



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 76 OF 2016

ANITA MUGAMBI PLAINTIFF

VERSUS

MERU COUNTY INVESTMENT

& DEVELOPMENT CORPORATION.....DEFENDANT

RULING

1. The application dated 14:06:16 seeks orders that

1. Spent.

2. That the Honourable Court be pleased to issue an order of temporary injunction restraining the Defendant/Respondent, its agents/servants, assigns, representatives and/or anyone acting at its behest from terminating lease dated 1/3/2011, evicting and/or increased the rent over Massionate E erected on MUNICIPALITY /BLOCK/11/119 situated at Meru pending hearing interparties of this Application or pending further orders of this court.

3. That the Honourable Court be pleased to issue an order of temporary injunction restraining the Defendant/Respondent, its agents/servants, assigns, representative and/or anyone acting at its behest from terminating lease dated 1/3/2011, evicting and/or increasing the rent over Massionate E erected on Municipality/Block/11/119 situated at Meru pending the hearing and determination of this suit.

4. That costs be borne by the Defendant/Respondent.

2. The grounds in support of the application are that

(a) That the Applicant is a tenant on MUNICIPALITY/BLOCK 11/119 comprising Massionates Block E respectively.

(b) That the lease as executed by the Applicant dated 1/3/2011 does not bear a clause for termination.

(c) That by way of a notice dated 26/4/2016 the Respondent has purported to terminate a lease without due process.

(d) That the tenant has been performing the obligations for the last 5 years.

(e) That it is in the interest of justice that the orders herein are sought.

3. Applicant has also filed a Replying Affidavit where she has deponed as follows:-

(1) That she is the Applicant herein well versed with the facts of this matter and therefore competent to make and swear this affidavit.

(2) That by way of a lease agreement dated 1/3/2011 she occupied the defendant's premises known as BLOCK E at monthly rent of Kshs. 20,000/=.

(3) That the said lease does not bear a termination clause It was to run until 2021.

(4) That he has been a faithful tenant with the predecessors of the defendant for the last 5 years and counting.

(5) That she has never defaulted or breached any terms of the lease to date.

(6) That the lease agreement dated 1/3/2016 did not have a termination clause therein. The Plaintiff was prepared to run the full term.

(7) That on the 26/4/2016 she received a letter revising the rent to Kshs. 140,800/= plus service charge of Kshs. 28,160/= making a total of Kshs. 168,960/=. Attached thereon was a new lease agreement.

(8) That no sooner had the representation of the defendant settled in her mind than the Plaintiff received another letter dated 07/6/2016 ostensibly terminating the lease with effect from 07/07/2016 as the effective date

(9) That it is now clear to her that the defendant simply wants to evict her from the said building.

(10) That the defendant is disturbing her quiet and peaceful occupation.

(11) That the defendant's actions are arbitrary, capricious and illegal and a ploy to make her leave the demised premises without reasonable cause.

(12) That there being a valid and subsisting lease which is still running the defendant cannot toss her back and forth at its whims and delight.

(13) That the defendant's actions are unjustified and infringe on her right to affordable housing under Article 40 of the New Constitution.

4. In further support of her application, the applicant has availed the following documents for Court's perusal:

(a) The copy of lease agreement of 1.3.11

(b) Letter dated 26.4.16 containing revision of rent and service charges.

(c) Letter of 7.6.16 terminating the lease.

5. The application is opposed via the Replying Affidavit of JOEL KINYUA IMITIRA where he has deponed as follows:-

(1) He is an adult male, and the Managing Director in the Defendant Company in this matter conversant with the facts of this case and authorized to swear this affidavit.

(2) He has read and understood the defendant /applicant's Notice of Motion filed on 15th June, 2016 and supported by an affidavit sworn on the same day and a supplementary affidavit sworn on the 6th July, 2016 and he swears this affidavit in reply thereto.

(3) On 1st March 2011, the Plaintiff herein entered into a lease agreement with the former Meru County Council subsequently the Meru County Government . The premises are wholly owned by Meru County Government. The Lease was in respect to House Number Block E erected on Title Number Municipality/Block 11/119-Meru (*Hereinafter called 'the premises*). On page 2 of the Lease, on General Covenants clauses, the Lease provided as follows on clause (1) and clause(5);

a. "The rent shall be reviewed after every two years;

b. "Any party wishing to alter this tenancy shall give one month's notice or pay one month's rent in lieu of notice."

(4) The Defendant instructed a registered valuer to prepare a report on fair and market rates for the premises. The valuer vide report dated 20th January, 2016 advised that the premises can attract a rent of Kshs. 100 per square foot per month.

(5) Following advice of the Valuer, the Defendant reviewed rent in respect to the Premises to Ksh. 100 per square foot and further service charge of Kshs. 20 per square foot. The Plaintiff was requested to execute new Tenancy Agreement.

(6) The Plaintiff declined to execute new Tenancy Agreement and also failed to pay reviewed rent. The Defendant engaged a professional to advise it on fair and market rental value of the Premises. The rental review was done in accordance with Lease dated 1st March 2011.

