



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 338 OF 2015

1. ELKANNA OMWENGA

2. HELLEN MANZANO T/A

SEA SIDE MEDICAL FACILITY.....PLAINTIFFS

VERSUS

1. ANTOINETTE CARVOLHO

2. SEAN PAUL CARVALHO

3. LOUZA KARIBU.....DEFENDANTS

RULING

1. The Application under consideration is the Notice of Motion dated 5th June 2015 in which the Defendants/Applicants are seeking the following orders:

1. That an order of eviction do issue compelling the Plaintiffs/Respondents to vacate the property known as title number MOMBASA/BLOCK XXI/104 and grant vacant possession thereof to the Defendants/Applicants.

2. That the Honourable Court be pleased to issue such further orders as it may deem in the interests of justice.

3. That the costs of this Application be borne by the Plaintiffs/Respondents.

2. The Application is premised on the grounds on the face of the motion and is supported by the affidavit of Sean Paul Carvalho the 2nd Defendant sworn on 5th June 2015. It is deponed that the 1st and 2nd Defendants together with one Richard Bellarimino Carvalho are registered as the absolute proprietors of the property known as **TITLE NUMBER MOMBASA/BLOCK XXI/104** which consists of two residential flats which was let to the Plaintiff in the year 2002 to be used as a residential property. That sometime in the year 2003, the Plaintiffs converted one flat into a commercial medical facility and thereafter also converted and integrated the second flat into the medical facility. That the Plaintiffs entered into a written agreement dated 1st September, 2003 pursuant to which part of the said property was let to the Plaintiffs. The Defendants state that under the terms of the said agreement the rent was payable monthly but the term of the agreement was not specified and no provision was made for the giving of notice to terminate the tenancy.

3. It is the Defendants' contention that pursuant to statute the said tenancy amounted to a periodic tenancy and could thus be terminated by either party by one month's notice. That several termination notices have been issued by or on behalf of the Defendants/Applicants demanding that the Plaintiffs/Respondents grant the Applicants vacant possession of the property, but the Plaintiffs have without lawful cause or right firmly refused to vacate the property and have simply purported to reject the termination notices duly issued. The Defendants state that the Plaintiffs have disclosed no known legal basis or grounds whatsoever under which they can purport to simply reject the termination notices issued. The Defendants aver that they wish to ensure that the use of the suit property is returned to residential use as it ought to be and to develop it for residential units.

4. The Defendants state that they have exhausted all reasonable and peaceable means of securing access to the premises and obtaining possession of the same from the Plaintiffs which have thus far been deliberately and unlawfully refused and/or ignored by the Plaintiffs. It is the Defendants contention that the Plaintiffs' suit herein discloses no valid cause of action and amounts to a mala fides stratagem intended to frustrate and delay the Defendants lawful repossession of the suit property without any legal foundation whatsoever and is to that extent a vexatious and frivolous abuse of court process that ought not to be countenanced by this court. That the continued occupation of the suit property by Plaintiffs is entirely without the consent and/or acquiescence of the Applicants and the same amounts to clear trespass and is unlawful and amount to a flagrant contravention of registered proprietor's constitutional right to fully exercise ownership of their property. It

is the Applicants' case that as a result of the Plaintiffs unlawful occupation of the suit property, they have been unable to develop the same and obtain reasonable rental income and have thus suffered loss and damage. The Applicants state that the Plaintiffs' conduct thus far is grossly unjust, unconscionable and unlawful and calls for the exercise of this court's discretion to grant the orders sought. The Applicants urged the court to allow the application and grant the orders sought herein.

5. The Plaintiffs/Respondents opposed the application and filed a replying affidavit sworn by Elkana Omwenga, the 1st Plaintiff. It is the Plaintiffs' contention that the application is misconceived, lacks merit and should be dismissed with costs.

