



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 197 OF 2014

TEKIMAMO COMPANY LIMITED..... PLAINTIFF/APPLICANT

VERSUS

JULIUS GITAHI GICHUKI DEFENDANT/RESPONDENT

RULING

Introduction

1. By a plaint dated **22nd September, 2014** the plaintiff (Tekimamo Company Limited) filed the suit herein seeking judgment against the defendant, Julius Gitahi Gichuki, for:-

- a) An order directing the defendant to immediately give vacant possession of the premises known as Nyeri Municipality Block III/6 to it;**
- b) Mesne profits;**
- c) Such further orders as this court may deem just and expedient to make;**
- d) Costs of the suit together with interest thereon at court rates.**

2. Simultaneously with the plaint, the plaintiff filed a notice of motion of even date seeking to, *inter alia*, temporarily restrain the defendant by himself, his servants, agents, nominees or any other person claiming through him or under him from continuing to trespass into, using or occupying, entering into, dealing with and/or in any way interfering with the suit property (that to say Plot No. Nyeri Municipality Block 111/6) pending the hearing of the application and/or pending the hearing and determination of the main suit.

3. The application is premised on the grounds that the plaintiff is the owner of the suit premises, that the defendant purporting to be a tenant of the plaintiff, illegally and unlawfully encroached onto the suit premises and started using them without the plaintiff's knowledge, consent or authority and that the plaintiff has never accepted rent from the defendant. Further, that there is no tenancy-landlord relationship between the plaintiff and the defendant; that the person with whom the plaintiff had a tenancy relationship over the suit property, Githingi Ngotho, passed away in 2012. It is pointed out that after Githingi Ngotho passed on, the defendant continued paying rent in the name of the deceased tenant, which action is said to be illegal.

4. It is further pointed out that despite having been issued with a notice to vacate the suit premises, the

defendant refused to vacate and instead filed a reference to the business premises tribunal claiming that the plaintiff was harrasing him and that after the dispute was heard, the defendant was directed to be depositing rent at the tribunal.

5. Maintaining that the defendant is for all intent and purposes not its tenant, the plaintiff explains that it urgently needs vacant possession of the suit property in order to enable it organize its affairs and have in place a tenant of its choice.

In view of the foregoing, it is contended that it is in the interest of justice to grant the orders sought.

6. The application is supported by the affidavit of one of the directors of the plaintiff company, Eustace Wachira Macharia, where the grounds thereon are reiterated.

7. To prove the averments in the supporting affidavit, the following documents are annexed to the affidavit:-

i) Company resolution authorizing the deponent of the supporting affidavit to sign the affidavit and pleadings in this case or any other court cases against the defendant, marked **W-1**;

ii) Letter from the plaintiff's estate agent dated 21st January, 2014 to the effect that the circumstances under which the defendant took possession of the suit premises are unknown to them and a letter from the Assistant Chief Karia Sub-Location confirming that Githingi Ngotho passed on in 2012, marked **W2**;

iii) Notice sent to the defendant on 1/7/13 requiring him to vacate the suit premises, marked **W3**;

iv) Copy of the reference filed by the defendant to the Business Premises Tribunal, Case No. 12 of 2014 and copies of receipts issued in respect of rent payment annexed thereto, marked **W4**.

8. In reply and opposition to the application, the defendant filed the replying affidavit that he swore on **6th October, 2014**. In that affidavit, the defendant has, *inter alia*, deposed that he has been a tenant of the plaintiff since 2011; that in 2013 the plaintiff's agent, for reasons unknown to him, declined to accept rent. Explaining that the plaintiff's offices are situated in the suit property, the defendant argues that it's inconceivable that the plaintiff can feign ignorance of his occupation of the suit property for such a long period of time.

9. Denying the allegations that he is in occupation of the suit premises illegally, the defendant refers to the reference he filed to the Business Premises Tribunal and pending appeal in the High Court from the decision of the Tribunal dismissing the plaintiff's notice of termination of various tenancies and contends that the current suit is *subjudice* those cases. In view of the foregoing, the defendant urges this court to order the plaintiff to accept rent as before.

