



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 287 OF 2017

MOSES MUMBU MUINDI1ST PLAINTIFF

EUNICE LOKO MUINDE2ND PLAINTIFF

VERSUS

KADA ENTERPRISES LIMITED1ST DEFENDANT

STEPHEN M. KINYUA2ND DEFENDANT

RULING

1. In the Application dated 4th July, 2017, the Plaintiff is seeking for the following orders:

a. That an order of injunction do issue against the Defendants, their agents, servants and contractors and each and every one of them restraining them from entering, trespassing onto, remaining on, constructing illegal structures, digging holes, excavating foundations or in any other way howsoever interfering with the 1st Plaintiff's land parcel No. Masii/Mithini/773 (previously known as Plot No. 153-Masii) or any part thereof, and from operating and/or interfering with the 1st and 2nd Plaintiffs' equipped petrol station thereon.

b. That Business Premises Rent Tribunal Case No. 4 of 2017 (Kada Enterprises Limed vs. Moses Mumbu Muinde & Eunice Loko Muinde) be transferred to this court and be consolidated with the suit herein and/or be stayed pending hearing and determination of the suit herein.

2. The Application is supported by the Affidavit of the 1st Plaintiff who has deponed that he is the absolute registered owner of parcel of land known as Masii/Mithini/773, previously known as Plot No. 153-Masii measuring 0.0747Ha (*the suit land*).

3. It is the 1st Plaintiff's deposition that the suit land is cabro-paved and developed with a fully equipped petrol station and an office block; that the other portion is undeveloped and that the equipped petrol station and office block are owned by the Plaintiffs.

4. The 1st Plaintiff deponed that they leased out the petrol station and two (2) rooms in the office block to the 1st Defendant for a period of three (3) years at an agreed monthly rent of Kshs. 120,000; that by a further agreement dated 17th December, 2014, the lease terms of three (3) years was extended by two (2) years and one (1) month making a total of five (5) years and one(1) month and that the 1st Defendant breached the terms of the lease.

5. It is the Plaintiffs' case that by a letter dated 31st August, 2016. They required the Defendants to comply with all the terms of the lease agreement; that the term of five (5) years and one (1) month terminated on 16th January, 2017 and that the lease reverted back to them.
6. When the 1st Defendant was called upon to vacate the suit land, the 1st Plaintiff deponed that the Defendants served them with an interim order issued by the Business Premises Rent Tribunal in Tribunal Case No. 4 of 2017 restraining them from evicting them from the suit premises and from terminating the 1st Defendant's tenancy and that by the time the Tribunal's Chairman's contract expired, a Ruling on the pending Application had not been delivered.
7. The Plaintiffs finally deponed that there does not exist any interim order now; that there is no tenancy between the Plaintiffs and the Defendants, controlled or otherwise and that in June, 2017, the 2nd Defendant wrongfully trespassed on the undeveloped portion of the suit land.
8. In response, the Defendants filed a Notice of Preliminary Objection in which they averred that the entire suit offends the provisions of Cap 301 and that it should be struck out.
9. Although the Defendants filed a Replying Affidavit on 10th October, 2017, the same was struck out by the court.
10. The advocates appeared before me and made oral submissions. I have considered those submissions.
11. It is not in dispute that the parcel of land known as Masii/Mithini/ 723 is registered in the name of the Plaintiffs.
12. According to the Lease Agreement of 16th December, 2011, the Plaintiffs leased to the 1st Defendant a portion of land at a monthly rent of Kshs. 120,000 for three (3) years. Later on, the two parties entered into another agreement in which they extended the lease "*for a further period on the same terms and conditions, beginning from 17th December, 2014 and ending on 16th January, 2017*".
13. The Plaintiffs have exhibited a letter dated 31st August, 2016 in which they informed the Defendants that unless they pay Kshs. 30,000 per month which they had unlawfully deducted from the monthly rent, they will take legal action. In the same letter, the Plaintiffs informed them that they will not renew the lease when it lapses on 16th January, 2017.
14. Indeed, the Plaintiffs actualized their threat of not renewing the lease by authoring the letter dated 17th January, 2017. The Defendants, on receipt of the letter, filed a dispute in the Business Premises Rent Tribunal number 4 of 2017 and obtained an interim order of injunction pending the hearing and determination of the Application.
15. Although the order states that the matter was to be heard on 2nd March, 2017, the term of the Tribunal came to an end before the matter could be heard.
16. I have seen the copy of the Replying Affidavit which was filed in the Business Premises Rent Tribunal. In the said reply, the Plaintiffs herein contested the jurisdiction of the Tribunal to hear the matter.
17. Indeed, in her submissions, the Plaintiffs' advocate submitted that the issue of whether the Lease Agreement was for five (5) years or for five (5) years and (1) month is immaterial because the Lease has already lapsed.
18. On the other hand, the Defendants' advocate argued that the Lease Agreement was for five (5) years, and therefore the Business Premises Rent Tribunal has the requisite jurisdiction to hear the matter. The Defendants' arguments are hinged on the definition of what a controlled Tenancy is pursuant to the

provisions of the Landlord and Tenant (*Shops, Hotels, and Catering Establishments*) Act.

19. From the pleadings filed by the Plaintiffs, it is obvious that the issue of whether the Business Premises Rent Tribunal has jurisdiction to entertain the matter or not is before the Tribunal. Indeed, the decision of the Tribunal on that issue is appealable to this court. I will therefore not address my mind on the issue, save to say that the Tribunal should be given an opportunity to make a decision on that issue.

20. Although this court has unlimited jurisdiction to hear disputes relating to Land and Environment, it is apparent from the provisions of Section 13 of the Environment and Land Act that the court also has the appellate jurisdiction to entertain appeals from Tribunals and subordinate courts.

21. It has been held in numerous authorities that whenever an Act of Parliament provides for a procedure or mechanism of redress, the same ought to be strictly followed (*See the Speaker of the National Assembly vs. Karume (2008) 1KLR 425; Mutunga Tea & Coffee Company Ltd vs. Shikera Limited & Another (2015) eKLR and Kones vs. R & Another Ex-parte Kimani wa Nyoike & 4 others (2008) 3 KLR (ER) 296 and Samson Chambe Vuko vs. Nelson Kilumo & others (2016) eKLR*).

22. Considering that the Tribunal has already granted to the Defendants an interim order of injunction, this court cannot venture into the issue of whether the Plaintiffs have a prima facie case with chances of success or not until the issue of the jurisdiction of the Business Premises Rent Tribunal is determined by the Tribunal or by this court on appeal.

23. For those reasons, I find that the Plaintiffs' Application dated 4th July, 2017 is incompetent and I strike it out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JANUARY, 2018.

O.A. ANGOTE

JUDGE