



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 26 OF 2018

'FAST TRACK'

DR. MOSES NENE T/A NEKIN FARM VET DEPOT.....PLAINTIFF

VERSUS

AYA INN LIMITED.....DEFENDANT

RULING

This ruling is in respect of an application dated 1st February 2018 brought by way of notice of motion by the plaintiff/applicant seeking for orders.

1) Spent

2) THAT the defendant by itself, its servants and or agents be restrained from harassing the plaintiff, interfering with his business, closing the premises or in whatsoever manner evicting him or placing into occupation any new tenant or taking possession of the business premises known as AYA INN BUILDING situated on the land parcel known as ELDORET MUNICIPALITY/ BLOCK 7/83 pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit.

3) THAT the defendant does reopen for the tenant the demised business premises known as AYA INN BUILDING situated on the land parcel known as ELDORET MUNICIPALITY/ BLOCK 7/83 and in default the tenant be at liberty to break in and gain unhindered access pending the hearing and determination of this application and thereafter pending the hearing and determination of the suit.

4) THAT the Officer Commanding Eldoret Central Police Station do assist in compliance of the orders and ensure peace prevails.

5) THAT the costs of this application be provided for.

This matter came to court vide a certificate of urgency when the court ordered that the matter be served within 7 days. The court later gave orders of temporary injunction pending the hearing of the application inter partes. Before the hearing of the application the respondent filed another application dated 15th March 2018 seeking to stay the orders of injunction granted by the court pending the hearing of the application inter partes. The court expunged the said application from the court records and ordered that the parties canvass the issues in the inter partes hearing of the application dated 1st February 2018.

Counsel for the plaintiff argued the application and relied on the grounds on the face of the application together with the supporting affidavit of the applicant. He stated that the applicant has been a tenant in the suit premises since 1999 and had already paid rent for 3 months prior to being evicted. It was further Counsel's submission that the applicant had filed this case at the Business Premises Tribunal which indicated that it did not have jurisdiction to hear and determine the matter.

Mr. Mogambi submitted that they had annexed copies of single business permits and a letter of intent informing the landlord of changing the business from agricultural to telephony. He stated that the Tribunal issued an injunction restraining the defendant from evicting the applicant and further that the court gave interim orders on 15/2/18.

Counsel also submitted that he had looked at the replying affidavit by the respondent which alleges that the applicant accepted to vacate the premises but it is not clear how the applicant was served with the letter. Counsel therefore relied on the list of authorities filed to support the applicant's case. He urged the court to grant the orders as prayed.

Defendant's Submissions

Mr Ndege for the defendant/respondent opposed the application and relied on the replying affidavit dated 13/3/18. He submitted that this matter was filed in the BPRT which had an opportunity to visit the premises and found out that the tenant had already vacated the suit premises. It was his submission that the tribunal made a finding that the applicant had already given vacant possession as per the annexed judgment.

Counsel further submitted that the applicant has not disclosed to the court that he is not in occupation of the premises and that the court cannot issue an injunction restraining the respondent from harassing a tenant who is not in occupation of the premises.

Mr. Ndege submitted that after the applicant vacated the premises the respondent applied to the County government to renovate the premises which approval was granted as per the annexed letter. Counsel also stated that the premises have been renovated and new tenants have taken occupation of the premises as per the annexed photos. It was also his submission that no receipts have been attached to show that the applicant has been paying rent

Finally Counsel for the respondent submitted that the applicant has not established a prima facie case as he is not in occupation of the premises. Further that injunctions are equitable remedies and applicants must come to court with clean hands. He urged the court to dismiss the applicant's application as the balance of convenience tilts in favour of the defendant.

Analysis and determination

This is an application for a temporary injunction restraining the defendant from harassing or evicting the plaintiff/applicant. The principles of grant of injunctions are very clear as per the Giella Casman Brown case. I need not regurgitate or reinvent them.

It should be noted from the onset that this matter had been filed at the Business Premises Tribunal who heard and rendered a judgment on the same. The Tribunal had earlier granted orders of injunction but later when they sent an inspector to the site they found out the tenant was not in occupation the same was vacated. The Tribunal allowed parties to tender their evidence and rendered a judgment that due to the fact that the tenant was no longer in occupation of the premises, they lacked jurisdiction to entertain the matter to reinstate the tenant into occupation.

From the supporting documentation and the submission by both Counsel, the applicant has not given forth any evidence to show that he has a prima facie case with a probability of success against the defendant. The fact that he annexed a single business permit does not establish that he is in occupation. Further the letter dated 17/7/17 indicating the intention of changing the business from agricultural to telephony does not help much as it was not responded to by the respondent. It is also admitted from the proceedings at the Tribunal that the respondent wrote a cheque to the applicant which the advocate admitted that they received but had not yet cashed.

Injunctions are equitable remedies which the court has discretion to grant or decline depending on the circumstances of each case. The court must be guided by the principles of grant of injunctions. In cases where a party can be compensated in monetary terms in case of damage then the court has no business granting interlocutory injunctions. The returns in a business can be calculated and valued in monetary terms. The other limb of the grant of temporary injunction that if the court is in doubt then it can decide on a balance of convenience tilts in favour of the respondent.

The gist of this application also wants the court to reinstate the applicant into occupation. I find that the applicant has not met the threshold of grant of temporary injunctions and the same is declined. The earlier orders granted by this court are hereby vacated.

Dated and delivered at Eldoret this 27th day of September, 2018.

M.A. ODENY

JUDGE

Ruling read in open court in the presence of Mr. Mogambi for Plaintiff/Applicant and Miss Mwangumbi for defendant/Respondent.

Mr. Koech: Court Assistant.