



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 155 OF 2017 (O.S)

(Formerly NYERI HCCC 15 OF 2017)

PETER WAITITU NJAU.....PLAINTIFF

VERSUS

BIASHARA SACCO SOCIETY.....DEFENDANT

RULING

1. On 1st September, 2017 the plaintiff herein took up the summons dated 31st August, 2017 for determination of issues listed therein.
2. Barely three weeks after the plaintiff took up the summons referred to above, the plaintiff filed the notice of motion dated **18th September, 2017** seeking the following orders:-
 - (i) **Certification of the application as urgent and deserving to be heard ex parte within the 1st instance.**
 - (ii) **An injunction to restrain the defendant its employees agents from evicting entering trespassing or in any other way interfering with his enjoyment and possession of the suit premises (platinum five (5) dimension lounge) erected on LR No. Nyeri Municipality Block 1/89 pending the hearing and determination of the application.**
 - (iii) **An injunction to restrain the defendant its employees agents from evicting entering trespassing or in any other way interfering with his enjoyment and possession of the suit premises (platinum five (5) dimension lounge) erected on LR No. Nyeri Municipality Block 1/89 pending the hearing and determination of the suit.**
 - (iv) **An injunction staying and prohibiting the defendant from executing the various proceedings in other courts or bodies particularly the Business Premises Rent Tribunal and Nyeri CMCC No.303 of 2017 pending the hearing and determination of the suit.**
3. The application is premised on the grounds that the applicant has heavily invested in the suit premises which is his source of livelihood; that the defendant, through its chairman intends to obtain orders adverse to his interest in the suit premises and that he stands to suffer irreparable loss and damage should the defendant evict him from the suit premises.
4. Maintaining that there is imminent threat of being evicted from the suit property before the issues he has raised in the suit herein are interrogated on their merits, the applicant urges this court to grant him the orders sought to obviate the imminent threat to his right to property and livelihood.
5. The application is supported by the affidavits (supporting affidavit sworn on 31st August, 2017; further supporting affidavit sworn on 19th October, 2017 and further-further supporting affidavit sworn on 2nd November, 2017) of the applicant in which the grounds on the face of the application are reiterated.
6. In support of the averments in the application and the supporting affidavits, the applicant has annexed the following documents:-
 - (i) A copy of the lease agreement executed between the applicant and the respondent over the suit property;
 - (ii) Copies of loan agreements executed between the applicant and the respondent;

- (iii) Valuation reports in respect of the suit premises;
- (iv) Minutes of the defendant concerning the approval for the developments he effected on the suit premises;
- (v) Demand letter from the respondent's advocate;
- (vi) Minutes of the respondent's meeting held on 12th march 2016 showing the value of the suit property had improved owing to the developments he effected in the suit property;
- (vii) Copy of bill of quantities;
- (viii) Copy of revised bill of quantities, dated 23rd April, 2017;
- (ix) Copy of revised valuation report in respect of the suit premises dated 1st November, 2017.

7. The application is opposed through the replying affidavit of the chairman of the respondent sworn on 25th September, 2017 and filed on 27th September, 2017 in which it is deposed:-

- (a) That this court lacks jurisdiction to hear and determine the dispute preferred before it because it relates to a cooperative society and its member;
- (b) That the applicant is undeserving of the equitable orders sought because he is guilty of none disclosure of material facts; has lied under oath that the respondent has commenced a suit before the Business Premises Rent Tribunal (BPRT) yet the suit pending before the BRPT was filed by him and that the applicant is guilty of gross abuse of the court process as he has obtained orders from the Tribunal and this court.
- (c) That the tenancy relationship that existed between the applicant and respondent ceased to exist after the respondent issued the applicant with a notice terminating it;
- (d) That contrary to the applicant's contention that he is the one who developed the suit premises, the suit premises were developed by the respondent;
- (e) That the developments effected by the applicant were limited by the terms of the lease which existed between the applicant and the respondent which lease has since been terminated owing to none payment of rent by the applicant;
- (f) That the suit preferred by the respondent before the lower court is merited as the respondent was entitled to bring a suit for eviction of the applicant after the lease that existed between them expired;
- (g) That the respondent as the sole owner of the suit property acted within its right by terminating the lease that existed between itself and seeking vacant possession of the suit premises; and
- (h) That the applicant has not made up a case for being granted the orders sought.

8. The following documents are annexed to the affidavit sworn on behalf of the respondent:-

- (a) Copies of pleadings filed by the applicant before the BPRT;
- (b) Copies of the orders obtained by the applicant both from the BPRT and this court;
- (c) Copies of valuation report and the report on expenses for renovation of the suit premises;
- (d) Copy of letter from the respondent to the applicant dated 11th November, 2014;
- (e) Copy of certificate of lease showing that the respondent is the registered proprietor of the suit property.

9. When the matter came up for hearing, counsel for the applicant submitted that eviction of the applicant who is in occupation of the suit premises will render the applicant's suit otiose. He also submitted that the applicant who has invested all his money in the suit premises, will suffer irreparable loss if he is evicted from the suit premises.

10. Explaining that the reference preferred before the BPRT was stayed pending the hearing and determination of this suit, counsel for the applicant informed the court that the respondent has instituted a suit before the lower court seeking eviction orders against the applicant.

11. Counsel for the respondent relied on the replying affidavit filed on 27th September, 2017 and submitted that the application is a non starter as it is premised on a suit which has no prayers.

12. He reiterated the contention that the applicant has approached the court with unclean hands for the reasons flanked out in the replying affidavit and submitted that by the time the applicant filed this suit, the tenancy relationship which existed between respondent and the applicant had ceased to exist.

