



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC CIVIL CASE NO. 90 OF 2015

MOHAMED RAFIQ SADIK.....PLAINTIFF/APPLICANT

VERSUS

DAVID KINYUA MBIKO.....1ST DEFENDANT/RESPONDENT

MOHAMED BOOR MOHAMED.....2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed this motion premised under the provision of Order 40 rules 1 and 2 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act seeking the following orders ;

a) Spent

b) Spent

c) That this Court do issue an order of mandatory injunction compelling the Respondents, their families or agents and employees working under their instructions to evacuate with immediate effect from the premises situated on plot No Mombasa/Block XXXVI/29 Old town in Mombasa pending hearing and determination of the suit.

d) The OCS Central Police Station to supervise the execution of the said order.

2. The application is grounded on the affidavit of Mohamed Rafiq and grounds stated on the face of the application inter alia that the Applicant is the owner of the suit premises which is not safe and may collapse any time. The Respondents who are in occupation of the building have refused to be evacuated.

3. The Applicant deposed that he has been advised by County engineers that the building is unsafe and need to be demolished before tragedy strikes. He annexed two letters to buttress this fact. He deposed that the building may collapse any time due to the heavy rains therefore he asked the Court to grant the orders sought.

4. The Application is opposed by the Respondents by a replying affidavit jointly sworn. They have denied that the suit premises is unsafe. The Respondents aver that after the fire incident, they replaced the roofing of the demised premises which was the only part that had been affected. They are surprised that the request to have the premises demolished on safety grounds came from the Applicant therefore in their view this application is propelled by malice.

5. The Respondents depose that the Applicant is intent on evicting them unprocedurally before their tenancy agreement expires and they have annexed a copy of the tenancy agreement. Further since the Applicant is seeking the orders in bad faith and tainted hands, he should not be granted the orders. Lastly that the Applicant has not made out a prima facie case with a probability of succeeding. They urged the Court to dismiss the application with costs.
6. Together with the Replying affidavit, the Respondents filed a preliminary point of law that this Court lacks jurisdiction to entertain this matter. The parties agreed that the objection and the application be heard together. They filed submissions in respect of both. I have considered these submissions filed.
7. On the issue of jurisdiction, the Respondents did not submit on it. I will treat it as abandoned. However I wish to note that by the nature of the prayers sought herein, the Business Premises Tribunal may grant the orders sought as pleaded but it is clothed with jurisdiction to grant appropriate orders was the matter be placed before it.
8. This Court is now tasked to determine the merits of the application. The Applicant in his submissions reiterated the contents of the application, the supporting affidavit and the replying affidavit. He submitted that there is emergency to evacuate the Respondents who have refused to move to a safe place. He submitted that his application has met the requirements of **Giella vs Cassman Brown** and urged the Court to grant the orders sought.
9. The Applicant had annexed in the supporting affidavit photographs of the suit premises to demonstrate that they are unsafe. In his letter to the County engineer dated 16.2.2015 (annex MRS 3) he asked that the engineer do issue a condemnation notice to enable him demolish the building.
10. In response to the letter the county engineer prepared a report in which they gave an analysis of the condition of the building. The report recommended that the building should be demolished. In the report, it is stated that the building was constructed over 70 years ago and that the fire incident affected part of it. The report has not been subjected to test through cross-examination and therefore this Court will not treat it as conclusive evidence.
11. The Applicant rented the premises to the Respondents from 4th July 2014 for a period of five years 3 months. It is not clear from the pleadings whether the Applicant served the Respondents any notice to terminate the lease before filing this suit. In submissions, the Applicant stated that he is not seeking eviction orders but evacuation orders. However the result will be the same so he ought to have served notice
12. The Applicant did not lay a background as to when the building became unsafe ; whether before or after letting out the suit premises to the Respondents. He has also not denied that they agreed with the Respondents to recover rents from monies used to repair the roof after the fire. He has not made provision on how the Respondents would recover the monies that they spent if the orders are granted. I say so because once this application is granted, there is nothing more to proceed to trial on the main suit.
13. In the case of Hassan vs Adan (2007) EA 179 the Court laid down the principles to be considered in granting mandatory injunction as was stated in 24 Habsbury's Laws of England 4 Edu as follows ;

“a mandatory injunction ought not to be granted on an interlocutory injunction in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory injunction, the Court had to feel a high sense of assurance that at the trial, it would appear that the injunction had rightly been granted”

14. The question then is does the present application make a clear case ? As I have outlined above, the request to declare the house as unsafe came from the Applicant. The report was prepared on the basis of this request therefore it would need to be subjected to cross-examination or comparison with another independent report. Further the Applicant has not made provision on the expenses incurred by the Respondents while repairing the roof will be sorted out. In the scenario presenting, this is not a clear case for which at the end of a trial a Court would have a sense of

assurance that granting the injunction then was proper.

15. The applicant creates an impression of a person who is attempting to use the Court process to terminate the tenancy between himself and the Respondents without following the procedure provided. This is an abuse of the Court process which does deserve the grant of an equitable remedy. Consequently, I find the application dated 21.12.15 as without merit and dismiss it with costs to the Respondents.

Ruling dated and delivered in Mombasa this 29th day of April, 2016

A. OMOLLO

JUDGE