6. The Application was canvassed by way of written submissions which were duly filed by the advocates for both parties and which I have read and I need not reproduce their contents herein. It was the Applicants' submission that they have met the prerequisite for the grant of injunctions as set out in **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358**. Relying on the case of **Mrao Ltd –v- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, counsel for the Applicants submitted that the facts of this matter disclosed not only a *prima facie* case but a clear infringement of the Applicants' rights which calls for this court's intervention. It was further submitted that the orders sought herein are in the nature of a mandatory order and the prevailing circumstances are such that it is just and fitting that such orders do issue and relied on the case of **Kenya Railways Corporation –v- Thomas M. Nguti & 6 Others (2009)eKLR** and case of **Stephen Kipkebut t/a Riverside Lodge –v- Naftali Ogola (2009)eKLR**.

7. On their part the Respondents' counsel submitted that the Applicants are seeking a mandatory injunction which if granted will finally determine this matter without the Plaintiffs having been given an opportunity to be heard on their case. That the Defendants counter-claim seeks substantive prayers which are similar to the orders now being agitated in the current application. It is their submission that granting the orders being sought in the application at this stage will be tantamount to allowing the Defendants' counter-claim uncontested and thereby bypassing the Plaintiffs' case before it has been heard and determined. The Respondents submission is that the application does not meet the standards set out for the granting of mandatory injunction.

8. I have considered the application, the affidavits in support and against and the rival submission made and the authorities cited. It is not disputed that the 1st and 2nd Defendants together with one Richard Bellarmino Carvalho are the registered owners of the property known as **TITLE NUMBER MOMBASA/BLOCK XXI/104**. It is also not in dispute that the Plaintiffs are tenants on the premises standing on the suit property. The Defendants aver that the tenancy was a periodic tenancy and that they have given the Plaintiffs termination notice but the Plaintiffs failed to hand over vacant possession and have continued to occupy the premises without the Defendants' consent. The Defendants are now seeking an order of eviction to issue compelling the Plaintiffs to vacate from the suit premises and grant vacant possession to them. The Plaintiffs on their part aver that the termination is unlawful. No doubt, the order sought is in the nature of a mandatory injunction.

9. The law as regards the principle to be applied when considering the prayer for eviction or vacant possession is different from the principles set out in the Giella case for the statement of approach when considering whether or not to grant mandatory injunction is higher than that in respect of prohibitory injunction. In the case of **Locabail International Finance Ltd –v- Agro – Export & Another (1986) 1 All ER 901** it was stated 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 at a simple and summary act which could easily be 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 sense of assurance that at the end of the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction.”

10. The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is *prima facie* established as per the standards spelt out in the law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

11. It is common ground that the Plaintiffs are in occupation of the suit premises pursuant to the tenancy agreement dated 1st September, 2003. The said tenancy agreement never spelt out how the tenancy may be terminated. Whereas the Defendants allege that the tenancy was a periodic tenancy and that they have given the requisite notice of termination, the Plaintiffs think otherwise. Before this court, it has been established that the Plaintiffs gained occupation of the suit premises lawfully through a tenancy agreement. There is a dispute as to whether the termination notice given by the Defendants is lawful or not. There is also a dispute as to whether the Plaintiffs continued occupation of the suit premises is unlawful. These are issues to be determined at the main trial. Having carefully considered the material before me, I am not satisfied that a case for mandatory injunction has been made out as outlined in the principles already mentioned. The Defendants' case is not usually strong and clear as to allow me to grant the orders of eviction and vacant possession prayed for. Having looked at the material placed before me, I cannot safely consider this a clear case that can be decided at once or in a summary manner.

12. The upshot of this is that the Notice of Motion dated 5th June 2015 lacks merit and the same is hereby dismissed with costs to the Respondents.

DATED, SIGNED and DELIVERED at MOMBASA this 7th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

No appearance for Plaintiffs/Respondents

No appearance for Defendants/Applicants.

Yumna Court Assistant

C.K. YANO

JUDGE