



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 90 OF 2018

GIDEON MOI.....PLAINTIFF

VERSUS

SAMUEL TOWETT KIBOWEN.....DEFENDANT

RULING

1. By Notice of Motion dated 21st February 2018, the plaintiff sought the following orders:

1) Spent

2) Spent

3) That pending the hearing and determination of the main suit, this honourable court be pleased to issue an order of injunction restraining the defendant by himself, his agents, servants and/or employees from making any further developments in parcel of land known as Nakuru/Municipality Block 4/138.

4) Spent

5) That pending the hearing and determination of the suit herein, this honourable court be pleased to issue a mandatory injunction to compel the defendant to give vacant possession to the plaintiffs (sic) of all that parcel of land known as Nakuru/Municipality Block 4/138.

6) That pending the hearing and determination of the suit herein, this honourable court be pleased to grant an order of injunction restraining the defendant by himself, his agents, servants and/or employees from interfering with the plaintiff's quiet possession and from trespass (sic) on the suit property.

7) That pending the hearing and determination of the suit herein, this honourable court be pleased to issue an order of eviction against the defendant from all that parcel of land known as Nakuru/Municipality Block 4/138.

8) That Officer in Charge of Nakuru Central Police Station be ordered to enforce orders of the court.

9) That costs of the application be borne by the defendant.

2. The application was supported by an affidavit sworn by the plaintiff. He deposed that he is the registered proprietor of the parcel of land known as Nakuru/Municipality Block 4/138 (the suit property) and that the defendant has been his tenant in respect of the suit property paying a monthly rent of KShs 50,000 until March 2017 when the tenancy was terminated. That the defendant responded to the notice of termination by filing a reference against the plaintiff in the Business Premises Rent Tribunal being Tribunal Case No. 30 of 2017 (Nakuru). The tribunal issued orders on 12th May 2017 restraining the plaintiff from evicting the defendant. The said orders however lapsed on 16th June 2017. The plaintiff therefore sought the orders in the application.

3. The defendant responded to the application through his replying affidavit sworn on 19th March 2018. He deposed that his tenancy is a controlled one which is governed by the Business Premises Rent Tribunal Act. He added that Tribunal Case No. 30 of 2017 (Nakuru) is still pending and that the orders of the tribunal were confirmed pending hearing and determination of the reference to the tribunal. He therefore urged the court to strike out this case since it is an abuse of the court's process.

4. The applicant filed written submissions in respect of the application on 10th May 2018. The defendant did not file any written submissions. He instead relied entirely on his replying affidavit.

5. I have considered the application, the affidavits filed and the submissions. There is no dispute that there is currently pending before the Business Premises Rent Tribunal, a case between the parties herein being Tribunal Case No. 30 of 2017 (Nakuru). The plaintiff acknowledges that the said reference is as a result of a notice of termination of tenancy that he served upon the defendant. The plaintiff does not dispute the jurisdiction of the tribunal to handle the reference, he only seems to argue that the tribunal has no jurisdiction to grant an injunction and that since he needs injunctions as prayed in the present application, he had to approach this court.

6. The Business Premises Rent Tribunal is established pursuant to **Section 11** of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**, Chapter 301 Laws of Kenya. Section 6 of the Act provides:

6. Reference to Tribunal

(1) A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal: Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section.

(2) A Tribunal to which a reference is made shall, within seven days after the receipt thereof, give notice of such reference to the requesting party concerned.

7. Pursuant to section 15 of the Act, any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to this court.

8. It is thus clear that the tribunal must be given a chance to determine the dispute before it. Upon its decision then a dissatisfied party can appeal to this court. I have perused the plaint herein as well as the present application. The plaintiff seeks eviction of the defendant from the suit property on the ground that he served a notice of termination of tenancy upon the defendant. This is the very issue that is pending before the tribunal. The court cannot be asked to determine the very issue that is properly before the tribunal.

9. The defendant has argued that this case amounts to abuse of court process and that it should be struck out. In **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR**, the Court of Appeal stated as follows in regard to what constitutes abuse of the court's process:

We must therefore determine if, in the circumstances the Originating Summons as framed, constituted an abuse of the court process. In this connection, we are greatly concerned that even after Mr Church had admitted that his occupation or possession was based on a tenancy he still did use the 1st respondent company to file an Originating Summons and claim a purchasers interest and also claim as an adverse possessor. In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. We are of course aware that we cannot comprehensively list all possible forms of abuse of court process and that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not, but in the circumstances of this case we do think that since the Originating Summons was instituted in the face of the admission of tenancy, this, in our view, does constitute an abuse of the court process. The 1st respondent and Mr Church did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in bona fides and was oppressive to the appellants. All these in our view constitute abuse of process.

To re-inforce the point, abuse of process has been defined in WIKIPEDIA, the free encyclopedia:

“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice.”

In BEINOSI v WYLEY 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohamad CJ, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

... The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive.

10. I am satisfied that by filing this case in this court while the same dispute is pending before the tribunal, the plaintiff has employed the judicial process in a frivolous, vexatious and oppressive manner to the detriment of efficient and effective administration of justice. I find and hold that this suit is an abuse of the court's process.

11. This suit is therefore struck out with costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 18th day of December 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Langat holding brief for Mr Kipkoech for the plaintiff/applicant

Mr Ikua for the defendant/respondent

Court Assistants: Gichaba & Lotkomoi