



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 14 OF 2017

JOSEPH CHILUMO & 29 OTHERS.....PLAINTIFFS/APPLICANTS

VERSUS

COUNTY GOVERNMENT OF KILIFI.....DEFENDANT/RESPONDENT

RULING

1. I have before me an application dated 31st January 2017. The 30 Plaintiffs/Applicants are seeking for an order:-

THAT this Honourable Court do issue a temporary injunction against the Defendant, its agents, employees, servants, assignees and/or any other person authorized by it from evicting the plaintiffs/ applicants from their respective houses in Ngala and Mwangea Housing Estates pending the hearing and determination of the suit herein.

2. The Application is supported by the annexed affidavit of Joseph Chilumo, the 1st Plaintiffs/Applicant sworn on 20th January 2017. The Application is premised inter alia on the following grounds:-

(i) That the County Government of Kilifi-the Defendant/Respondent herein, has issued a Notice to the Plaintiffs requiring them to vacate their respective houses by 8th February 2017 for purposes of reserving the same for its employees.

(ii) That the said notices is against the purpose for which the Defendant was established under the Constitution of Kenya 2010, it violates the national Constitution. , it breaches the Constitutional rights of the Plaintiffs, it is made in bad faith and more particularly, the notice is against:-

(a) The purpose of the Defendant's functions as provided for in Section 8(d) of Part 2 of the Fourth Schedule to the Constitution of Kenya, 2010.

(b) The objects and principles of devolved government which provide, among others, for the promotion social and economic development and for the provision of proximate, easy accessible services throughout Kenya as stated in Article 174(f) of the Constitution of Kenya, 2010.

(c) The fundamental right under Article 40(3) of the Constitution of Kenya, 2010 which insulates the Plaintiffs from being deprived of their interests in the said houses by the State.

(d) The fundamental right under Article 43(b) of the Constitution of Kenya 2010 which bestows the Plaintiff with the right to accessible and adequate housing and accessible and adequate housing and to reasonable standards of sanitation.

(e) The right to administrative action that is reasonable and procedurally fair as stipulated under Article 47 of the Constitution of Kenya, 2010.

(f) The right to equal protection and benefit of the law and against any form of discrimination as enshrined under Article 27 of the Constitution of Kenya, 2010.

(iii) By issuing the said notice and if the same is implemented, then the Defendants shall have committed the Constitutional and legal breaches and or violations stated hereinabove.

(iv) Consequently the Plaintiffs shall suffer irreparable harm, loss and damage that cannot be compensated by way of damages including:-

(a) Rendering the plaintiffs'' families homeless or without proper and or adequate housing.

(b) Disruption of the plaintiffs'' lifestyle which shall have great economic and or social prejudices.

3. The Defendant is however opposed to the order sought. In a Replying Affidavit sworn by its Director of Legal Services Ms Michelle Bibi Fondo on 20th March 2017, the County Government of Kilifi avers that the suit premises were put up by the defunct County Council of Kilifi for purposes of housing its employees and were rented to several staff members of the defunct council in accordance with a tenancy agreement. The said tenancy agreement allowed the defunct council to terminate the tenancy by giving a month's notice and/or by re-entering the premises if rent was in arrears for seven days.

4. The Defendant further avers that after the promulgation of the Constitution and operational action of the devolved governance system, the suit premises and the tenants were taken over by the Defendant by virtue of Section 134 of the County Government Act, 2012 and the Defendant accordingly became the owner of the suit premises.

5. Further and in addition to the foregoing, the Defendants aver that on 6th May 2015, they issued a termination notice to the Plaintiffs to the effect that the housing units of the estate will be reserved only for its employees and gave the Plaintiffs 30 days to vacate the premises as provided in the tenancy agreement. The plaintiffs however refused and moved to the Chief Magistrates Court at Malindi where they filed **Civil Suit No. 201 of 2015; Joseph Chilumo & 35 Others –vs- County Government of Kilifi**.

6. It is further the Defendants case that upon obtaining injunctive orders in the said case, the plaintiffs neglected to pay rent and are now in arrears. The said suit was however dismissed for want of jurisdiction on 29th June 2016. Subsequently, on 4th November 2016, the Defendants issued another notice requiring the plaintiffs to clear the rent arrears and to vacate the premises within 3 months from the date of the notice. The Defendants contend that despite the said notice, the plaintiffs neglected to clear the rent arrears and instead moved to this Court and filed the current suit and the application now before me.

7. I have considered the application and the Affidavit in reply. I have also considered the written and oral submissions made before me by the Learned Counsels for the Parties herein. I think it is now settled that in an interlocutory injunction application such as this one, the applicant has to satisfy the triple requirements to;

(a) Establish his case only at a prima facie level;

(b) Demonstrate irreparable injury if a temporary injunction is not granted; and

(c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.

8. In ***Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125***, the Court of Appeal fashioned a definition for “prima facie case” in civil cases in the following words:-

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a Standard, which is higher than an arguable case.”

