



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 298 OF 2017

KULTHUM SULEIMAN KHAMIS.....PLAINTIFF

VERSUS

- 1. REGISTERED TRUSTEES, KENYA PORTS AUTHORITY PENSION SCHEME**
- 2. LUSTMAN & COMPANY (90) LIMITED**
- 3. DICKSON KARIUKI t/a DIKEMWA AUCTIONEERS.....DEFENDANTS**

RULING

1. This is the Notice of Motion dated 18th august, 2017. It is brought under Section 1A, 1B and 3A of the Civil Procedure Act. Order 40 Rules 1, 2, 3, 4 and 10 Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

2. It seeks orders;

1. Spent.

2. That an order of temporary injunction be granted restraining the Defendants by themselves, their agents, assigns and/or employees or anyone claiming in or through him or otherwise howsoever from selling, disposing off, parting with possession of or in any other manner howsoever interfering with the Plaintiff's movable goods carried from the demised premises or in any other manner howsoever interfering with the Plaintiff's/Applicant's occupation, tenancy and/or quiet possession and enjoyment of the demised premises standing on Title Number Mombasa/Block/579/xi, Mombasa Island pending the hearing and determination of this suit or further orders of this Honourable Court and a mandatory injunction compelling the third Defendant to return all movable goods carried belonging to the Plaintiff from the demised premises.

3. That an order of temporary injunction be issued restraining the Defendant by themselves, their agents, assigns and/or employees or anyone claiming in or through them, or otherwise howsoever from evicting, terminating the tenancy, harassing, entering into or in any other manner whatsoever interfering with the Plaintiff's quiet possession and enjoyment and a mandatory injunction compelling the Defendants to forthwith open the premises which they have illegally, unlawfully and/or wrongfully locked after the purported distress herein and/or the Plaintiff be allowed to break the locks placed thereon and enter into their demised premises.

4. That costs to this application be borne by the Defendants.

3. The grounds are on the face of the application and are listed as in paragraph a-e. I do not need to reproduce them here.

4. The application is supported by the affidavit of Kulthum Suleiman Khamis, the Plaintiff/Applicant herein sworn on the 18th August, 2017 and a supplementary affidavit sworn on the 4th December, 2017.

5. The application is opposed. There is a replying affidavit sworn by Silas Mwangi, the 2nd Defendant's property manager sworn on the 4th October, 2017.

6. On the 9th November, 2017 it was agreed that the Notice of Motion be disposed by way of written submissions. The parties filed written submissions and the matter came up for highlighting on 11th December, 2017.

THE PLAINTIFF/APPLICANT'S SUBMISSIONS

7. It is the Plaintiff's submissions that she is a tenant in the demised premises Mombasa/Block/579/xi Mombasa Island belonging to the 1st Defendant. That on 22nd February, 2017, the 3rd Defendant acting as an agent of the 1st and 2nd Defendants descended on the premises in company of three police officers and broke the main gate illegally, unlawfully and/or wrongfully carried away all movable goods, furniture fittings and other house hold goods.

8. It is her further submissions that she was not served with the mandatory fourteen (14) days notice or proclamation for distraint or distress. That the Defendants' purported distress for rent was illegal, unlawful, wrongful and void ab *initio* and the entire process ought to be set aside in its entirety.

9. That after carrying out the purported distress, they locked up the premises. They have put forward the cases of *Gusii Mwalimu Investment Co. Ltd And 2 Others – versus- Mwalimu Hotel Kisu Ltd (1996) eKLR, (2) Kamau Mucaha –versus- Riples Ltd (1993) eKLR , (3) Washington Jalango Okumu –versus- Boffar Ltd (2005) eKLR .*

Further that some of the items taken are exempt under Section 16 of the Distress for Rent Act and locking her out of the premises was utterly wrong.

10. The Defendants act of removing the Plaintiff's proves that they were in collusion to obtain vacant possession without following the due process.

11. The Plaintiff has established a prima facie case against the Defendants/Respondents. She prays that the orders be granted.

THE 1ST, 2ND & 3RD DEFENDANTS/RESPONDENTS' SUBMISSIONS

12. It is the Defendants/Respondents contention that the Plaintiff/Applicant was the 1st Defendant's tenant. That she fell into arrears to the tune of Kshs309,000 as at January 2017. The 3rd Defendant was instructed to distraint for rent arrears.