10. In support of the averments contained in his replying affidavit, the defendant has annexed the following documents to the affidavit:-

a) Copies of receipts covering the period 2011 to 15th June 2013, marked **IJ/772/1**;

b) Letter dated 11th July, 2013 in which the defendant replied to the plaintiff's notice and demand to vacate the suit property, marked **IJ/772/II**;

c) Business licences for year 2012, 2013 and 2014 issued to him by the County Government of Nyeri to carry out business in the suit premises, marked **IJ/772/III to V**;

d) Letter dated 25th November, 2011 in which the plaintiff communicated its position concerning the then tenant's intention to sub-let the suit property to the defendant, marked **IJ/772/VI**;

e) Copies of pleadings, in particular replying affidavit filed by the deponent to the replying affidavit filed in this suit; and the order issued by the Tribunal on 14th September, 2014 in the reference filed before the Business Premises Tribunal, marked **IJ/772/VIII-IX**;

f) Memorandum of appeal filed by the **plaintiff in Nyeri High Court Civil Appeal No. 139 of 2012**, marked **IJ/772/X**;

g) Letter from the defendant's advocate dated 11th June, 2014 forwarding a cheque for Kshs. 110,000/- to cover rent for July, 2013 to June, 2014, marked **IJ/772/XI**.

11. When the matter came up for hearing, counsel for the plaintiff **Mr Ananda** (holding brief for Mr. Jaoko), informed the court that there was no lease agreement executed between the plaintiff and the defendant. He submitted that there being no lease agreement executed between the plaintiff and the defendant, the defendant is not a tenant of the defendant. He pointed out that the tenant of the plaintiff in the premises was Githinji Ngotho who passed on in 2012.

12. Mr. Anunda informed the court that the defendant illegally occupied the suit property following the death of Githinji Ngotho. He stated that the plaintiff learnt about the defendant's illegal occupation of the suit property in 2013, after a report was filed by its agent to the effect that the defendant is a stranger. Upon receipt of that information, the plaintiff issued a notice on the defendant to vacate the suit property.

13. Instead of vacating the suit property as required of him, the defendant filed a reference to the Business Premises Rent Tribunal to wit Nyeri BPRT No. 12 of 2014.

14. Mr. Anunda explained that the tribunal stated it had no jurisdiction but nevertheless directed the defendant to deposit rent to the tribunal.

15. Referring to receipts for payment of rent produced by the defendant which are in the name of the Githinji Ngotho, counsel for the plaintiff submitted that the defendant is not an agent of the deceased so as to occupy the suit premises on behalf of the deceased.

16. Concerning the contention by the defendant that the current suit is *subjudice* the proceedings in the tribunal and the pending appeal concerning the decision of the tribunal, Mr. Anunda maintained that the suit is not *subjudice* those other pending proceedings.

17. With regard to the pending appeal, counsel for the plaintiff stated that according to the plaintiff the appeal has no basis.

18. Concerning the jurisdiction of this court to hear and determine the dispute, counsel referred to the case of **Nashibas & Company Ltd vs. Nyali Air conditioning** (a copy of which was not availed to the court) and submitted that the plaintiff has made a case for granting of the orders sought.

19. On his part, counsel for the defendant **Mr. Wahome**, made reference to prayers number 2,3, 4 and 5 in the application herein and submitted that being mandatory in nature, if granted, the prayers will conclude the suit preliminarily, yet it is not desirable to have the suit determined at the interlocutory stage. In this regard, he pointed out that the respondent has been in occupation since 2011 and that the letter dated 25th November, 2011 intimates that the plaintiff was aware of the intention of the deceased tenant to sub-let the suit property without authority.

20. According to Mr. Wahome, the question as to whether the deceased had authority to sub-let the suit premises to the defendant can only be determined if the matter goes for full hearing. The defendant's counsel further submitted that there is evidence that from the time Githinji Ngotho passed

on in 2012, the plaintiff had been accepting rent until sometime in 2013 when it declined, forcing the defendant to file a reference to the tribunal. Mr. Wahome pointed out that the tribunal directed that the defendant be paying rent at the tribunal and gave parties liberty to apply. Mr. Wahome also pointed out that the appeal lodged by the plaintiff challenging the Tribunal's order dismissing its termination notices is still pending. He also faulted the plaintiff for having moved to court with unclean hands.

