIVIL CASE NO. 145 OF 2012

TERESIA IRUNGU.....
.....PLAINTIFF

VERSUS

JACKTON
OCHARO.....1ST
DEFENDANT

ALICE KERUBO NYAMBATI.....
.....2ND DEFENDANT

KENNEDY MOKUA

T/A MOCO AUCTIONEERS
..... 3RD DEFENDANT

RULING

1. What is before me is the Plaintiff's application brought by way of Notice of Motion dated 24th April, 2012. The application is brought under Order 40 rules 1, 2, 4 and 10 of the Civil Procedure Rules, sections 1A, B, 3A and 63 (e) of the Civil Procedure Act and sections 2 and 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301 Laws of Kenya. In the application, the Plaintiff sought; a mandatory injunction directed at the 1st and 2nd defendants to unconditionally, re-instate, restore and/or put back the Plaintiff into the shop premises situated on LR. No. Kisii Municipality/Block III/139 (hereinafter referred to as "**the suit premises**") forthwith and a temporary injunction to restrain the defendants from terminating, altering the terms of the tenancy and/or in any other manner dealing and/or interfering with the Plaintiff's occupation and/or possession of the suit premises without complying with the provisions of section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301 Laws of Kenya pending the hearing and determination of this suit. The application was supported by the affidavit of the Plaintiff and one, **Wambui Maina** both sworn on 24th April, 2012. In the said affidavits, the Plaintiff claimed that the Plaintiff was at all material times a tenant of the 2nd defendant in the suit premises under a tenancy that was not reduced into writing and as such was a controlled tenancy within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301 Laws of Kenya (hereinafter referred to as "**the Act**"). The

Plaintiff claimed that, on 16th March, 2012 the defendants invaded the suit premises where the Plaintiff was carrying out business, removed all the Plaintiff's goods in the premises and locked up the same in the pretext that they were levying distress for rent amounting to Ksh. 24,000.00. The Plaintiff claimed that as at that date, the Plaintiff was up to date in her rent payment to the 2nd defendant. The Plaintiff claimed that the defendants by their said actions have in effect evicted the Plaintiff from the suit premises without following the procedure laid down in the Act. The Plaintiff annexed to her affidavit in support of the application, copies of several deposit slips for payments made at Wakenya Pamoja Sacco Society Ltd. Kisii Branch over a period of time in the account of the 2nd defendant. The last of such payments in the sum of Ksh. 8,000.00 was made on 15th March, 2012. The Plaintiff claimed that those payments were on account of rent due to the 2nd defendant for the suit property. The Plaintiff claimed that her eviction was undertaken without a lawful court order and as such the same was irregular, illegal and unlawful. The Plaintiff claimed that in the circumstances, the Plaintiff is entitled *ex-debito justitiae* to the orders sought. The Plaintiff claimed that her illegal eviction from the suit premises has caused her irreparable loss and unless the orders sought are granted, she would stand permanently evicted from the suit property.

