



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI

CASE NO 199 OF 2014

HABIBA WAMBUI RAMADHAN.....1<sup>ST</sup> PLAINTIFF/APPLICANT

ANITA NYAMBURA.....2<sup>ND</sup> PLAINTIFF/APPLICANT

JOHN MWANGI WADHIGO.....3<sup>RD</sup> PLAINTIFF/APPLICANT

JOSEPH NJIHIA KAMAU.....4<sup>TH</sup> PLAINTIFF/APPLICANT

SULTAN AMIN HASHIM.....5<sup>TH</sup> PLAINTIFF/APPLICANT

MARIAM HASSAN CHEPKEMBIO.....6<sup>TH</sup> PLAINTIFF/APPLICANT

ZAWERIA WAMBOI MWANGI.....7<sup>TH</sup> PLAINTIFF/APPLICANT

PETER BAO KIMANI.....8<sup>TH</sup> PLAINTIFF/APPLICANT

VERSUS

MARY NJERI GITIBA.....DEFENDANT/RESPONDENT

RULING

The application for this court's consideration is the Notice of Motion dated 24<sup>th</sup> February 2014 brought under the *Rent Restriction Act, Cap 296, Laws of Kenya Article 43(1) (b) of the Constitution* and the *inherent power of the Court* seeking for orders that an injunctive orders be issued restraining the Defendant/Respondent by herself, her servants and or agents from evicting, auctioning and interfering with the plaintiffs' quiet possession of *Plot No Nairobi/206 along Digo Road in Pumwani*, pending the hearing and determination of the complaint lodged. That the Defendant be restrained from forcefully evicting, auctioning, increasing rent and/or harassing the plaintiffs.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of the 1<sup>st</sup> plaintiff who stated that the plaintiffs are tenants in the suit premises plot at Pumwani at an agreed monthly rent of *Kshs 400/=* and the defendant has through the Firm of *Kiume Kioko & Co. Advocates* served them with a demand notice to pay the sum of *Ksh 414,400/=* within one month or vacate the suit premises and failure to which she would through an auctioneer levy distress as well as evict the plaintiffs without further notice. The plaintiffs contend that they have been paying rent to one *Amina Chebunge*, who was the head tenant and upon her demise in 1995, the defendant collected rent

from them until 2007 when an application was filed in court regarding ownership of the suit premises by one **Kibungei Arap Kogo**, against the defendant in **ELC No 410 of 2007**, which is pending in court. The deponent avers that the plaintiffs are ready to pay rent but do not know who to pay to because the issue of ownership is yet to be determined in court. They seek the orders for the reasons that unless they are issued they would be forcefully evicted.

This application is opposed. The defendant filed a Replying Affidavit on 30<sup>th</sup> April 2014, wherein she stated that the application as filed by the plaintiffs does not meet the principles laid down in the case of **Giella –vs- Cassman Brown** on the issuance of injunction.

Further that the application has been brought in bad faith for the reasons that the plaintiff never replied to the letter sent to them by Kioko Advocate to express their alleged position in regard to the levying of distress that is the subject of this matter. She further stated that she was non suited as she had no knowledge of **Plot No 206 in Pumwani**, as alleged but she is the proprietor of **LR No 25180**, having been registered since 1<sup>st</sup> July 1999. Therefore the orders if issued in respect of plot 206, will be in vain, a futility which this court cannot grant. It was her contention that the plaintiffs have filed this suit as a way of collateral to escape the owner of the suit premises. She however acknowledges that she instructed **Kiume Kioko & Co Advocates** to levy distress against the plaintiffs and others for occupying the property as she had not authorized them from occupying the said premises and since they are in occupation they have to pay for it. She averred that the market value for rental houses in the area that the suit premises is situated was **Ksh 3,500/=**. She further stated that she had no knowledge of **Amina Chebunge**, and that the plaintiffs have never been on her premises and neither has she collected rent from the plaintiffs. That the suit **No 470 of 2007** was dismissed and that the matter had no bearing with this suit. That this Court has no jurisdiction to issue the reliefs sought. That the plaintiffs have not shown what loss or damages that they would suffer that cannot be compensated by an award of damages. It was her further contention that the application should be dismissed with costs.

This application was canvassed by way of written submissions which the court has read and carefully considered. I have considered the affidavits written submissions and the authorities relied upon by the parties. But before determining the application on merit, the court has to interrogate first whether there is a **Landlord–tenant relationship** between the plaintiffs and the defendant. The plaintiffs herein have claimed that they had been remitting rent to the defendant. However the defendant has disputed this fact alleging that she does not own **Plot No Nairobi /206**. I have looked at the letter dated **12<sup>th</sup> February 2014**, addressed to the plaintiffs by the Firm of **Kiume Kioko & Advocates** which indicated that they were given instructions by the defendant herein. In the said letter it is acknowledged that the plaintiffs have been paying a monthly rent of Ksh 400/= and that the plaintiffs have not been paying the said rent which has now accumulated. At paragraph 8 of the defendant’s Replying Affidavit, she stated that there was no tenancy agreement over the occupation of the suit property.