(7) The Lease provided that the rent was subject to review after two (2) years. Since the Plaintiff took over the premises, over 5 years ago, the rent has never been reviewed. The Defendant , which is managing the premises, on behalf of Meru County Government has not been receiving rent as per prevailing market rates . The Plaintiff has been paying Kshs. 20, 000 per month compared to market rates of Kshs. 168,960. The County Government is losing Kshs. 148,960 per month.

(8) Vide letter dated 7th June 2016, the Defendant issued one (1) month to vacate the premises. The notice was issued in accordance with clause 5 (*General Covenants-page 2*) of Lease dated 1st March, 2011. Thus the Plaintiff's assertion that the Lease did not contain termination clause is untrue and misleading.

(9) Defendant further avers that a lessor has power to terminate a Lease under ***Section 56(a) of the land Act***. The Defendant terminated the lease in accordance with clause on the Lease. It issued 30 days termination notice to the Plaintiff as required under the Lease.

(10) Defendant also states that:-

(a) That the Lease Agreement between the parties herein having been for ten (10) years was required under law to be registered;

(b) According to Section 36 (2) of the Land Registration Act, the Lease Agreement having not been so registered , therefore means it cannot be regarded as a lease but as a mere contract;

(c) Lease having not been registered, the intention of parties could not have been to create long term lease;

(d) Thus, the lease could have been terminated by giving one (1) month notice of termination. The rent is payable on monthly basis.

(11). The grant of the orders sought by the applicant would infringe on the Defendant's proprietary rights. The Defendant has a right to ensure maximum utility of the Premises. The Defendant is already incurring financial loss as there are many potential tenants ready to come into the Premises and pay the rent at current commercial rate.

(12). It is only fair and in the interest of justice that the current application be dismissed, with costs.

6. Respondent has also availed supporting documents as "JKI -5".

7. Way back on 06:07:16, the Plaintiff had obtained Injunction Orders against the defendant. The said orders have been extended from time to time until 27.4.17.

The issue for determination at this stage is only one. Whether the application meets the criteria set out in the case of *Giella Versus Cassman Brown & Co Ltd. [1973] EA 358*. The set criteria is;

(a) Demonstration of a Prima Facie case with a high probability of Success.

(b) Demonstration that the Plaintiff stands to suffer irreparable loss unless the temporary injunction sought is granted.

(c) If the Court is unable to determine the application based upon the first two principles, it will decide it upon a balance of convenience.

8. PRIMA FACIE CASE

On this issue, the Court can only consider whether the applicant has established a strong case. Her anchor is the agreement dated

01:03: 2011 between her and County Council of Meru. Applicant avers that the agreement has no termination clause. Respondent on the other hand makes reference to the general covenant clause.

1. "The rent shall be reviewed after every two years.

5 "Any party wishing to alter this tenancy shall give one month's notice or pay one month's rent in lieu of Notice"

As submitted by the applicant in *National Bank Versus Pipe Plastic Sarkilit (K) Ltd & Another. Civil Appeal No. 95 of 1999.*

" A Court of Law cannot re rewrite a contract between the parties as the parties are bound by the terms of their contract , unless coercion, fraud or undue influence ".

9. This Court will not purport to interpret the terms of the agreement at this stage. The Court will be guided by what is plainly provided. There is indeed a provision for alteration of the tenancy whereby a one month's notice is to be given. The Respondent did issue such a notice which the applicant failed to comply with. The fact that the new proposed rent is high is not a factor to be considered at this stage as the contract is silent on the amount of rent to be considered during the alteration of the tenancy.

I therefore find that a prima case has not been established.

On this criteria, application fails.

10. Does the applicant stand to suffer irreparable damage?. The applicant has not demonstrated that he stands to suffer irreparable harm or that damage, would not be an adequate compensation. To this end, I find that the case cited by defence *Vivo Energy Kenya Limited versus Maloba Petrol Station Limited & 3 others [2015] eKLR* is applicable. In that case, Reference was made to the decision in

Nguruman Limited -versus Jan Bonde Nielsen & 2 other, Civil Appeal No. 77 of 2012 where it was held:

".....If damages recoverable in law is an adequate remedy and the Respondent is capable of paying , no interlocutory order of injunction should normally be granted. however strong the applicant's claim may appear at that stage..."

11.The applicant has not advanced any argument to the effect that Respondent would not be in a position to pay damages. The application fails on this criteria.

12.**Balance of convenience.** As the matter stands now, applicant is apparently not paying any rent. She is also the one enjoying the Injunctive Orders . The Respondent and by extension the public is incurring losses yet the premises belong to the Respondent. The balance of convenience does not tilt in favour of the applicant. The application fails on this ground.

13.CONCLUSION

Finally I find that the Injunctive Orders were granted on 11.07.16. The provisions of order 40r 6 of Civil Procedure Rules states that " Where a suit in respect of an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the Court orders otherwise".

In the instant case, the Injunctive Orders have lapsed by operation of the rules of procedure.

I find that the application has no merits. The same is dismissed with costs to Respondent. The Injunctive Orders given earlier on are hereby vacated .

DELIVERED, DATED AND SIGNED AT MERU THIS 19TH DAY OF JULY, 2017 IN THE PRESENCE OF:

C:A Janet

Miss NJenga for Plaintiff

Thangicia h/b for Kiruki for defendant present

HON. L. N. MBUGUA

JUDGE