



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 197 OF 2014

NANCY OTIENO OUMA.....PLAINTIFF

AND

JOSEPH KALOKI T/A ROYAL FAMILY ASSEMBLY.....DEFENDANT

RULING

1. By a Notice of Motion application dated 15th March 2018, Nancy Atieno Ouma, the Plaintiff herein prays for orders that the Defendant be compelled by way of mandatory injunction to surrender and/or hand over vacant possession of Plot No. 508, 509, 5010, 486/487 and 488 Malindi. In addition, she prays that the Officer Commanding Station (OCS) Malindi Police Station do ensure compliance with the orders by providing security.

2. The said application is supported by the Plaintiff's affidavit sworn on the said 15th March 2018 and is premised on the grounds that:-

- a) The Defendant is a tenant whose term has expired and (who) has categorically stated that he cannot vacate since this suit is pending;*
- b) The defence which was filed at the institution of the suit has been overtaken by events;*
- c) It is in the interest of justice that this suit be disposed off by way of summary procedure;*
- d) The Defendant's tenancy having been terminated by effluxion of time there is no need of going on with the case to a full hearing; and*
- e) The Defendant's acts has denied the Plaintiff his rights to use and draw benefits from the suit plots occasioning him loss and damages.*

3. In a Replying Affidavit sworn and filed herein on 9th May 2018, the Defendant Joseph Kaloki Nzivo avers that the Plaintiff's subject application is baseless, unmeritorious, draconian and an abuse of the process of this Court. The Defendants avers further that the applicant has not met the principles for the grant of a mandatory injunction and the orders sought should not be granted at this stage.

4. The Defendant accuses the Plaintiff of material non-disclosure and states that on 12th June 2015, this Court ruled that the parties should maintain status quo and that the Plaintiff should not be evicted from the suit properties pending the hearing and determination of the suit.

5. It is further the Defendant's case that the orders sought herein if granted will highly prejudice the Defendant and the Church Worshippers and shall cause unreasonable and unconscionable hardships more so given the extent of the developments the Defendant has carried out on the suit properties.

6. The Defendant avers that he has carried out the said extensive developments on the suit properties with the consent of the Plaintiff and the Plaintiff is therefore estopped by dint of Section 120 of the Evidence Act from making an application to evict him from the suit premises. It is further his case that he is ready and willing to pay the monthly rent pending the determination of the suit.

7. I have considered the application and the response thereto. I have equally perused and considered the written submissions filed by the Learned Advocates for the parties as well as the authorities they referred me to.

8. From the material placed before me, it is evident that by a letter dated 5th September 2012, the Plaintiff offered the suit premises to the

Defendant for a lease of five years three months effective 1st October 2012 for the purpose of running a church. The Defendant accepted the letter of offer on the same date by appending his signature thereon. While the letter of offer stated that a Standard lease would be prepared by the Landlord's Advocates, it would appear that none was prepared to-date.

9. Subsequently the Defendant took possession of the suit premises where he runs a church known as the Royal Family Assembly. It is apparent that upon taking possession of the suit premises which measures ½ an acre of land, the Defendant decided to put up some structures thereon. This seemingly did not go down well with the Plaintiff and/or her authorized agents Messrs Nairobi Homes (Mombasa) Ltd. By a letter dated 28th November 2013, the said agents wrote to the Defendant herein stating as follows:

RE: MANAGEMENT OF PROPERTY –NOTIE TO VACATE PLOT NO.

508/509 MLD

The letter of offer on the above plot dated 5th September 2012 refers.

We have noted with a lot of concern that you are erecting permanent structures on the said Plot without the permission of your landlord or ourselves. This is contrary to our lease agreement and a breach of our contract.

In view of the above we strictly advice you to stop the unauthorized on-going construction.

On foregoing, we serve you with six months notice to vacate the premises you are occupying as a tenant. This notice is effective 1st December 2013 to 30th May 2014.”

10. By his letter dated 4th December 2013, the Defendant wrote back to the agent advising them that he had consulted with the landlady upon which consultations it had emerged that the agents did not consult the Plaintiff. Accordingly, he advised the agents to consult with the Landlady. In the meantime, he promised to continue paying rent and to proceed with the constructions works.

