



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CONSTITUTIONAL PETITION 5 OF 2018

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS OF
FUNDAMENTAL FREEDOMS UNDER ARTICLE OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION
OF RIGHTS OF FUNDAMENTAL FREEDOMS UNDER
ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS
OF FUNDAMENTAL FREEDOMS UNDER ARTICLE 43 (1)(B)
OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: THE CONSUMER PROTECTION
ACT NUMBER 46 OF 2012 IN THE MATTER OF: THE LANDLORD
AND TENANT (SHOPS, HOTELS AND CATERING ESTABLISHMENTS)
ACT JOEL KIILU.....RESPONDENT/PETITIONER**

VERSUS

NATIONAL HOUSING CORPORATION.....APPLICANT/RESPONDENT

RULING

1. By a Notice of Motion dated 21st June, 2018 the Respondent/Applicant is seeking orders that the petition herein dated 9th March, 2018 be struck out and or dismissed for failure to disclose any reasonable cause of action and or is an abuse of the court processes.
2. The application is based on the ground inter alia, that the petitioner together with others had filed ELC Petition No.17 of 2017 over the same subject matter and therefore the Petitioner is barred by Section 6 of the Civil Procedure Act from filing this Petition, and consequently that the court lacks jurisdiction to entertain the petition herein.
3. The Application is opposed by the petitioner who filed grounds of opposition dated 9th October, 2018. The petitioner avers *inter alia*, that having withdrawn himself from ELC Petition No.17 of 2017 vide Notice of Withdrawal filed and dated 29th May, 2018 is thus properly before this court.

4. The application was canvassed by way of written submissions. The Applicant filed their submissions on 16th January 2019 while the Respondent filed theirs on 4th February 2019. In their submissions, the Respondent stated that it is not in dispute that the Petitioner entered into a lease agreement dated 4th August 2011 for occupation of the Respondent's residential house known as L1 (42) at a monthly rent of Kshs.,2,800/= for a period of two years. That pursuant to Clause 9 of the agreement, the premises was to be used solely as a private residence only while clause 10 prohibited any subletting or parting with possession of the premises or any part thereof without prior written consent of the respondent. The Respondent argued that the Petitioner converted the premises from residential to commercial use and further sublet the premises in breach of the express terms of the lease agreement. The Respondent further argues that parties are bound by the contract that they signed and relied on the case of **Securicor Courier (K) Ltd –v- Benson David Onyango & Another (2008) eKLR and Curtis –v- Chemical Cleaning & Dyeing Co. Ltd (1951) 1 ALL ER**. The Respondent avers that it was a term of the lease agreement that any party who desired to terminate the lease was only required to serve the other party with a one month notice of the intention to terminate. That it is admitted by the petitioner that indeed the Respondent issued the notice dated 26th May 2017 giving the Petitioner two month's notice. It is therefore the Respondent's submission that the petition does not disclose any reasonable cause of action.

5. The Respondent further submitted that in paragraphs 9, 10, and 11 of the petition, the petitioner has admitted that he, together with others filed **Mombasa ELC Petition No.17 of 2017, Rashid Khamis Mwakiremba & 5 Others –v- National Housing Corporation** challenging the validity of the said notice, alleging violation of the Petitioners fundamental rights and freedoms and seeking injunctive orders and damages against the Respondent. That the court in its ruling delivered on 28th February 2018 found the petitioners' application in ELC NO.17 of 2017 as lacking merit and dismissed the same. The Respondent argues that the orders sought in the current petition mirror the ones sought in **Mombasa ELC Petition No.17 of 2017** which is still pending in court, and therefore the current petition is in violation of Section 6 of the Civil Procedure Act. For these reasons the Respondent urged the court to strike out the petition.

6. On his part, the petitioner submitted that the petition herein raises a myriad of issues, that the Petitioner has reasonable causes of action against the Respondent with high prospects of success. It is therefore the Petitioner's submission that the petition is not for striking out. The petitioner further argued that he is no longer a party in ELC Petition No. 17 of 2017 having filed a notice of withdrawal dated 29th May 2018.

