

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCSUIT NO. 28 OF 2017

JOSEPH MUSYOKI MUTHUKI.....PLAINTIFF

VERSUS

ADELE TURA1STDEFENDANT

HEAVENLINK PROPERTIES.....2ND DEFENDANT

RULING

The 1st Defendant is the registered proprietor of all that parcel of land known as L.R No. 2327/281 situated on Chui Lane, Hardy Estate, Langata together with the developments thereon comprising of a residential house (hereinafter referred to as “the suit property”). The Plaintiff brought this suit against the Defendants on 16th January 2017. The Plaintiff averred that on or about 24th December 2016 he entered into a tenancy agreement with the 2nd Defendant as agent of the 1st Defendant in respect of the suit property commencing on 1st January 2017. The Plaintiff averred that under the said tenancy agreement he was required to pay two (2) months rent amounting to Kshs. 360,000/= as a deposit and one month rent in the sum of Kshs. 180,000/= in advance making a total of Kshs. 540,000/=. The Plaintiff averred that he fulfilled his part of the tenancy agreement by paying the said sum of Kshs. 540,000/= after which he took possession of the suit property on 2nd January 2017. The Plaintiff averred that on 4th January 2017 the 1st Defendant came to the suit property with a new lease which was materially different from the lease that was made between him and the 2nd Defendant. The Plaintiff averred that on 8th January 2017, the 1st Defendant demanded that he vacates the suit property notwithstanding the fact that he had fulfilled his part of the lease agreement. The Plaintiff averred that he was under threat of eviction by the 1st Defendant unless the court intervenes.

Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 12th January, 2017 seeking a temporary injunction to restrain the Defendants from evicting him from the suit property or interfering in any way with his to quiet and peaceful occupation thereof pending the hearing and determination of the suit. In his affidavit in support of the application, the Plaintiff stated that on 24th December 2016 he entered into a rental/lease agreement with the 2nd Defendant who acted as agent of the 1st Defendant in respect of the suit property. Following that agreement, he met the 1st Defendant who allowed him to move onto the suit property with effect from 1st January 2017 in accordance with the terms of the lease which he had entered into with the 2nd Defendant. The Plaintiff stated that in accordance with the terms of the said lease, he paid to the 1st Defendant a total sum of Kshs. 540,000/= comprising of two (2) months rent as a deposit and one (1) month rent in advance. The Plaintiff stated that after he moved into the suit property on 2nd January 2017, the 1st Defendant came up with a new lease agreement which was different from the one he entered into with the 2nd Defendant and demanded that he signs the same. The Plaintiff stated that from 8th January 2017, the 1st Defendant started demanding that he vacates the suit property without any lawful cause. The Plaintiff stated that the 1st Defendant also started sending security guards to the suit property to evict him. The Plaintiff stated that the aforesaid acts by the 1st Defendant was illegal and that the 1st Defendant would carry out his threat to evict him from the suit property unless restrained by the court. The Plaintiff annexed to his affidavit in support of the application, a copy of the purported lease/tenancy agreement which he entered into with the 2nd Defendant, documents in proof of the payment of Kshs. 540,000/= and correspondence exchanged

with the 1st Defendant.

The application was opposed by the 1st Defendant through a replying affidavit sworn on 24th February 2017. The 1st Defendant admitted that there were negotiations between the Plaintiff and the Defendants over the possibility of the Plaintiff leasing the suit property from the 1st Defendant. The 1st Defendant stated that through deceit, the Plaintiff took possession of the suit property before they had agreed on all the terms of the lease and before the execution of the lease. The 1st Defendant stated that there was no lease between him and the Plaintiff and that the Plaintiff had obtained *ex parte* orders herein through misrepresentation and non-disclosure of material facts. The Plaintiff did not file a further affidavit to refute the allegations contained in the replying affidavit by the 1st Defendant.

I have considered the Plaintiff application together with the affidavit filed in support thereof. I have also considered the affidavit filed in opposition to the application and the submissions by the parties' respective advocates. In the case of Giellavs.Cassman Brown & Co. Ltd. (1973) E. A 358, it was held that an applicant for a temporary injunction must establish a *prima facie* case with a probability of success against the respondent and must also demonstrate that he stands to suffer irreparable harm which cannot be compensated in damages unless the order is granted. If the court is in doubt as to the above, the application would be determined on a balance of convenience. An injunction is an equitable remedy and as such discretionary. It follows therefore that even if a party meets all the conditions set out above, the court may still refuse to grant the injunction if it is of the opinion that it would be inequitable to do so. I am not satisfied that the Plaintiff has met the conditions for granting the orders sought. The Plaintiff has not satisfied the court that he entered into a lease agreement with any of the Defendants in respect of the suit property. The material on record shows that the parties had commenced negotiations with a view to entering into a lease agreement. It is apparent however that the Plaintiff took possession of the suit property before the parties could enter into the said lease agreement. The 1st Defendant has contended that the Plaintiff took possession of the suit property by deceiving the security guards who had the keys to the suit property that he had the permission of the 1st Defendant to take possession of the suit property. The Plaintiff did not deny this fact. The purported lease annexed to the affidavit of the Plaintiff in support of the application was not signed by any of the Defendants. The same is therefore not a lease capable of enforcement by this court. The 1st Defendant contended that the Plaintiff took possession of the suit property even before paying the deposit and advance rent which the parties seems to have agreed upon. Again, the Plaintiff has not denied this fact. The documents annexed to the Plaintiff's affidavit supports the 1st defendant's contention in this regard. Due to the foregoing, I am not satisfied that the Plaintiff has established a *prima facie* case against the Defendants with a probability of success. I also find the conduct of the Plaintiff inequitable. The Plaintiff does not therefore deserve an injunctive relief which is an equitable remedy. The Plaintiff took possession of the 1st Defendant's property without his permission. A court of law cannot lend its aid to the Plaintiff to keep what he obtained unlawfully.

As to whether the Plaintiff would suffer irreparable harm if the orders sought are not granted, I have noted that the purported lease which the Plaintiff claimed to have entered into with the Defendants was terminable by two (2) months notice or payment of two (2) months rent in lieu thereof. I have also noted that the Plaintiff has sought general damages in the plaint. This means that the Plaintiff's possible loss can be quantified and compensated in damages. I am not satisfied that the Plaintiff would suffer irreparable harm which cannot be compensated in damages.

The upshot of the foregoing is that there is no merit in the Notice of Motion application dated 12th January 2017. The same is dismissed accordingly with costs to the 1st Defendant.

Delivered and Signed at Nairobi this 27th day of June, 2017

S. OKONG'O

JUDGE

Ruling read in open court in presence of:

Ms. Wangui for Plaintiff

N/A for 1st Defendant

N/A for 2nd Defendant

Kajuju Court Assistant