9. In the matter before me, it is not contested that the suit premises were leased by the defunct County Council of Kilifi to the plaintiffs. A copy of the tenancy agreement is attached to the Applicant’s Supporting Affidavit and marked “JC-1” Clause 18 thereof reads as follows:-

“18. The tenancy shall be terminated at the end of any calendar month by either party giving the other previous notice in writing in that behalf provided that if and whenever any part of the rent is in arrears for seven days (whether formally demanded or not) or if any whenever there shall be a breach by the tenant of any of the foregoing conditions of tenancy, the council may re-enter upon the premises and thereupon the tenancy shall determine as if written notice to quit has been due, given and expired.”

10. It is also not denied that on promulgation of the Constitution of Kenya 2010 and the subsequent enactment of the County Government Act, the suit premises became the Defendants Property and all tenants thereon including the Plaintiffs became tenants of the Defendant herein by virtue of Section 134 of the County Government Act.

11. It would appear that after taking over the suit premises by operations of the law as above –mentioned, the Defendants determined to take back the suit premises for use by its employees. Thus on or about 6th May 2015 they issued various notices to the Plaintiffs in the following manner:-

“Notice to vacate House Premise Ngala Housing Estate; House No-

This is to advice you that it has been decided that you vacate the premises and handover the same to the County Government of Kilifi. Housing Units of this Estate will be reserved for only the employees of the County Government.

*You are hereby given **one month from the date of this letter upto to 6th June 2015** to look for alternative accommodation.*

We highly regret for any inconveniences we shall have caused.”

12. Aggrieved by the Defendant’s notice, the Plaintiffs moved to court and filed ***Malindi CMCC No. 201 of 2015; Joseph Chilumo & 35 Others –vs- The County Government of Kilifi***. The said suit was however dismissed after the Chief Magistrate’s Court determined that it had no jurisdiction to hear the same on 29th June 2016. The Court granted the parties a right of appeal within 30 days.

13. It would however appear that neither party appealed the decision. Subsequently, on or about 4th November 2016, the Defendant issued another notice to the Plaintiffs. The new notice reads as follows:-

“Take notice that the appeal period concerning the case No CMCC No. 2010 of 2015 (Malindi) - Joseph Chilumo & 35 Others –vs- County Government of Kilifi ended on 29th August 2016.

This is therefore to notify you to clear your house rent/arrears within a period of three (3) months

and give vacant possession of the premises on or before 8th February 2017.”

14. It is this new Notice that prompted this Suit and the current application before me for an injunction. In **Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014)eKLR, the Court of Appeal stated:-**

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

15. Outlining their case for an injunction, the Plaintiffs argue that the decision to terminate the tenancy goes against the purpose upon which the Defendant was established and in any case, is in violation of Articles 27, 40, 43 and 47 of the Constitution. The plaintiffs do not however specifically plead nor have they adduced any evidence on the specific right or fundamental freedom infringed by the Defendant in giving the said notice.

16. It is clear to me that the genesis of this Suit is the tenancy agreement between the parties herein. Section 6 of the County Government Act gives the County Government powers to enter in its own name. I have not seen any Clause either in the Act or in the Constitution that creates an obligation upon the Defendant to provide specific housing to its inhabitants. I am not convinced by the Plaintiffs arguments that merely because the Defendant is a public body, it is obliged by law to provide housing to its subjects.

17. From the material placed before me, the relationship between the Plaintiffs and the Defendants is purely contractual. The Plaintiffs have themselves produced the said contract in court as we have seen and it provides at Clause 18 thereof that either party can terminate the tenancy upon giving a month’s notice to the other. The plaintiffs were first issued with notice on 6th June 2015. They did not vacate the suit premises. In the latest notice, the Defendant has given them three (3) months notice, two (2) more than what is prescribed in the contract.

18. In **Stanley Kamere & 26 Others –vs- National Housing Corporation & 2 Others (2015) eKLR**, the Honourable Justice Anyara Emukule dealing with a more or less similar matter stated as follows:-

“Section 3(1) of the Housing Act Cap 117 of the Laws of Kenya establishes the National Housing Corporation as a body Corporate. Section 3(4) of the Act gives the Corporation power to enter into contract, to hold and dispose of property both movable and immovable, and may sue and be sued in its corporate name. A general reading of the Act gives the clear impression that the Corporation though State owned, is expected to run its affairs on the principles of modern business, to make investments and generate returns. From the uncontroverted pleadings, of the first Respondent, it is clear that the First Respondent’s rental houses are designed to generate revenue for the construction of more houses. There is nothing in the Act that requires them to provide social/charitable public facilities. To have them step out into the role of providing free housing would be without basis and ultra vires their statutory mandate....That being said, the relationship between the parties is purely contractual. The petitioners have not pleaded or proved that there was any fraud, coercion or undue influence in the course of the contract.”

19. Similarly in the application before me, the relationship between the parties is purely contractual. The plaintiffs have not in my view demonstrated that there exists a constitutional issue over and above the contractual issue herein. From the provisions of Clause 18 of the tenancy agreement, it was envisaged by the parties that the tenancy arrangement would at some point come to an end. The said contract was not to run in perpetuity. Thus having been given three months to vacate, the plaintiffs cannot be heard to claim that they stand to suffer irreparable loss if and when the tenancy is terminated.

20. In the premises, I find and hold that the application dated 31st January 2017 has not merit. The same is dismissed.

21. Each Party shall bear their own costs.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J.O. OLOLA

JUDGE