



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 1067 OF 2016

ALICE NGIMA KARIITHI.....PLAINTIFF

VERSUS

GRANDWAYS VENTURES LIMITED1STDEFENDANT

KANG'ETHE ENTERPRISES AUCTIONEERS.....2ND DEFENDANT

RULING

On 26th April 2013, the 1st Defendant offered to the Plaintiff a lease of shop No. F4A007 – RC situated on Woodvale Grove, Westland, Nairobi on terms and conditions which were set out in the letter of offer of the same date. The letter of offer provided among others that the lease was to be for six (6) years and that the Plaintiff would pay monthly rent of Kshs.84,740/=, Kshs.60,214/=, Kshs.66,235/=, Kshs.72,859/=, Kshs.80,145/= and Kshs.88,160/= for the 1st, 2nd, 3rd, 4th, 5th and 6th years respectively of the tenancy. The letter of offer provided further that if the rent was not paid on due date, the Plaintiff would pay a penalty on the rent due and not paid at the rate of 2% per month from the date of default to the date of payment. The Plaintiff accepted the 1st Defendant's offer on 6th May 2013 and took possession of the suit property.

On 25th July, 2016, the 1st Defendant instructed the 2nd Defendant to levy distress against the Plaintiff for the recovery of rent arrears amounting to Kshs.735,928/=. Acting on the said instructions the 2nd Defendant proceeded to the suit property and made a proclamation over the Plaintiff's movable properties thereon giving the Plaintiff 14 days to pay the outstanding rent together with auctioneers charges failure to which the said properties would be removed from the Plaintiff's premises and sold to recover the said rent.

The Plaintiff moved this court on 5th September, 2016 seeking an order for accounts of monies due and owing by the Plaintiff to the 1st Defendant, a declaration that the Plaintiff is a protected tenant, a permanent injunction to restrain the Defendants from selling or disposing of the Plaintiff's properties and a mandatory injunction compelling the 1st Defendant to allow the Plaintiff to vacate the suit property.

Together with the plaint, the Plaintiff brought an application by way of Notice of Motion dated 2nd September 2016 seeking a temporary injunction to restrain the Defendants from selling, disposing of, transferring or in any other way dealing with the Plaintiff's properties in the suit property pending the hearing and determination of this suit. The application which was supported by the Plaintiff's affidavit was brought on the grounds that although the Plaintiff and the 1st Defendant had entered into an agreement to lease the suit property for 6 years, the formal lease was not drawn and executed by the parties and as such the Plaintiff became a protected tenant under the Landlord and Tenant (Shops, Hotels

and Catering Establishments) Act, Cap 301 Laws of Kenya (“the Act”). The Plaintiff contended that the distress that was levied against her by the 2nd defendant on the instruction of the 1st Defendant was illegal and void because the 1st Defendant had not served her with a notice under the Act. The Plaintiff contended further that the 1st Defendant had failed to give a true statement of account and had continued to charge interest on the outstanding rent without giving an explanation on how the said interest was arrived at despite demands by the Plaintiff upon it to do so. The Plaintiff contended that in view of the Defendant’s conduct aforesaid, the Plaintiff continued occupation of the suit property had become untenable. The Plaintiff contended that she would suffer irreparable loss if the orders sought are not granted. The Plaintiff annexed to her affidavit in support of the application among others, the letter of offer of the lease over the suit property dated 26th April, 2013, a copy of e-mail dated 5th June, 2016 from the 1st Defendant, a copy her e-mail dated 4th June, 2016 to the 1st Defendant, a copy of a letter dated 15th July 2016 addressed to her by the 1st Defendant, a copy of the proclamation dated 27th July, 2016 by the 2nd Defendant, and a copy of her termination of the lease dated 15th August 2016.

