



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 71 OF 2018**

**CHARLES MUTURI AND 32 OTHERS.....PLAINTIFFS**

**VERSUS**

**LUCAS NGARARI NJOGU.....1<sup>ST</sup> DEFENDANT**

**SAMSON OTIENO WASEKA.....2<sup>ND</sup> DEFENDANT**

**JOSEPH WAWERU (AS TRUSTEES OF**

**NYAYO MARKET SELF HELP GROUP).....3<sup>RD</sup> DEFENDANT**

**THE COUNTY GOVERNMENT OF**

**TRANS NZOIA.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Notice of Motion dated 27<sup>th</sup> July, 2018 seeks that an interlocutory injunction be issued to restrain the defendants from in any manner interfering with the plaintiff's business premises standing on part of **LR Number 2216 /27/111** pending the hearing and determination of the suit.

2. The Notice of Motion is founded on **14** grounds set out at the foot of the application. These are the same grounds that are replicated in the supporting affidavit 27/7/2018. In summary the grounds relied on are that the applicants are tenants of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the suit premises and their tenancies are controlled. For some time the 1<sup>st</sup> to 3<sup>rd</sup> respondents have intended to evict the applicants. On the 17/7/2017 the 1<sup>st</sup> - 3<sup>rd</sup> respondents in an annual general meeting resolved to use previous notices and letters from NEMA and Public Health authorities to enable members demolish the business premises of the applicants. However the 1<sup>st</sup> - 3<sup>rd</sup> respondents later wrote to the head of enforcement County Government of Trans Nzoia seeking the County Government's assistance in the demolition of the plaintiff's business premises. The County Government then scheduled a demolition exercise for 29/7/18; it is argued that the demolition is intended to circumvent the provisions of the **Landlord and Tenant Act Cap 301** of the Laws of Kenya.

3. In the supporting affidavit it is stated by the deponent that the applicants have paid rent and renewed their business licences for the year **2018** and they attach several copies of sample receipts and licences.

4. The applicants have exhibited **3** orders issued by the **Business Premises Rent Tribunal Eldoret**. The order dated **5<sup>th</sup> May 2017** in BPRT 18-47/2016 - Eldoret struck out the landlord's notice as incompetent and ordered service of a fresh notice upon the applicants. The second order by the same Tribunal in another case **Tribunal Case Number 22-55/2017-Eldoret** also ordered the management committee and/or registered trustees of the respondent to serve the tenants with fresh notice under **Section 4(2) Of Cap 301**. The third order made by the Business Premises Rent Tribunal in **Kitale Case No. 08/18** on 12/7/2018 prohibited the respondents from harassing the applicants in any manner. There is also a sample letter dated 31/5/2017 sent to one Charles Waimiri (2<sup>nd</sup> plaintiff); it alleges that he has trespassed into the respondents' land and put up an unplanned illegal structure which the respondents allege are a nuisance and a health hazard. The letter requires him to remove the said structures within **14** days.

5. In a replying affidavit sworn on the 22<sup>nd</sup> August 2018 and filed on the same day **Lucas Njogu** the 1<sup>st</sup> respondent he depones to the following facts: that the suit premises is a three storey building used by various shareholders and their respective tenants for commercial purposes; that it was build according to approved architectural plans; that on completion each member or shareholder was allocated his section to use for business purposes; that in the course of time some members built additional structures in the hallways and walkways and other open spaces which were without the consent of the respondents and which were also not in the initial approved plans; that the said structures have caused congestion and interfered with the smooth running of operations in the premises and they would make evacuation in

the event of a fire impossible; that unprofessional connections to electricity to the structures objected to increases the risk; that NEMA and the County Government of Trans Nzoia have on several occasions warned that the structures should be removed and the applicants are aware of these notices by such statutory bodies; that the national and county authorities on inspection of the premises condemned the structures and ordered that they be demolished; that the structures ought be removed, and the respondents have no malice but just want to comply with the law; that the suits before the business premises tribunal were not adjudged on the merits but were struck out on technicalities; that this court lacks jurisdiction to entertain or determine the suit; that the plaintiffs have admitted that their structures are illegal; that the plaintiffs have come to court with unclean hands; that this court should avoid giving orders that will perpetuate an illegality; that the alleged tenancy agreements have expired and can not be relied on; that even if the tenancy agreements were still in existence, the structures are illegal and so the tenancies are not enforceable. The deponent exhibits a copy of an inspection report by the county government; an environmental restoration order from NEMA; a fire inspection report from the county government and two other letters on the issue of the structures.

