



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MERU

ELC COURT NO. 109 OF 2012

KENNEDY MWANIKI AND 19 OTHERSPLAINTIFF/RESPONDENTS

VERSUS

NATIONAL HOUSING CORPORATIONDEFENDANT/APPLICANT

RULING

1. The Notice of Motion filed on 05:05:17 seeks orders that the Plaint filed herein be struck out and the suit be dismissed with costs.
2. The grounds in support of the application are that the plaint does not disclose any reasonable cause of action, that the cause of action herein has been overtaken by events as the lease which was the subject matter of these proceedings expired, that there are currently no lease to be enforced and that the continued sustenance of these proceedings is highly pre-judicial to the Defendant.
3. In further support of the application are the affidavits of Fredrick Ochwa, one filed on 15:05:17 and another on 19:10:17.
4. The application is opposed vide the Replying affidavit of Mary P. Marangu filed on 20/9/2017. The respondents aver that they have all been residing in houses at Tuntu estate previously owned by the Municipal Council of Meru, but which houses were taken over by the National Housing Corporation (defendant).
5. The plaintiffs aver that in a meeting of 4th November 2010 attended by officials of the defunct Municipal council of Meru and the Board of Directors of the defendant, it was agreed that the tenants would not be evicted until some new houses are completed.
6. The Respondents admit that their leases expired and/or determined in the year 2013 but the Respondents remained in actual, active, continuous and physical occupation of their respective houses since the year 2013 where they still reside to date and the Applicant has been receiving the rent payable in respect of each house by the Respondents and always issued receipts to the respondents at all material times upon payment.
7. The respondents claim that the Applicant's actions of continuity to receive and issue receipts to the respondents even after expiry of lease period, created a fresh lease between the Applicant and the Respondents since leases for less than 2 years can be implied or oral and need not be registered at all for them to be valid.
8. The respondents therefore aver that their occupation of the said Tuntu Estate is legal, and that there is even a permanent order of injunction issued by this Court restraining the Applicant from evicting the

respondents and this order is still in force. The respondents have annexed a bundle of receipts to confirm that they have been paying rent.

9. On 19:09:17, the Court gave directions for the application to be canvassed by way of Written Submissions. Parties have filed the said submissions.

10. Defence arguments are that leases were executed in July 2011 between the parties and they were to subsist for a period of 2 years. The leases were to terminate on 31:07:13. Defence claim that the present suit was filed in order to enforce that lease agreement of 2011.

11. Defence claim that after July 2013, there was no lease to be enforced.

12. In Support of their arguments, defendants have proffered the following authorities: **J.A.O vs Home Park Caterers Ltd and 2 others (2004) e KLR** where citing *D.T. Dobie & Co (k) Ltd vs Muchina & another (1982) KLR*, the Court had defined a reasonable cause of auction as one “**with some chance of success when only the allegations in the plaint are considered**”. The other case cited by the defendant is **Jane Wairimu Turanta vs Githae John Vickery & Another (2013) e KLR** where citing the case of *Francis Kamande vs vanguard electrical Services Ltd (1966)*, it was held, that a suit can be struck out and that this summary procedure can only be adopted “**when it can be clearly seen that a claim or answer on the face of it is obviously unsustainable**”.

13. The defendant has also cited the case of **John Mulwa Kang’aatu Vs Pan African Co. Ltd (2015)**, and the case of **William T. Abira & 12 others Vs Kenya Civil Aviation Authority (2016) eKLR**. In these cases the issue being addressed is that of amendment of pleadings. The proposed amendment should embody a legally valid claim or defence, and there should be no delay in bringing forth such amendments.

14. The Plaintiffs on the other hand aver that the issues which drove them into Court way back in 2012 have never been addressed and/or adjudicated up to date.

15. Further, Plaintiffs aver that upon the expiry of the written leases in the year 2013, the Defendants accepted and received rent from them without any further written leases thereby creating by construction, new leases as between the parties herein.

