



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 238 OF 2016

AMOS KEIRERI KANYUGO PLAINTIFF/APPLICANT

-VERSUS-

KIREITHI TRUST DEFENDANT/RESPONDENT

RULING

1. By a plaint dated **3rd November, 2016**, the plaintiff herein brought this suit seeking judgment against the defendant, Kireithi Trust, for inter *alia*, an order directing the defendant to re-open shop No. G12 at Tabby Plaza on **L.R No. Nyeri Municipality/Block 3/68** (hereinafter referred to as “the suit property”) which he accuses the defendant of having unlawfully locked.

2. Simultaneously with the plaint, the plaintiff brought the notice of motion of even date seeking the following orders:-

1) Certification of the application as urgent and deserving to be heard *ex parte* in the first instance;

2) An order compelling the respondent to immediately re-open his shop pending arbitration or the hearing and determination of the application/suit.

3) A temporary injunction to restrain the respondent by itself, its agents, servants or otherwise whatsoever from closing, blocking or in any other manner whatsoever interfering with his tenancy in respect of the shop herein pending arbitration or hearing and determination of the suit;

4) Costs of the application.

3. The application is opposed through the notice of preliminary objection dated **8th November, 2016** in which the respondent contends that the lease agreement on which the applicant’s claim is hinged is invalid and as such incapable of being enforced by this court; that this court lacks jurisdiction to entertain the suit as a court of first instance.

4. Terming the application frivolous, vexatious, bad in law and an abuse of the court process, the respondent claims that the applicant is not its tenant.

5. On 23rd November, 2016 the respondent filed its statement of defence in which it basically reiterated the contents of its notice of preliminary objection herein.

6. When the notice of preliminary objection came up for hearing, counsel for the applicant, **Mr. Muthui**, reiterated the contention that no lease agreement exists between the applicant and the respondent. He pointed out that the lease agreement relied on by the applicant is not signed by the respondent and submitted that the applicant ought to have lodged his claim with the Business Premises Rent Tribunal (BPRT).

7. Counsel for the respondent, **Mr. Macharia**, acknowledged that the lease agreement relied on by the applicant is not signed by the respondent but pointed out that the lease agreement is on the respondent's letter head. Explaining that the tenant accepted the terms of the lease, he pointed out that before the respondent purportedly terminated the agreement, the parties were relating on the basis of that agreement. He referred to the respondent's letter dated 21st October, 2016 where the respondent acknowledged the applicant as its tenant.

8. Concerning the respondent's contention that the applicant ought to have filed a complaint/reference before the BPRT before seeking an injunction before this court, based on the decision of the Court of Appeal in the case of **Nathidas & Co. Ltd v. Nyali Air Conditioning & Refrigeration Services Ltd**, he submitted that it was proper to institute the suit before this court because the Tribunal has no jurisdiction to grant an injunction. According to him, the question as to whether or not the tenancy that exists between the parties is a controlled one is a matter of fact to be proved by way of evidence.

9. For the foregoing reasons, he submitted that the preliminary objection does not meet the threshold set in **Mukisa Biscuits** case.

10. In a rejoinder, counsel for the defendant/respondent submitted that the fact that the lease is on a letter head of the plaintiff/respondent does not cure the fact that the lease is not signed by the respondent. He reiterated the contention that this court lacks jurisdiction to hear and determine the claim as a court of first instance. According to him, the documents relied on by the applicant do not specify the term of the lease yet a lease agreement must have a time frame.

Analysis and determination

11. From the pleadings and the submissions by the respective parties the issues for determination are:

- a) Whether this court has jurisdiction to hear and determine the suit herein?
- b) Whether there exists or existed a tenancy agreement between the plaintiff and the defendant?
- c) Whether the applicant has made up a case for being granted the orders sought?
- d) What orders should the court make?