6. In a replying affidavit file by the 4<sup>th</sup> respondent on **29/8/2018** the deponent one **Sifuna Wakofula** avers that vide a letter dated **16/5/2016** Ms. Wechesa & Mago Architects wrote a letter to the market chairman and copied it to the County Engineer stating that there were uncoordinated constructions and extensions within the suit premises and recommended their removal. The County Government thereafter conducted an inspection which established that all exits in the suit premises were blocked by the structures; that the structures violated fire safety rules; that drainage systems have been affected leading to destruction of concrete beams; that NEMA also voiced its objection to the structures on the basis that they increased the capacity beyond what the premises were meant for and that it there were no clear fire exits in the event of a fire; that NEMA then issued a restoration order to the respondents; that the justice and peace centre had also reported to the 4<sup>th</sup> respondent that it had received reports that the premises were at the risk of collapsing and therefore it sought the 4<sup>th</sup> respondent's intervention whereupon a statutory notice was issued to the market chairman; that the county architect had inspected the premises and established that the structural integrity thereof had been compromised; that when a reminder was sent to the market chairman by the public health on the **21/2/2018** the market secretary alleged that the market management had been unable to comply with the notices from the 4<sup>th</sup> respondent and asked it to take action; that the structures are not approved and they pose a danger to the public; that the county government would only base its demolition of the structures on expert reports and not on the recommendations of the general meeting of the Nyayo Market Self Help Group. Further the deponent avers that the business permits issued by the 4<sup>th</sup> respondents do not absolve the parties from complying with legal health and safety guidelines; that the suit is premature as appeal mechanisms have not been exhausted; that the business premises rent tribunal has the original jurisdiction to hear and determine the dispute and that if orders from the tribunal had been breached the best remedy is contempt proceedings; that the application by the 25<sup>th</sup> respondent is *res judicata* and his claim is *res subjudice* **BPRT Case No 8 of 2018 – Kitale**, and that the application has not established a prima facie case with probability of success.

7. A further supporting affidavit sworn by the 1<sup>st</sup> applicant was filed on the **9<sup>th</sup> October 2018** in response to the two replying affidavits of the respondents. The same emphasizes that rents have been paid to the 1<sup>st</sup> and 3<sup>rd</sup> respondents to date, that the premises were inspected even before the **2018** licensing, that they should be heard before any, if at all, demolition of their structures issues. Further the deponent avers that the reports by the officers of the 4<sup>th</sup> respondent and NEMA require independent verification. It is also his opinion that termination by legal process of the tenancies and court action to secure a demolition order as resolved in the special general meeting of **17/7/2018** should have been sought before any unilateral decision to demolish the structures is implemented. Further he alleges that the structures were built and rented out by the landlord presumably upon approval of the 4<sup>th</sup> respondent. Finally it is averred that the Business Premises Rent Tribunal; has no jurisdiction to deal with demolitions hence the suit.

8. The applicant filed his submissions on the **11<sup>th</sup> October 2018** and the 1<sup>st</sup> to 3<sup>rd</sup> respondents on **24<sup>th</sup> September 2018**. The 4<sup>th</sup> respondent brought up the rear on the **29<sup>th</sup> October 2018**. I have considered all these submissions.

9. I consider that the licensing of the applicants to conduct their businesses in the structures and the suit premises generally was based on an inspection of the structures and the premises. Any authority that would license members of the public and then turn around to condemn the same premises it had licensed them to conduct business on requires to justify such a turnaround.

10. There is also a dispute as to who constructed the structures complained of as well as the issue of whether rent is still being paid to the 1<sup>st</sup> - 3<sup>rd</sup> respondents.

11. The issues raised regarding the legality of the structures and the veracity of the reports submitted by various authorities can not be verified at this interlocutory stage. If these issues have not been verified in this court the proposed demolition of the structures, an irreversible process, may not be proper. It is necessary that any party who comes to court be granted an opportunity to articulate their case before such an action that definitely affect their right to livelihood is undertaken.

12. Besides there appears to have been a tug of war between the tenants and the landlord as to whether the tenants should vacate the premises or not. It existed before this suit was filed.

13. Thirdly this suit is purely about the intended demolition of the premises. However, whether or not the applicant's submission that the jurisdiction of the Business Premises Rent Tribunal does not extend to the intended demolition is correct I find that this matter concerns land, land use, leases and the environment and that the applicants have therefore come to the proper forum. One of the issues raised is whether the legality of the tenancies and the perfection of the termination process would be required to be observed first if the demolition is to happen.

14. I find that if the proposed demolition is allowed to occur the very substratum of the suit the subject matter would be completely obliterated and the suit would be rendered nugatory.

15. For the above reasons I find that the application by the applicants is merited and I grant the application dated **27<sup>th</sup> July, 2018** in terms of **prayer 3** thereof with the effect that the interim orders injuncting the respondents from conducting any demolition are hereby confirmed pending the hearing and determination of this suit.

**Dated, signed and delivered at Kitale on this 15<sup>th</sup> day of November, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**15/11/2018**

Coram

Before - Hon. Mwangi Njoroge Judge

Court Assistant: Picoty

Mr. Kiarie for plaintiff/applicant

N/A for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent

N/A for the 4<sup>th</sup> defendant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**15/11/2018**