16. Plaintiffs have proffered the following authorities, in support of their claim.

i JOSEPH NDUNGU MWAURA VS. JAMES GITHIGA MWAURA (2004) eKLR.

ii. SAID HAMD SHAMISI VS. DIAMOND TRUST OF KENYA LIMITED (2010) eKLR.

iii. D.T DOBIE & COMPANY (KENYA) LIMITED VS. JOSEPH MBARIA MUCHINA & ANOTHER (1980) eKLR.

iv. KUTIMA INVESTMENTS LIMITED VS MUTHONI KIHARA & ANOTHER (2015) eKLR.

17. It is apparent that the suit herein was filed to enforce the leases executed in July 2011 which leases were to run for 2 years. The defence had apparently served the Plaintiffs with notice to vacate on 09:05:12 before the expiry of the lease period prompting the Plaintiff’s to seek redress in Court.

18. It appears that to date the tenants are still in occupation of the houses owned by Defendant.

19. The main prayer in the plaint is framed as follows:

“An order of permanent injunction restraining the Defendant from evicting or in any other manner whatsoever from interfering with the Plaintiffs quiet possession and enjoyment of House No 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,26,27,28,29, and 30 at Tuntu estate during the

currency of the lease period”.

20. It follows that the injunction was only to last up to the end of the lease period which time was July 2013.
21. The pleadings of the plaintiffs are crystal clear and hence there is no cause of action that can be discerned from the plaint after the period of 2013 July. This case cannot therefore be equated to the case of Joseph Ndungu Mwaura (Supra).
22. The Plaintiffs have however introduced another aspect of the case. They urge the Court to look at the existing relationship between the parties. The Plaintiffs’ aver that by construction, new leases, have been created because the Defendant has been continuing to accept rent from the Plaintiffs’ (tenants) to date.
23. On this issue plaintiffs aver that they propose to amend the Plaint to incorporate this issue. Defence on the other hand avers that the amendment would in essence amount to bringing a new cause of action. The defence has submitted at length on this issue of amendment.
24. I find that the issue of amendment is neither here or there. No such amendments have been made since July 2013(more than 4 years ago).
25. I have however interrogated the circumstances under which the parties have found themselves in the present situation, whereby, the Plaintiffs still continue to pay rent, and they are issued with receipts.
26. It is evident that when the present suit was filed, Plaintiffs had also filed an application for Injunction to restrain defendants from evicting them. In a ruling delivered on 27:09:12, the prayer for injunction was allowed pending the hearing and determination of the suit.
27. The Plaintiffs went to sleep for the next 3 and half years. To date the suit has never been heard. It is hence quite apparent that it is the Court’s orders of 27.09:12 which enforced the status quo relationship between the litigants, which entails payment of rent and the issuance of receipts. The delay in bringing forth the amendment is inordinate and inexcusable.
28. It is not the place for this Court to re write contracts for the parties. In the case of **National Bank of Kenya ltd vs. Pipealastic Samkolit (k) ltd (2002) EA 503**, the court stated thus:-
- “A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion fraud or undue influence are pleaded and proved.....”**
29. I have taken into account the provisions of article 159 of the constitution and Section 1 A (1) of the Civil Procedure Act. Somehow litigation must come to an end. I opine that Plaintiff should not be allowed to change goalposts after obtaining the orders of 27:09:2012 and after allowing the said orders to rest in bliss for 3 ½ years. It is therefore no longer tenable for this suit to remain pending.
30. As rightly submitted by the defence the court has to exercise its discretion while considering all the facts appertaining to this case particularly the delay in the prosecution of the suit.
31. Pursuant to provisions of order 2 rule 15 of the civil procedure rules **“at any stage of the proceedings, the court may order to be struck out or amend, any pleading on the ground that it discloses no reasonable cause of action or defence in law.....”**.
32. As rightly submitted by the applicant/defendant, the present suit was filed to enforce the tenancy agreement, which agreement terminated on 31.7.2013. There is no valid claim in this suit. The application is merited and the plaint filed on 9.6.2012 is hereby struck out.
33. Consequently, the suit herein is hereby dismissed. As to costs, I have taken into account the circumstances under which this suit was filed. As such, each party is to bear their own cost of the suit.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 21st
FEBRUARY, 2018 IN THE PRESENCE OF:-**

Court Assistant: Janet/Galgalo

No appearance for plaintiffs

No appearance for respondent

HON. L. N. MBUGUA

ELC JUDGE