13. Contrary to the statement by the applicant's counsel that the proceedings before the Tribunal have been stayed pending the hearing and determination of this suit, he stated that those proceedings have not been stayed.

14. Based on paragraph 6 of the loan agreement executed between the applicant and the respondent, he reiterated the contention that the respondent was within its right to terminate the tenancy upon default in the obligation to pay rent.

15. He pointed out that the applicant has not demonstrated that he has been meeting his obligations owed to the respondent of repaying the loan and paying rent.

16. Arguing that the court cannot be asked to rewrite the agreement between the parties, counsel for the respondent submitted that the applicant should at least be making payment in respect of the loan or the rent.

17. Based on the agreements executed between the parties to this dispute, he submitted that the application is lacking in merit and urged the court to dismiss it. He further pointed out that the respondent's title in respect of the suit property has no encumbrance in favour of the applicant.

18. Because of the proceedings pending before the BPRT, he stated that there are two parallel proceedings over the same subject matter.

19. In a rejoinder, counsel for the applicant stated that no reference has been filed before the BPRT and that the applicant has neither paid rent nor the loan since September 2017.

Analysis and determination

20. This being an application for injunction pending the hearing and determination of the suit, to be entitled to the orders sought, the applicant must satisfy the conditions set down in the celebrated case of **Giella v. Cassman Brown(1973) E.A 358** which are:-

- (i) The applicant must demonstrate a *prima facie* case with a probability of success;
- (ii) Demonstrate that unless the order sought is granted, he will suffer loss not compensable by award of damages;
- (iii) If the court is in doubt it will determine the matter on a balance of probabilities.

21. What amounts to a prima facie case was defined in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) e KLR** thus:-

“In civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

22. On whether the applicant has demonstrated a prima facie case with a probability of the success at trial, upon considering the documentary evidence relied on by the applicant in support of the application, I find that the agreements executed between the applicant and the respondent allowed the respondent to terminate the lease that existed between them for breach of his obligations to it which obligations included payment of rent and repayment of the loans advanced to the applicant.

23. Whilst the applicant has moved this court for determination of whether the respondent is justified in demanding both rent and installments for the loans before he has recouped his investments, the agreements executed between the parties appear to impose both obligations on the applicant so that unless the applicant is able to prove that the agreements are not a true reflection of the agreement executed between him and the respondent, this court would lack any basis for holding that the applicant has made up a *prima facie* case with probability of success at trial. In that regard, see the following clauses of the agreements executed between the applicant and the respondent. Clause 3(a) of the lease agreement dated 8th January, 2015 and clause 6 of the loan agreement executed on 3rd November, 2016 provides as follows:-

“3(a)If the rent hereby reserved or any part thereof shall at any time be unpaid for seven days after becoming payable (whether lawfully demanded or not) or if any of the covenants on the part of the lessee herein contained shall not be performed and observed.....it shall be lawful for the lessor to serve upon the lessee a notice in writing specifying such nonpayment or breach of the aforesaid and requiring the lessee forthwith to remedy the same and if the lessee shall not within fourteen day comply with such notice the lessor may at any time thereafter re-enter upon the premises or any part thereof in the name of the whole and thereupon this tenancy shall be absolutely determined without prejudice to the right of action of the lessor in respect of any antecedent breach of any of the covenants on the part of the lessee herein contained.”

(6) That the second and third party (second party is the applicant herein) by executing this agreement confirm that they are fully aware that, in case of default the first party (the first party is the respondent herein) shall be free to rescind the lease granted to the second party by the first party over part of Nyeri Municipality Block1/89 and take over the premises and the business therein.”

24. It is common ground that the applicant defaulted in his rent and loan paying obligation to the respondent leading to issuance of a termination notice of the lease agreement hereto in accordance with the terms of the lease agreement executed between the parties to this suit.

25. Since the duty of the court is to interpret the terms of the contract entered between the parties to the dispute brought before it and not to re-write the agreement for the parties, having gone through the agreements executed between the parties to this dispute, I find and hold that the applicant has not made up a *prima facie* case with a probability of success at trial because there is evidence that he defaulted in his rent paying obligation to the respondent which breach entitled the respondent to terminate the lease agreement that existed between them.

26. On whether the applicant stands to suffer irreparable loss or otherwise put loss incapable of being compensated by award of damages if the orders sought are not granted, my view is that the applicant's interest being recovery of the amount of money he has used in developing the suit property and the profit he would gain there from, the loss if any, that he might suffer owing to denial of the orders sought in case he succeeds in his case against the respondent, is quantifiable hence compensable by way of damages.

27. Although I am not bound to consider the third condition as I have no doubt that the applicant can adequately be compensated by way of damages in case he succeeds in his case against the respondent, I am equally of the considered view that the balance of convenience tilts in favour of the respondent whose rights have accrued under the agreements executed between it and the applicant.

28. It is also doubtful whether the application can be sustained yet the suit on which it is premised has no prayer for injunction. In my view, by seeking for an injunction through the application herein when the main suit has no prayer for an injunction, the applicant violated the provisions of **Order 2 Rule 6** of the Civil Procedure Rules which prohibits parties to suits from departing from their initial pleadings unless by way of amendment.

29. The upshot of the foregoing is that the application herein is found to be lacking in merit and is dismissed with costs to the respondent.

Orders accordingly.

Dated, Signed and Delivered in open court at Nyeri this 22nd day of May, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the applicant

Mr. Nganga for the respondent

Court assistant - Esther