13. The 3rd Defendant proclaimed the Plaintiff's movables on 30th January, 2017 and issued the proclamation notice. After expiry of the period, the 3rd Defendant returned to the premises on three consecutive days but found the doors locked.

14. The 3rd Defendant sought and obtained break in orders in Mombasa CMCC Misc Civil Application No. 35 of 2017 which orders were allowed. Police presence was necessary to ensure peace and order. The break in order was implemented and the removal of the proclaimed goods was done on 22nd February, 2017 in the presence of police officers. The attached properties were advertised for sale in the Star Newspaper of 11th March 2017.

15. The Plaintiff confirmed in writing that the outstanding rent was Kshs345,000 and sought ten (10) days to give vacant possession. The Plaintiff constructively deserted the premises. As at August, 2017 the rent arrears stood at Kshs420,000 and electricity bill at Kshs168,987/90.

16. The 3rd Defendant was again instructed to distraint for rent but found an abandoned house with nothing capable of being attached. The 1st Defendant then moved in and renovated it ready for letting to a new tenant. They have relied on the cases of *Giella –versus- Cassman Brown & Co. Ltd (1973) EA 358., Kenya Railways Corporation –versus- Thomas M. Nguti And 6 Others (2009) eKLR , Global Vehicles Kenya Ltd –versus- Lenana Road Motors (2015) eKLR.*

17. They further submitted that that the Plaintiff in her supplementary affidavit raises new issues which do not form part of the plaint or the Notice of Motion parties are bound by their pleadings.

18. The distress for rent was not illegal and the 1st Defendant's right of entry was legal. They have relied on the case of *East Africa Railways Corporation –versus- Karangi (1988) eKLR, Triton Service Stations –versus- PJP Holdings Ltd (2009) eKLR* where Koome J. as she then was held;

“When the appellants refused to pay rent and acknowledge the title of the owner as landlord they become trespassers. The owner had therefore the right to remove the appellants from his property using no more force than was reasonably necessary.”

19. The Plaintiff had in numerous letters indicated that she was going to give vacant possession to the premises. The Plaintiff has not established a prima facie case with a probability of success at the trial.

20. That the Plaintiff has not satisfied the test for grant of interlocutory mandatory injunction. They have put forward the case of *Kenya railways corporation –versus- Thomas M. Nguti And 6 Others (2009) eKLR.*

The Plaintiff has failed to demonstrate that she deserves the orders of mandatory injunction at this stage. The taking over on 19th July, 2017 was not forceful. The Plaintiff had constructively deserted the premises. They pray that the application be dismissed with costs.

21. I have considered the pleadings, the Notice of Motion and the affidavits in support plus the annexures. I have considered the replying

affidavit and the annexures. I have considered the written submissions of both counsels and the authorities cited.

22. There is no doubt that the Plaintiff/Applicant was a tenant to the 1st Defendant. It is not in dispute that she was in rent arrears. The issues for determination are;

i) Whether the Plaintiff/Applicant has satisfied the test for grant of interlocutory injunctions.

ii) Whether the Plaintiff/Applicant has satisfied the test for grant of an interlocutory mandatory injunctions.

iii) Who should bear costs?

23. I have considered the facts that have emerged and the legal principles applicable. The Principles were laid down in the precedent setting case of *Giella –versus-Cassman Brown And Company Limited (1973) EA 358*. In the case of *Mrao Limited –versus- First American Bank Limited And 2 Other s (2003) eKLR* the Court of Appeal gave a definition of what amounts to a prima facie case.

24. Has the Plaintiff made out a prima facie case with a balance of success at the trial? It is the Plaintiff's/Applicant's contention that the letters annexed to the replying affidavit and marked "SM3", "SM8", "SM2" do not amount to letters of instruction as envisaged in the Rule 11 of the Auctioneers Rules.

I have looked at Rule 11 of the Auctioneers Rules and find that it refers to a court warrant or letter of instruction emanating from a suit which has been filed and concluded, it talks about a decree.

25. In my view the letters of instruction being referred to are those the 3rd Defendant issued under the Distress for Rent Act. I am of the view that those under the Distress for Rent Act need not conform with the letter of instruction set out in Rule 111 of the Auctioneers Rules.

