



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 640 OF 2017

TEJ SEHMI.....PLAINTIFF

VERSUS

MOHAMED WELI HASSAN.....DEFENDANT

RULING

The plaintiff brought this suit against the defendant on 6th September, 2017 seeking the following reliefs:

1. A permanent injunction restraining the defendant from forcefully accessing House No. 1 on L.R No. 1/756 Ring Road, Kilimani (hereinafter referred to as “the suit property”).
2. A declaration that there is no landlord and tenant relationship between the plaintiff and the defendant.
3. An order for the eviction of the defendant from the suit property.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 5th October, 2017 seeking the following orders:

- (i) A declaration that there exists no landlord and tenant relationship between the plaintiff and the defendant.
- (ii) A declaration that the Rent Restriction Tribunal lacked jurisdiction to issue the orders that it made on 25th September, 2017 in Rent Restriction Case No. 1194 of 2017 and that the said orders should be declared null and void.
- (iii) A declaration that the defendant’s entry into the suit property pursuant to the said orders made by the Rent Restriction Tribunal on 25th September, 2017 was illegal.
- (iv) An order directing the OCS Kilimani Police Station to ensure compliance with the above orders and the removal of the defendant from the suit property.

The plaintiff’s application was brought on the grounds that the plaintiff was the owner of the suit property which the defendant occupied as a tenant initially at a rent of Kshs.60,000/- per month which was increased to Kshs.71,500/= per month. The plaintiff averred that on 6th February, 2017, he served the defendant with a notice to vacate the suit property on account of persistent default in the payment of rent which had accumulated to Kshs.286,000/=. The plaintiff averred that on 23rd May, 2017 the defendant cleared the rent that was in arrears but refused to vacate the suit property. The plaintiff averred that the defendant fell into rent arrears again and on 8th September, 2017, the plaintiff instructed auctioneers to levy distress against the defendant for the recovery of rent that had accumulated once again to the tune of Kshs.265,000/=. The plaintiff averred that the defendant did not pay the rent that was outstanding within 14 days that he was given by auctioneer as a result of which the auctioneer removed his movable properties from the suit property to recover the said rent. The plaintiff averred that following the removal of the defendant’s properties from the suit property by the auctioneer, the defendant vacated the same after which the plaintiff took possession and locked the property.

The plaintiff averred that after moving out of the suit property as aforesaid, the defendant rushed to the Rent Restriction Tribunal (hereinafter referred to only as “the tribunal”) on 25th September, 2017 and obtained orders restraining the sale of his goods that had been attached by the auctioneer and his eviction from the suit property without disclosing the fact that he had moved out of the suit property voluntarily and that his lease with the plaintiff had expired.

The plaintiff averred that using the said orders from the tribunal, the defendant re-entered and occupied the suit property. The plaintiff averred that the tribunal had no jurisdiction to issue the said orders of 25th September, 2017. The plaintiff averred that it had a prima facie case against the defendant with high chances of success.

The application was opposed by the defendant through a replying affidavit sworn on 24th October, 2017. The defendant admitted that he was the plaintiff's tenant on the suit property at a monthly rent of Kshs. 71,500/=. The defendant denied that the plaintiff had served him with a notice to vacate the suit property. The defendant denied further that he had vacated or attempted to vacate the suit property. The defendant averred that while he was at work and his child at school, the plaintiff went to the suit property, evicted his maid and locked the premises. The defendant averred that following his forceful eviction from the suit property, he filed a suit against the plaintiff at the tribunal and obtained an order which forced the plaintiff to reinstate him into the suit property.

The defendant averred that the tribunal had jurisdiction to make an order for his reinstatement into the suit property. The defendant averred that the rent that he was paying was an "agreed rent" and not the "Standard Rent" and that the tribunal had to determine whether the Standard Rent for the suit property exceeded its jurisdiction before it downed its tools. The defendant urged the court to dismiss the plaintiff's case so that the case pending before the tribunal could be heard to its logical conclusion.