2. The Plaintiff's application was opposed by the defendants who filed separate affidavits in reply for that purpose. In his affidavit in reply sworn on 7th May, 2012, the 1st defendant deposed that he is one of the registered proprietors of the suit property and that the Plaintiff used to be their tenant in the suit property until 1st September, 2002 when her tenancy was terminated by a valid notice served upon her under the Act. After the termination of the Plaintiff's tenancy as aforesaid, the 1st defendant and the other proprietors of the suit property filed a suit in the High Court at Kisii for her eviction but the file went missing before the suit was heard and determined. The 1st defendant claimed that the Plaintiff's rent had been increased by the Business Premises Rent Tribunal ("the tribunal") from Ksh.4000.00 to Ksh. 6000.00 with effect from 1st July, 1999 and that the Plaintiff declined to pay the new rent together with the arrears and that is why the Plaintiff was served with a notice of termination of tenancy aforesaid which she never contested. The 1st defendant contended that the Plaintiff had neither paid the rent arrears nor the new rent ordered by the tribunal since October, 2001. The 1st defendant contended that the Plaintiff sublet the suit property to one, **Wambui Maina** in the year 2002 and that it was the said Wambui Maina who was evicted from the suit premises and not the Plaintiff as alleged. The 1st defendant claimed that the said Wambui Maina had not made any payment to the proprietors of the suit property. He claimed further that, whereas the proprietors of the suit property were not being paid, the Plaintiff was receiving in excess of Ksh.30,000.00 per month for subletting the suit premises. The 1st defendant annexed to his affidavit, a copy of a certificate of official search on the title of the suit property which contained the particulars of the proprietors of the suit property. The 1st defendant also annexed to his affidavit, various notices that they had served upon the Plaintiff for variation of the rent payable and for the termination of the Plaintiff's tenancy. Also annexed to the said affidavit was a plaint and defence that were filed in the High at Kisii in the case that sought the eviction of the Plaintiff from the suit property.
3. In her replying affidavit sworn 10th May, 2012, the 2nd defendant contended that she has been wrongly sued in this suit as she is not the proprietor of the suit premises and as such could not have evicted the Plaintiff. On his part, the 3rd defendant who is an auctioneer deposed that he received instructions from the proprietors of the suit premises to levy distress against the Plaintiff. He proceeded to prepare a proclamation which he served on the suit premises. Upon receipt of the said proclamation, the occupants of the premises locked the same and disappeared. This forced him to apply to court for a break in order so that he may collect the distained goods from the suit premises. When he went to the suit premises with the court order and police officers to break into the premises, the occupants thereof who claimed to have been sublet into the premises by **Wambui Maina** pleaded with him to allow them to remove their goods from the premises as they did not know the Plaintiff herein against whom the distress was being levied. The 3rd defendant gave in to that request from the said occupants of the suit premises who collected their goods and

vacated the suit premises leaving the same vacant. The 3rd defendant notified the owners of the suit premises of this development and they came and locked up the suit premises which had now been abandoned.

4. In her response to the defendant's said affidavits, the Plaintiff in her affidavit sworn on 25th May, 2012 reiterated that she was all along paying rent to the 2nd defendant who is the wife of one of the proprietors of the suit premises. The Plaintiff contended further that the defendants could not have levied distress against her if she was not a tenant in the suit premises. The Plaintiff contended further that even if she had sub-let the suit premises which was not the case, the defendants still needed to have a lawful court order to evict whoever was in possession.
5. On 17th May, 2012, the advocates for the parties agreed to argue the Plaintiff's application by way of written submissions. The Plaintiff filed her submissions on 25th May, 2012. The 1st and 3rd defendants filed their submissions on 5th June, 2012 while the 2nd defendant filed her submissions on 6th June, 2012. I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavits filed by the defendants. Lastly, I have considered the written submissions filed by the advocates for the Plaintiff and the defendants together with the cases relied on by them in support of those submissions. The Plaintiff is seeking prohibitory and mandatory injunction at this interlocutory stage. The principles applicable to an application of this nature are now settled. For a temporary prohibitory injunction, an applicant must establish a prima facie case with a probability of success and must also demonstrate that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience. These principles were pronounced in the well-known case of, **Giella vs. Cassman Brown & Co. Ltd. (1973) E.A 358**. For an application for temporary mandatory injunction, different principles come into play. An applicant for a temporary mandatory injunction must demonstrate that he has a very strong case that is likely to succeed at the trial. The likelihood of success here must be higher than that which is required for a prohibitory injunction. The applicant must also meet the usual conditions necessary for interlocutory injunction set out herein above. In the case of **Shepherd Homes Ltd. – vs- Sandham [1971] 1 ch.340**, which was cited with approval in the court of appeal case of, **East African Fine Spinners Ltd. & 3 others vs. Bedi Investments Ltd. , Nairobi Civil Application No. Nai. 72 of 1994**, which the Plaintiff herein has relied on in support of her submissions, **Meggary J.** had this to say on interlocutory mandatory injunction;

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

In the case of, **Redland Bricks Ltd –vs- Morris [1970] AC 652**, it was stated that jurisdiction to issue a mandatory injunction “**is a jurisdiction to be exercised sparingly and with caution but in the proper case, unhesitatingly**”. Applying the foregoing principles to this case, the question that I need to answer is whether the Plaintiff has satisfied the court that she has unusually strong and clear case against the defendants that warrants the issuance of the interlocutory prohibitory and mandatory injunction sought.