26. Section (2) of the Auctioneers Act states;

“.....

c) Any person who levies distress for rent or distrains under the provisions of any written law.”

I find that the 3rd Defendant was levying distress under the Distress for Rent Act hence Rule 11 of the Auctioneers Rules would not apply.

I therefore hold that the letters issued to the 3rd Defendant by the 2nd Defendant were proper.

27. It is also the Plaintiff/Applicant's contention that the 3rd Defendant took items that were exempt under Section 16 of the Distress for Rent Act. It is the Defendants/Respondents response that the clothing were taken from the house after it had been abandoned and they removed them for safe keeping as they needed to renovate the premises for a new tenant. That they have always been willing to hand over the same to the Plaintiff/Applicant.

28. It is the Plaintiff's/Applicant's further contention that the distress was illegal. In his replying affidavit sworn on the 4th October, 2017, Silas Mwangi, the 2nd Defendant's property manager, that he appointed the 3rd Defendant to levy distress. That the 3rd Defendant visited the premises and proclaimed the Plaintiff's movable property and gave fourteen (14) days notice required by law. That thereafter, the 3rd Defendant visited the premises and found the premises locked.

29. The 3rd Defendant then obtained break in orders Vide Mombasa CMCC Misc. Civil Application No. 35 of 2017. That the entry into the premises was therefore not forceful and/or illegal.

30. I have gone through the replying affidavit of Silas Mwangi and I have to come to the conclusion that the 3rd Defendant followed due process before re-entering the premises.

I have also gone through the letters written by the Plaintiff. They are attached to the replying affidavit of Silas Mwangi and marked Annexures "SM7", "SM8", "SM9", "SM10", "SM11", "SM12-15". There is no doubt that the Plaintiff was in rent arrears and made proposals on how to pay.

In Annexure "SM1", the Plaintiff suggests that she be given ten (10) days to surrender the house.

31. All these letters show that the Plaintiff was aware that the 1st Defendant was desirous of taking back the house.

To date she has not shown that she has paid any amount towards offsetting the rent arrears. I am of the view that the levying of distress was lawful. The taking over premises was done following court order hence it cannot be said to have been forceful and illegal.

32. In her supplementary affidavit, the Plaintiff admits she wrote the letters to the Defendants seeking to be given time to surrender the premises. I find that the Plaintiff/Applicant has failed to establish a prima facie case with a probability of success at the trial.

33. The principles for granting of mandatory injunctions are clear. It will usually not be granted unless the case is unusually strong and a clear one.

Also that the court must feel a high degree of certainty that the trial will vindicate the grant of interlocutory relief.

34. In the case of Lucy Wangui Gachera –versus- Minudi Okemba Lore Malindi Civil Appeal No. 4 of 2015 quoted the case of Shepherd Homes Limited –versus- Sandahm (1971) CH34 Meggarty J stated;

“It is plain that in most circumstances a mandatory injunction is likely, other things being equal to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will of course grant such injunctions as the justice of the case requires, but at the interlocutory stage when the final result of the case cannot be known and the court has to do the best it can. I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation on motion as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction, than it would be to grant a comparable prohibitory injunction. In a normal case, the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.”

35. Also in the case of Locabail International Finance Ltd –versus- Agro export (1986) All ER 901 Mustil restated the same principle thus;

“The matter before court is not only an application for a mandatory injunction , but is an application for a mandatory injunction which if granted would amount to the grant of a major part of the relief claimed in the action such an application should be approached with caution and the relief granted only in a clear case.”

36. I am persuaded by the above decisions in finding that the Plaintiff/Applicant herein has not demonstrated that her case is a clear one and straightforward. I have considered the circumstances herein and I find that the Plaintiff/Applicant has failed to demonstrate that the Defendants used excessive force in taking over the premises.

37. I find that the Plaintiff has failed to demonstrate that she deserves to be put back into occupation. This prayer for mandatory injunction fails as well.

I find no merit in this application and I decline to grant the orders sought. In essence the Application is declined. The costs of the application do abide the outcome of the main suit.

It is ordered.

Dated, signed and delivered at Mombasa on the 15th day of March 2018.

L. KOMINGOI

JUDGE

15/3/2018