11. The agents do not seem to have responded to the Defendant's letter. But by another letter dated 30th April 2014, they reminded the Defendant of their notice to vacate and advised them to arrange to hand over the premises as scheduled on 31st May 2014. As it turned out, the Defendant did not vacate the suit premises. Subsequently, on 28th October 2014, the Plaintiff filed this suit seeking inter alia, a declaration that the Defendant is a trespasser in the suit premises as well as an order of his eviction and demolition of the buildings he had erected in the said premises.

12. Contemporaneously filed with the suit on the said date was a Notice of Motion application dated 27th October 2017 wherein the Plaintiff sought temporary orders of injunction to restrain the Defendant from trespassing, entering upon, remaining in and/or undertaking any development on the suit premises.

13. Having heard the application inter partes, the Honourable Justice O. Angote then seized of the matter declined the application and ordered that the status quo be maintained pending the hearing and determination of the suit.

14. By the present application before me, the Plaintiff avers that now that the five years three months granted in the tenancy have expired, on 31st December 2017, the Defendant should be compelled by way of mandatory injunction to surrender and/or hand over vacant possession. It is however the Defendant's case that the suit is yet to be determined and that the orders of status quo remain in force and should not be undermined through this application.

15. In *Kenya Breweries Ltd –vs- Washington Okeyo(2002) 1EA 110*, the Court of Appeal observed that :-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being on a different and higher standard than was required for a prohibitory injunction.”

16. From the pleadings filed herein, there is no doubt that the Plaintiff is the proprietor of the suit premises. At Paragraph 3 of his Defence filed herein on 28th January 2015, the Defendant admits paragraphs 3, 4, 8, 9 and 10 of the Plaintiff. The admitted paragraphs establish the fact that the Defendant occupies the suit premises by dint of the letter of offer issued to him through the Plaintiffs authorized agents and dated 5th September 2012.

17. The said Letter of Offer grants the period of the lease at paragraph 4 thereof as follows:-

“The lease for the premises will be for a period of five years three months effective 1st October 2012.”

18. That being the case, the lease was expected to terminate on or before 31st December 2017. The Letter of Offer does not make provisions for extension of the lease and I was unable to find on what basis the Defendant wants to continue his occupancy of the suit premises.

19. While it is true that on 12th June 2015 the Honourable Justice Angote granted orders of status quo herein, it is clear to me that the Learned Judge appreciated the import of the Letter of Offer and did not intend his Orders to be a ground to perpetuate the contract period beyond the term provided by the parties. That must be the reason the Learned Judge surmised at paragraph 20 and 21 of his Ruling as follows:-

“20. The Plaintiff herein has acquiesced for a great length of time and the order of injunction cannot issue. Indeed, the order that the Plaintiff is seeking is mandatory in nature and the same cannot be granted at this stage.

21. My only concern is the magnitude of the investment the Defendant has put in the construction of a church on a property that does not belong to him considering that the permission to use the suit property shall expire in the year 2017, I am not sure if the said investment was well thought of.”

20. It is clear from a perusal of paragraph 7 of the Defendant’s said Defence that they did with his fellow worshippers put those investments in the promise and hope allegedly from the Plaintiff that a standard periodic lease shall be executed between himself and the Plaintiff. That promise and hope is however just that. A perusal of the Letter of Offer and the correspondence exchanged between the parties did not reveal anywhere where the Plaintiffs permitted the construction of the said buildings and/or gave the Defendant hope that the lease would be renewed.

21. As it were, Courts of law are designed to enforce contracts between parties and not to re-write them. As Mwera J (as he then was) stated in *Housing Finance Company of Kenya Ltd –vs- Njuguna (KLR) 1176 (CCK):-*

“....Courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they chose. This they must do together with the meeting of the minds. If it appears to Court that one party varied the terms of a contract with another without the knowledge, consent or otherwise of the other, and the other demonstrates that the contract did not permit such variation, this Court will say no to the enforcement of such a contract.”

22. In the circumstances of this case, I am persuaded that the contract giving rise to the relationship between the parties herein has terminated by effluxion of time and there is no reason to deny the Plaintiff the prayers sought herein pending a hearing as to whether or not the Defendant ought to have vacated the suit premises on 30th May 2014. The Defendants cannot demonstrate any right he has to continue occupying and/or utilizing the suit property. I am not satisfied that any purpose will be served by delaying the determination of the issues to any later stage as suggested by the Defendant.

23. The upshot is that I am satisfied that there is merit in the Plaintiff’s application dated and filed herein on 15th March 2018. The same is allowed with costs.

Dated, signed and delivered at Malindi this 14th day of March, 2019.

J.O. OLOLA

JUDGE