6. The Plaintiff has claimed that at all material times the 2nd defendant was the registered proprietor of the suit premises and as such proprietor, the 2nd defendant leased out the same to the Plaintiff on terms and conditions that were not reduced into writing. The Plaintiff claimed that while in occupation of the suit premises as a lessee pursuant to the said lease agreement with the 2nd defendant, the defendants invaded the suit premises purporting to be levying distress to recover an outstanding rent and evicted her therefrom contrary to the provisions of the Act. The Plaintiff's contention is that the purported distress for rent that was levied by the defendants against her and her subsequent eviction from the suit premises

was illegal and as such, null and void.

7. There is no doubt from the material before me that the 2nd defendant is not the registered proprietor of the suit premises. According to the certificate of official search dated 4th May, 2012 which is attached to the replying affidavits of the 1st and 2nd defendants, the suit premises is registered in the names of **Jackton Ocharo, Samson Nyambati Nyamweya and Charles Latema Nyamweya**. Of the three registered proprietors, only one, namely, **Jackton Ocharo** has been made a party to this suit. In her statement of defence and replying affidavit, the 2nd defendant denied her alleged ownership of the suit premises. Since the 2nd defendant is not registered as the proprietor of the suit premises as alleged by the Plaintiff, it is not clear under what circumstances the 2nd defendant would have entered into a tenancy relationship if at all with the Plaintiff in relation to the suit premises. The Plaintiff produced several deposit slips for payments made at what seems to have been the 2nd defendant's loan account at Wakenya Pamoja Sacco Society Ltd., Kisii Branch. These payments varied between Ksh. 4000.00 and Ksh. 8,000.00 per month and the Plaintiff claimed that the same were on account of rent payable for the suit premises. Whereas in the Plaintiff and in her affidavit in support of the application herein the Plaintiff claimed that she entered into a tenancy agreement with the 2nd defendant who was registered as the proprietor of the suit premises, in her further affidavit in response to the replying affidavits of the defendants, the Plaintiff claimed that she was a tenant of the 1st and 2nd defendants.

8. It is clear from the material placed before me by the 1st defendant that the Plaintiff was a tenant of, Jackton Ocharo, Samson Nyambati Nyamweya and Charles Latema Nyamweya (hereinafter referred to jointly as "**the proprietors of the suit premises**") with whom she had several disputes over her tenancy going back to 1999. It is not clear why the Plaintiff decided to sue the 1st defendant alone instead of suing all the proprietors of the suit premises who have been known to her all along. On the material before me, I am unable to establish any tenancy relationship between the Plaintiff and the 2nd defendant. The only link between the Plaintiff and the 2nd defendant seems to be the payments that the Plaintiff claims to have deposited in the 2nd defendant's account and which the 2nd defendant has not denied. Those payments alone in my view cannot create a tenancy relationship between the Plaintiff and the 2nd defendant having regard to the fact that the 2nd defendant is not one of the proprietors of the suit property.

9. As I have stated above, the Plaintiff's landlords were the proprietors of the suit premises. This is clear from the previous cases that they had over the suit premises the details of which are set out in the exhibits attached to the replying affidavit of the 1st defendant. The 3rd defendant also made it clear in his affidavit in reply to the application herein that he was instructed by the proprietors of the suit premises to levy distress for rent against the Plaintiff. The 1st defendant who is one of the proprietors of the suit premises admitted in his replying affidavit that the Plaintiff was their tenant until sometimes in the year 2002 when she moved out of Kisii town and sub-let the suit premises to one, **Wambui Maina**, who was the one evicted from the suit premises. From the foregoing, it is clear that the purported distress for rent was levied against the Plaintiff by the 3rd defendant on the instructions of the proprietors of the suit premises. It follows that if the said distress for rent was illegal and if it was used to illegally evict the Plaintiff from the suit premises, then, the liability for such action would lie against 3rd defendant who carried out the illegal distress and the eviction of the Plaintiff and the proprietors of the suit premises who instructed him to do so.