7. I have considered the application, the submissions and the authorities cited by the parties. I have also looked at the pleadings herein. The following issues emerge for determination:

a) Whether the suit offends the provisions of Section 6 of the Civil Procedure Act

b) Whether the suit should be struck out.

8. This suit was instituted by the petitioner vide the petition dated 9th March 2018 and filed on even date. The Petition is supported by the affidavit of the petitioner sworn on 9th March 2018 and the annexures thereto.

9. Among the averments in the petition are that by an agreement dated 4th August 2011, the Respondent leased to the petitioner a house known as L45 (formerly L 42) at a monthly rent of Kshs.2,800/= for an initial period of two years among other terms. That by a letter dated 26th May, 2017, the Respondent notified the petitioner to vacate the premises within two months. The petitioner avers that if evicted from the suit premises, he will incur substantial loss having invested heavily in the premises.

10. The petitioner avers that on or about 24th July 2017 the Petitioner and a group of five other tenants filed a Petition being ELC Petition No.17 of 2017 before this court seeking the following orders inter alia, " a declaration that the Respondent has violated the fundamental rights and freedoms of the petitioners by proceeding to forcefully evict them from houses L40..." That on 28th February 2018, this court (Omollo, J) delivered a ruling on the petitioner's application dated 24th July 2017 in ELC Petition No. 17 of 2017 wherein it held that the application lacked merit and dismissed the same with an order that costs to abide the outcome of the Petition. The petitioner avers that the effect of that ruling is that unless this court intervenes, the petitioners is apprehensive that the Respondent will at any moment evict him thereby causing him to suffer substantial loss and damage since the facts and legal principle in this matter differs completely from that in ELC Petition No.17 of 2017. On the basis of these and other averments in the Petition, the Petitioners prays for the reliefs sought in the Petition.

11. On the issue whether the suit offends the provisions of Section 6 of the Civil Procedure Act, the Petitioner in this suit acknowledges that there has been litigation in this court in ELC Petition No. 17 of 2017 between himself and five others and the Respondent herein. Among the issues raised in that Petition was the alleged violation of the Petitioners rights and freedoms by the Respondent. The parties in the previous proceedings include the same the parties in this suit.

12. Section 6 of the Civil Procedure Act provides as follows:

6. No court shall proceed with trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

13. The Petitioner admits that the Respondent herein and himself were parties in **ELC Petition No. 17 of 2017**. The court in **ELC Petition NO. 17 of 2017** dismissed the Petitioners' Application dated 24th July 2017. The Petitioner avers that the effect of the ruling in **ELC Petition No. 17 of 2017** is that unless this court intervenes, the Petitioner is apprehensive that the Respondent will at any moment evict him. This in my view is not a good reason to file a separate suit over the same issues and involving the same parties. The Petitioner has alleged that he has withdrawn from **ELC No.17 of 2017** and was not longer a party in that suit. However, I note that this allegation is only raised in the submissions as there is no notice of withdrawal that is attached to the petition. Moreover, the withdrawal if any, on 29th May, 2018 was

made when the suit herein had already been filed. The dispute herein is still pending in **ELC Petition No.17 of 2017**. I have no hesitation in finding, as I hereby do, that this suit offends the provisions of Section 6 of the Civil Procedure Act.

14. I do not think that this suit can be sustained by amendment of the petition or otherwise. Sub judice is a principle that goes to the core of rule of law as far as litigation is concerned. Any suit that runs afoul this principle has zero chance of survival. In view of my finding that this suit offends Section 6 of the Civil Procedure Act, I am convinced that this is an appropriate case in which to exercise the drastic power of striking out for being an abuse of the court process. In the end, I strike out the suit with costs to the Respondent.

15. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 12th day of March 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Awino holding brief for Wafula for Respondent/Applicant

No appearance for Petitioner

Esther Court Assistant

C.K. YANO

JUDGE