The plaintiff's application came up for hearing on 1st November, 2018 when Ms. Nyabuto appeared for the plaintiff while Mr. Koyoko held brief for Mr. Cheboi for the defendant. In her submissions in support of the application, Ms. Nyabuto reiterated the contents of the plaintiff's affidavit in support of the application. She submitted that the defendant had vacated the suit property when the tribunal purported to reinstate him. Ms. Nyabuto submitted further that the orders made by the tribunal on 25th September, 2017 were made without jurisdiction since the suit property was not controlled under the Rent Restriction Act, Chapter 296 Laws of Kenya. She submitted that the rent that was being paid by the defendant for the suit property was Kshs.71,500/- and as such the property was outside the jurisdiction of the tribunal whose jurisdiction is limited to premises whose monthly rent is Kshs. 2500/- and below. She submitted that where rent has been agreed upon by the parties, it is not necessary for the tribunal to assess the Standard Rent. She submitted that the plaintiff had entered into a written lease with the defendant providing for the rent payable. Ms. Nyabuto urged the court to allow the plaintiff's application as prayed. Mr. Kayoko did not respond to the application. He informed the court that Mr. Cheboi whose brief he was holding no longer had instruction to act for the defendant.

I have considered the plaintiff's application together with the supporting affidavit. I have also considered the defendant's affidavit in opposition to the application. Finally, I have considered the plaintiff's advocate's submissions. I am of the view that the prayers sought by the plaintiff cannot be granted at this interlocutory stage of the proceedings. In his first prayer, the plaintiff has sought a declaration that there is no landlord and tenant relationship between the plaintiff and the defendant. The defendant filed a statement of defence on 30th October, 2017 denying the plaintiff's claim. The issue as to whether or not there is an existing landlord and tenant relationship between the plaintiff and the defendant cannot be determined summarily without a trial in the circumstances of this case. The determination of that issue will require evidence and the court can only pronounce itself on the same conclusively after hearing the suit. It should be noted further that this is a relief that the plaintiff has sought in his plaint and if the same is granted at this stage, the plaintiff would have obtained judgment in the case without a hearing.

The plaintiff has also sought a declaration that the tribunal had no jurisdiction to issue orders of injunction restraining the plaintiff from evicting the defendant from the suit property and selling his goods that were attached by the auctioneer after levying distress against him. I am of the view once again that this is not an issue which the court can determine conclusively on the application before me. The jurisdiction of the tribunal is determined based on among others, the Standard Rent for the premises under consideration. Section 2 Rent Restriction Act, Chapter 296 Laws of Kenya (hereinafter referred to only as "the Act") provides that the Act shall not apply to dwelling houses which have a Standard Rent exceeding Kshs. 2,500/-.

In section 3 of the Act, Standard Rent is defined as a monthly rent at which a dwelling house was let as at 1st January, 1981 and if the premises were not let or erected as at 1st January, 1981 or the tribunal is unable to determine whether the premises were let or erected as at that date, such rent as may be determined by the tribunal on the parameters set out in the Act.

The defendant has contended that the rent he was paying was agreed rent and not the Standard Rent for the suit property and as such the same could not be used as a basis for ousting the jurisdiction of the tribunal. In my view, this is not an idle argument. There is no evidence before the court whether the suit property had been erected as at 1st January, 1981 and if it was, whether it was let and the monthly rent at which it was let out. The issue would require interrogation by the court at the trial and cannot be determined summarily as sought by the plaintiff. The other order sought by the plaintiff is a declaration that the entry by the defendant into the suit property following the tribunal's order made on 25th September, 2017 was illegal. This issue is connected to the issue of the tribunal's jurisdiction. As I have already held above, the issue of the tribunal's jurisdiction cannot be determined summarily at this stage. Without determining whether the tribunal had jurisdiction to make the orders that it made on 25th September, 2017, the court cannot also determine the issues of the legality of the said orders and defendant's re-entry into the suit property. The last prayer by the plaintiff was for Police assistance. It was dependent on the court granting the other prayers that I have considered above. Since I have held that the said prayers are not for granting, I need not consider this last prayer.

The upshot of the foregoing is that the plaintiff's Notice of Motion application dated 5th October, 2017 has no merit. The application is dismissed with costs to be in the cause.

Delivered and Dated at Nairobi this 31st day of January, 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Nyabuto for the Plaintiff

N/A for the Defendant

Mr. Okumu-Court Assistant