10. The next issue that I need to consider is whether the Plaintiff has on a prima facie basis established that the distress for rent that was levied against her by the proprietors of the suit premises that led to her eventual eviction from the suit premises as she alleges was illegal. Before I interrogate this issue however, there is a procedural issue that was raised by the 1st and 3rd defendants' advocates in their submissions that I need to lay to rest. The issue is whether this court can determine the legality of the action of the proprietors of the suit premises in an action in which only one of them is sued and whether the orders that the court may issue in this action against the 1st defendant who is just one of the proprietors of the suit premises would bind the others. From what I have stated above, the Plaintiffs

landlord in the suit premises was not the 1st defendant but the proprietors of the suit premises. The distress must be taken therefore to have been levied on their joint instructions. The same would apply to the eviction of the Plaintiff from the suit premises if at all she was so evicted. Since the 1st defendant does not own the suit premises alone, I don't think that the reliefs sought against him singly would bind the other proprietors of the suit premises. It would be against the rule of natural justice for this court to purport to issue orders against persons who have not been brought before it. The court cannot condemn the other proprietors of the suit premises unheard. I am aware that, under Order 1 rule 9 of the Civil Procedure Rules, no suit can be defeated on account of a misjoinder or non-joinder of parties. In this particular case however, the issue seems to go beyond a mere non-joinder. It touches on the competency of the Plaintiff's suit which has been lodged against only one of the joint proprietors of a property in which the Plaintiff seeks to be restored after an alleged illegal eviction. I will revert to this issue at the conclusion of this ruling.

11. Assuming for argument sake that the Plaintiff can maintain this suit as against the 1st defendant alone leaving out the other proprietors of the suit premises, I would now revert to the issue that I had left hanging above namely, whether the distress against the Plaintiff was illegal and whether the Plaintiff was illegally evicted from the suit premises. As I have held hereinabove, the Plaintiff was a tenant of the proprietors of the suit premises and was liable as such tenant to pay rent to them. The proprietors of the suit premises had a right under the Distress for Rent Act, Cap.293 Laws of Kenya to levy distress against the Plaintiff to recover any outstanding rent. According to the documents before the court, the proprietors of the suit premises levied distress against the Plaintiff to recover rent arrears amounting to Ksh. 24,000.00. The Plaintiff has denied that she was in rent arrears. It is not clear from the material before the court as to the full particulars of this rent arrears of Ksh. 24,000.00. It is also not clear as to what the Plaintiff's monthly rent was and why it was being paid to the 2nd defendant and not to the proprietors of the suit premises. Whereas the 1st defendant claimed that the Plaintiff's rent was Ksh. 6000.00, the payments that the Plaintiff made into the 2nd defendant's account which she claims to have been on account of rent for the suit premises ranged from Ksh. 4000.00 to Ksh. 8000.00. In the circumstances, I am unable to establish on the material placed before me by the parties whether the Plaintiff was up to date in her rent payment for the suit premises or not. In the same vein, I would not be able to determine whether the distress for rent that was levied against the Plaintiff was illegal or not.