12. On whether this court has jurisdiction to hear and determine the case herein, it is contended that because the tenancy that exists between the plaintiff and defendant, if any, is a controlled one, this court lacks jurisdiction to hear and determine the claim herein as a court of first instance and that the plaintiff ought to have first filed a complaint or reference before the BPRT, before seeking an injunction before this court.

13. The said contention is challenged on the grounds that the issue as to whether the tenancy agreement is or was a controlled one is a question of fact and as such incapable of forming the subject matter of the preliminary objection; and that the Tribunal lacks jurisdiction to grant an injunction.

14. In determining this issue I adopt the decision in the case of **Moses N. Gitonga & another v George Gatheca Kinyanjui & another [2014] eKLR** where **Kasango J.** stated:-

“12. Precedence shows that the right forum is to seek orders of injunction in the High Court even if there is a case pending in the PBRT. This was the holding in the case of S. N. T/A Baby

Steps Kindergarten Vs Hasham Lalji Properties Ltd & Another [2008] eKLR, where Nambuye, J. (as she then was) held that the High Court has jurisdiction to entertain an application for injunction even if the dispute arises from tenant landlord relationship governed by the Landlord, Tenant, Shops Hotels and Catering Establishment Act, Cap. 301. The learned Judge held as follows:

“Issue of jurisdiction arises because it is common ground that the dispute arises from a tenant and landlord relationship which relationship is governed by the Land Lord, Tenant, Shops, Hotels, and Catering Establishment Act, Cap 301 Laws of Kenya. It is trite law and this court takes judicial notice of the fact that the said Act has an inbuilt dispute resolution mechanism to some extent. This mechanism does not cover disputes seeking such equitable reliefs. The court of appeal in its decision in the case of NARSHIDAS & COMPANY LTD VERSUS NYALI AIR CONDITIONING AND REFRIGERATION SERVICES LTD NARIOBI CA 205/1995 where the central theme in the decision is that a controlled tenant confronted with an illegal threat of forcible eviction cannot go to the Business Premises Rent Tribunal established under the Act as that tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. The CA went on to state that the superior court has jurisdiction not only to entertain the application for the injunctive relief but also to grant the same. On that basis this court is satisfied that it is properly seized of the matter.”.....

.....Having established that the Application is properly before this court, it is my view that the same should be determined on the basis of the principles of injunction as laid down in the case of GIELLA v. CASSMAN BROWN & CO. LTD[1973] EA 358 at page 360 where Spry J. held that:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

15. Applying the aforesaid decision to the circumstances of this case, I find I must overrule the defendant/respondent’s objection.
16. On whether there exists or existed a tenancy agreement between the plaintiff/applicant and the defendant/ respondent, from the documents annexed to the affidavit sworn in support of the application to wit letters dated 21st October, 2016 and the notice dated 28th October, 2016, I have no doubt that there existed a tenancy between the parties herein.
17. As to whether the plaintiff/applicant has made up a case for being granted the orders sought, based on the uncontroverted evidence of the plaintiff/respondent that the defendant respondent has locked the suit property and the provisions of **Section 57** of the Land Act which suggest that a notice is necessary before a periodic tenancy can be terminated, I find the conduct of the defendant/respondent of locking/terminating the tenancy without issuing the plaintiff/applicant with a notice or before the lapse of the notice it had issued, to have been unjustified and unlawful.
18. In view of the foregoing, I find the defendant/respondent’s notice of preliminary objection to be unmerited and dismiss it with costs to the plaintiff/respondent.
19. On the other hand, I find the notice of motion dated **3rd November, 2016** to be merited.
20. Since the defendant/respondent has filed his statement of defence, thus taking away the parties right to have the dispute determined by arbitration, I grant the orders sought under prayer (2) and (3) of the notice of motion herein pending the hearing and determination of the suit.

Orders accordingly.

Dated, signed and delivered in Nyeri on this 16th day of January, 2017.

L WAITHAKA

JUDGE

In the presence of:

Mr. Ombongi h/b for Mr. Macharia Waweru for the applicant

Mr. Muthui Kimani for respondent

Court clerk - Esther