21. Maintaining that the current suit is *subjudice* the proceedings pending before the tribunal and the appeal pending before the High Court, the defendant's counsel urged the court to dismiss the suit with costs.

22. In a rejoinder, Mr Anunda pointed out that no tenancy agreement was adduced and reiterated his contention that the Tribunal had no jurisdiction to hear and determine the reference by the defendant. He also reiterated his contention that the appeal pending at the High Court and the reference pending before the Tribunal are not a basis for sub judice.

Analysis and determination

23. It is not in dispute that after the plaintiff issued the defendant with a notice to vacate the suit premises, the defendant filed a reference to the Business Premises Rent Tribunal. Contrary to the contention by the plaintiff that the Tribunal stated it had no jurisdiction, the evidence on record shows that the parties before the Tribunal recorded a consent in the following terms:-

“1. By consent/tenant to deposit the rent from July, 2013 to the Tribunal until further orders of the Court.

2. The landlord will collect the amount less 10% collection charges.

3. The landlord is at liberty to apply.

4. No orders as to costs.”

24. It is clear from the above consent order, that contrary to the contention by the plaintiff that the tribunal stated that it had no jurisdiction to hear and determine the dispute, the tribunal did not decline jurisdiction over the matter brought before it. In fact, it is not clear whether the issue of the Tribunal having or not having jurisdiction was raised before it. Be that as it may, now that the question of jurisdiction of the Tribunal to hear and determine the dispute preferred before it has been raised in these proceedings, it is important to consider and determine whether the current suit is *subjudice* the case filed at the tribunal.

25. On whether the Tribunal had jurisdiction to hear and determine the dispute herein, I begin by pointing out that the Business Premises Rent Tribunal established under **Section 11** of the the Landlord Tenant Shops, Hotels and Catering Establishments Act, Cap 301 Laws of Kenya is not one of the Tribunals repealed by the Environment and Land Court Act. As such, the Tribunal continues to hear matters reserved for it under the Act as the “Court” of first instance. Appeals from the tribunal then fall to this court (Environment and Land Court Act). In this regard see this court's decision in the case of **Beatrice Nduta Kiarie Vs John Mwangi Thuo** Nakuru, ELC No. 290 of 2012.

26. Under Cap 301, the Business Premises Rent Tribunal has Power to, *inter alia*:-

(e) make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;....” (emphasis supplied).

27. It is clear from the aforementioned provisions of the law and in particular **Section 12(1)(e)** of Cap 301, that the Tribunal has power to make an order of recovery of possession and payment of arrears of

rent and mesne profits. Under that Section of the Law, it is clear that the power to make the order for possession and/or payment of mesne profits extends to any person, whether or not he is a tenant, so long as the person is in occupation of the suit premises, as is the situation in this case lies with the tribunal as the "court" of first instance.

28. Under **Section 15**, the High court gets seized of such disputes by way of appeal. The section provides:-

“15. (1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the High Court:

Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

(2) In hearing appeals under subsection (1) of this section, the court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.

(4) The procedure in and relating to appeals in civil matters from subordinate courts to the High Court shall govern appeals under this Act:

Provided that the decision of the High Court on any appeal under this Act shall be final and shall not be subject to further appeal.”

29. At the pain of repetition, it is clear from the above provision of the law that the Tribunal has jurisdiction to hear and determine the dispute preferred before it.

30. On whether the current suit is *subjudice* the proceedings began at the tribunal, it is noteworthy that **Section 6** of the Civil Procedure Act, Cap 21 Laws of Kenya **prohibits a court from proceeding with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.** (Emphasis supplied)

31. Having already found that the tribunal has power to determine the dispute lodged therein, I find the current suit to be bad in law. Noting that under **Section 15** of Cap 301 aforementioned, the only lawful way this court can get seized of the dispute from the Business Premises Tribunal is by way of Appeal, I decline to order for stay of the suit as contemplated under **Section 6** of the Civil Procedure Act and instead dismiss the suit with costs to the defendant.

Dated, signed and delivered at Nyeri this 2nd day of June, 2015

L N WAITHAKA

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the defendant

Court assistant - Lydia