The Plaintiff’s application was opposed by the 1st Defendant through a replying affidavit sworn by Suku E. Sherwin on 5th October, 2016. The 1st Defendant stated that the Plaintiff having signed a letter of offer could not contest the existence of a lease between her and the 1st Defendant for 6 years. The 1st Defendant stated that the Plaintiff was not diligent in her rent payment obligations to the 1st Defendant as and when the rent fell due and that as of the date of execution of the affidavit the Plaintiff was in rent arrears to the tune of Kshs.866,202/=. The 1st defendant denied that it had failed to provide the Plaintiff with statements of her rent account. The 1st Defendant contended that it had availed the rent account statements to the Plaintiff on several occasions. The 1st Defendant contended that it was undeniable fact that the Plaintiff did not pay rent in accordance with the letter of offer of the lease and that she was in arrears. The 1st Defendant contended that the letter of offer executed by the Plaintiff did not provide for use of rent deposit to clear rent arrears. The 1st Defendant annexed to its replying affidavit among others, a copy of a letter dated 11th February, 2014 forwarding to the Plaintiff a lease for execution and a copy of the Plaintiff’s rent statement from 1st November, 2015 to 1st August, 2016.

The application was argued before me on 13th October, 2016 when Mr. Wairegi appeared for the Plaintiff while Ms. Otieno appeared for the defendants. In his submission, Mr. Wairegi argued that rent that was due and payable by the Plaintiff to the 1st defendant as at 31st July, 2016 was Kshs.540,064/= and that against this amount, the Plaintiff had issued the 1st Defendant with post dated cheques amounting to Kshs.338,000/= and a sum of Kshs.184,000/= held by the 1st Defendant as a deposit. Mr. Wairegi argued that the said cheques and the deposit held by the 1st Defendant were sufficient to cover the rent that was outstanding as at the time the Plaintiff terminated her tenancy with the 1st Defendant in respect of the suit property. Mr. Wairegi submitted that there was no lease between the parties and that the distress which was levied by the 1st Defendant was illegal. In her submissions in reply, Ms. Otieno submitted that there was a lease between the parties the terms of which were contained in the letter of offer. Ms. Otieno submitted that as at the time of levying distress the Plaintiff was in rent arrears and as such the distress was lawful.

I have considered the Plaintiff’s application together with the supporting affidavit. I have also considered the defendants’ affidavit in opposition to the application and the submissions by the advocates for the parties. What is challenged in these proceedings is the distress which was levied by the 1st Defendant against the Plaintiff through the 2nd Defendant on 27th July, 2016. For the Plaintiff to obtain the orders sought, the onus was upon her to establish on a prima facie basis that the distress aforesaid was unlawful and that if the orders sought are not granted, she will suffer irreparable injury which cannot be compensated in damages. On the material before me, I am not persuaded that the distress levied herein was illegal and that the Plaintiff would suffer irreparable harm unless the orders sought are granted. The evidence before me by both parties shows that the Plaintiff was very irregular in her rent payments to the 1st Defendant and was in rent arrears most of the time. The statement of account which was submitted by

the 1st Defendant shows that as at 27th July 2016 when the distress for rent was levied against the Plaintiff, the Plaintiff was in rent arrears to the tune of over Kshs.700,000/=. The Plaintiff did not file supplementary affidavit to controvert the contents of this statement of account. In the absence of any evidence that the distress against the Plaintiff was illegal, I am not satisfied that the Plaintiff has established a prima facie case against the Defendants.

I was unable to appreciate the Plaintiff's protected tenancy argument. The Plaintiff executed an agreement with the 1st Defendant under which the 1st Defendant and the Plaintiff agreed to enter into a lease for six (6) years. Although no lease was signed, the agreement was binding inter partes. The Plaintiff having agreed to take on a lease for six (6) years cannot claim protection under the provisions of the Landlord and Tenant (shops Hotels and Catering Establishments) Act. Even if it is assumed that the Plaintiff was a protected tenant, I am unable to see how that status would have shielded her from paying rent and in default from distress. The Plaintiff has also not convinced me that she will suffer irreparable harm unless the orders sought are granted. The plaintiff has contended that her continued occupation of the suit property is no longer tenable and that she has terminated her tenancy with the 1st Defendant. The Plaintiff is not fighting to retain her tenancy. Her only concern is over the goods which have been distrained. I am of the view that the 1st Defendant who is the Plaintiff's Landlord can compensate the Plaintiff for the value of the said properties in the event the Plaintiff proves at the trial that the distress was unlawful.

The upshot of the foregoing is that the Plaintiff's Notice of Motion dated 2nd September, 2016 has no merit. The same is dismissed with costs to the 1st Defendant.

Delivered and Signed at Nairobi this 31st day of March, 2017

S. OKONG'O

JUDGE

In the presence of

N/A for the Plaintiff

Ms. Omondi for the Defendants

Kajuju Court Assistant