What then is this arrangement of rent payment between the plaintiffs and defendant? The plaintiffs’ relationship with the defendant is that of a Controlled Tenancy, because the defendant has created a month to month Tenancy. Controlled Tenancy is defined in **Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap 301** as:-

**“Controlled tenancy means a tenancy of a shop, hotel or catering establishment**

**(a) Which has not been reduced into writing; or**

**(b) Which has been reduced into writing and which –**

**i. is for a period not exceeding 5 years;**

**ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or**

**iii. relates to premises of a class specified under subsection (2) of this section:**

***“Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy”***

A controlled tenancy cannot be terminated nor can its terms be altered prior to a Notice as per Section 4 being given. Section 4 provides that there can be no termination and alteration of the terms and conditions of a controlled tenancy other than provided therein. In particular **Section 4(2)** provides,

***“A landlord who wishes to terminate a controlled tenancy or to alter, to the detriment of the tenant, any term or condition in, or right of service enjoyed by the tenant under, such a tenancy shall give notice in that behalf to the tenant in the prescribed form.”***

There is evidence that **Notice** was served upon the plaintiffs to pay the outstanding rent or face eviction.

**Halsbury’s Laws of England, 3rd Edition Vol. 15, page 247** provides for the operation of estoppel between landlord and tenant and it provides as follows:-

***“The relationship of landlord and tenant maybe brought into being even though the landlord has no title to the land of which he has purported to create a tenancy. If a landlord who has no title to do so, grants a lease under seal, the tenant, being a party to the deed, is estopped from disputing his lessor’s title. The doctrine of estoppel between landlord and tenant is not, however, confined to leases by deed”.***

Further at page 247 states,

***“The doctrine of estoppel which operates between landlord and tenant applies to tenancies from year to year, at will, or on sufferance, as well as to leases for years; and anyone holding under a tenant, or defending as landlord in an action of ejectment, is bound by it.”***

This means that it matters not that the defendant has denied the relationship between the two parties herein as that of landlord–tenant relationship because once she purported to create a tenancy; the law would presume that tenancy had been created.

Having stated so, this court will now look at the merit of the plaintiffs’ application. The main issue is whether the plaintiffs have made out a case to justify the orders of injunction that they seek. The case of **Giella –vs- Cassman Brown &Co.Ltd (1973)EA** clearly outlines the principles to be considered when granting an injunction and this can be summarized as follows:-

- a. In view of the above submissions, do the plaintiffs have a prima facie case in seeking injunction in terms of prayers 2?***
- b. Have the Plaintiffs shown that they will suffer irreparable injury that cannot be atoned by damages?***
- c. Where does the balance of convenience tilt?***

In **Mrao Ltd -vs- First American Bank of Kenya Ltd** the Hon. Mr. Justice Bosire J.A( as he then was )said –

***“..So what is a prima facie case? I would say that in civil cases it 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, as to call for an explanation or rebuttal from the latter.”***

The plaintiffs have stated that they do not know who the legal owner of the suit property was but they moved to Court after being served with notices to yield vacant possession of the suit property. The defendant has denied ownership of the suit premises but a keen reading at her Replying Affidavit at

paragraph 4, 12, and 13 shows that indeed she was the Landlord and had been collecting rent from the plaintiffs. However the defendant has not shown to what extent the plaintiffs are in arrears because no evidence has been shown to this court. The receipts the plaintiffs have provided is not a reflection of the rent remitted to the defendant as not all receipts if any have been shown. It is therefore my finding that whereas the plaintiffs have not shown a prima facie case with a probability to succeed, the defendant too has not shown to this court to what extent the plaintiffs are indebted to her and has denied owning the suit premises. The issues raised by the parties herein can only be canvassed at the hearing where the court will have to determine whether **LR No 25180** is not the same as **Plot 206**. However since the defendant has not properly disclosed her relationship with the plaintiffs then this court will be guided by the English case of **Films Rover Internationale (1986) 3 All ER 772 at page 780 – 781**, where Justice **Hoffman** made this point regarding the grant of injunctive relief;

***“...that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ .....”***

The plaintiffs in this case have been on the suit property for the last 12 years. Evicting them without giving them a hearing in court would be an injustice to them. Further the defendant would not suffer any damages as the damages can be quantified since the rent owed to her can be tabulated. It is therefore my finding that ***status quo be maintained and for avoidance of doubt***, the plaintiffs should ***not be evicted*** from the suit premises but the parties must comply with the following terms:-

***1. The defendant tabulates all the rent outstanding on each plaintiffs account at the rate of Ksh 400/= within the next 30 days and served upon the plaintiffs in person.***

***2. The plaintiffs upon receipt of their rent arrears to pay the monies to A/C No 09600018740 Family Bank, Account Name D.K Gitibah. Within 30 days and receipts filed in court.***

***3. Mention to confirm compliance and further directions on 15<sup>th</sup> May 2015.***

***4. Costs of this application shall be in the cause.***

It is so ordered.

Dated, Signed and delivered this ***10<sup>th</sup> day of April 2015***

**L. GACHERU**

**JUDGE**

In the Presence of:-

Present in persons Plaintiffs/Applicants

None attendance for the Defendant/Respondent though notified.

Hilda: Court Clerk

**L. GACHERU**

**JUDGE**

**Court:**

Mention Notice to issue to the Defendant's Advocate. The same to be issued by Deputy Registrar of this Court.

Further Mention on 15<sup>th</sup> May 2015.

**L. GACHERU**

**JUDGE**