12. The Plaintiff has also claimed that she was unlawfully evicted from the suit premises. It is not in dispute that the Plaintiff was a protected tenant under the provisions of the Act. As such tenant, the Plaintiff's tenancy could only be terminated in accordance with the provisions of section 4 of the Act. It follows that any termination of the Plaintiff's tenancy contrary to the provisions of the said Act would be illegal. The 3rd defendant who was the auctioneer who was instructed to levy distress against the Plaintiff denied that he evicted the Plaintiff in the process of carrying out the said distress. According to him, the suit premises was occupied by persons other than the Plaintiff who claimed to have been sub-let in the premises by **Wambui Maina**. The said persons requested to be allowed to remove their goods from the suit premises which they were allowed to do which resulted in the suit premises remaining vacant and available for repossession by the proprietors of the suit premises on account of abandonment. The Plaintiff admitted that she was not personally present in the suit premises when the distress was levied. She claimed that she moved to Nairobi in the year 2011 and left her business in the suit premises in the hands of Wambui Maina who she described as her partner. The said Wambui Maina swore an affidavit confirming that the Plaintiff's business was left under her control and care and that she was present when the defendants invaded the premises, threw out the Plaintiff's goods therefrom and locked the premises up. In paragraph 16 of his affidavit, the 1st defendant claimed that the Plaintiff had sub-let the suit property to Wambui Maina and that it is Wambui Maina **who was evicted** and not the Plaintiff. I am in agreement with the Plaintiff's advocate's submission that the Plaintiff's tenancy could only be terminated after following the due process. It was not open to the proprietors of the suit premises to evict the Plaintiff from the suit premises through the levying of distress. Even if the Plaintiff had sub-let the suit property to Wambui Maina who had in turn sub-let the same to other persons which is very likely in the circumstances of this case, the proprietors of the suit property had to take appropriate legal proceedings for the eviction of the said Wambui Maina and her sub-tenants. In the Court of Appeal case of, **Gusii Mwalimu Investment Co. Ltd. & 2 Others vs. Mwalimu Hotel Kisii Ltd, Civil Appeal No. 160 of**

1995 (unreported), it was held that “**It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession**”. Whereas the 3rd defendant has claimed that the occupants of the suit premises willingly vacated the same, the 1st defendant has expressly stated on oath that Wambui Maina who was in occupation of the suit premises was evicted. In the circumstances, I am inclined to agree with the Plaintiff and Wambui Maina that the Plaintiff was actually evicted from the suit premises. Since the proprietors of the suit premises did not obtain a court order for possession, the Plaintiff’s eviction from the suit premises was illegal.

13. The main relief sought by the Plaintiff in this suit is the recovery of the suit premises. It is on this relief that the interlocutory injunctions sought in this application are anchored. After the eviction of the Plaintiff, the suit premises reverted to the proprietors thereof. It follows that if the Plaintiff is to recover the same, the restoration order must be directed at the said proprietors. As stated above, the suit premises is owned by three people out of whom the Plaintiff sued only one, the 1st defendant herein. I am doubtful whether the 1st defendant would be able to restore the suit premises to the Plaintiff without the involvement of the other proprietors thereof who have not been made parties to this suit. I am equally doubtful of the ability of the 2nd and 3rd defendants to restore the Plaintiff into the suit premises even if ordered to do so by the court. The 2nd defendant has no known interest in the suit premises while the 3rd defendant is only an auctioneer who was instructed to levy distress and who ended up not carrying away any goods from the suit premises. The 2nd and 3rd defendants have no control over the suit premises and in my view; the court would be acting in vain to order them to put back the Plaintiff into the suit premises. I am of the view that, although the Plaintiff’s failure to join the other proprietors of the suit premises into this suit is not fatal to the suit in view of the provisions of Order 1 rule 9 of the Civil Procedure Rules aforesaid, the same is fatal to the present application. Although the Plaintiff has established that her eviction from the suit premises was unlawful, I am not persuaded that the Plaintiff would be able to obtain the injunctive reliefs sought in the Plaintiff if the suit proceeds with the same parties as the defendants. I am therefore not satisfied that the Plaintiff has established a prima facie case with a probability of success against the defendants on the basis of which the orders sought in the present application can issue. Having reached that conclusion, I am not obliged to consider whether the Plaintiff would suffer irreparable harm unless the orders sought are granted.

13. In conclusion, it is my finding that the Plaintiff’s application dated 24th April, 2012 has no merit. The same is hereby dismissed. The costs of the application shall be in the cause.

Signed, dated and delivered at Kisii this 7th day of November, 2013.

S. OKONG’O,

JUDGE.

In the presence of:-

Mr. Ochwangi for the plaintiff

Mr. G.M. Masese for the 1st and 3rd defendant

Mr. G.M. Masese holding brief for Nyambati for the 2nd defendant

Mobisa Court Clerk.

S. OKONG’O,

JUDGE.