



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CIVIL SUIT NO. 228 OF 2015

LUCY NYAWIRA KANGARI.....PLAINTIFF
/APPLICANT

VERSUS

NAIROBI CITY COUNTYDEFENDANT/
RESPONDENT

RULING

The Plaintiff has filed a Notice of Motion dated 13th March 2014 seeking an order to restrain the Respondent, its servants and/or agents be restrained from evicting or in any way interfering with her occupation and quiet possession of house number 185/77, Joseph Kangethe Estate (herein after referred to as the suit premises) pending the hearing and determination of the suit.

The application is supported by the Plaintiff's affidavit sworn on 13th March 2015 where she contends that she has been a tenant of the Defendant at the suit premises since 26th June 2014. The Plaintiff avers that she took over the tenancy of the suit premises from the previous tenant, **Sia Sally Rama** with full approval and consent of the Respondent and that further, she paid transfer fees and the tenancy was duly transferred to her names. The Plaintiff annexed evidence of a payment receipt for transfer fee in respect of the suit premises dated 26th June 2014 issued in the Plaintiff's name. She also exhibited a memo dated 26th June 2014 from the City Council of Nairobi certifying that she had paid rent, rent deposit and water deposit for the suit property.

It is the Plaintiff's contention that at the time of effecting the transfer, she inherited a sub-tenant who had been issued with a vacation notice by the former tenant but never vacated until the intervention of the Respondent was sought. The Plaintiff states that on 1st October 2014, she was issued with a housing estate card which although it erroneously indicated that it was issued on 1st October 2013 instead of 1st October 2014, is conclusive evidence of her tenancy.

The Plaintiff avers that on 22nd January 2015, she was summoned by the Defendant to verify her tenancy at their office as a routine procedure and she annexed as evidence a letter dated 22nd January 2015 to this effect. She further exhibited a house rent payment receipt for Kshs 14,000/- dated 3rd April 2015 issued in her name and contended that the subtenant moved out of the premises on 9th March 2015 after which she moved into the premises.

The Plaintiff avers that on 10th March 2015, she came home on the evening to find the premises locked

and his security guard arrested by the Respondent's officers on charges of malicious damage to property, and in particular of the padlock which was still intact and was still locking the premises. It is the Plaintiff's case that there is no basis for the Respondent's action and that she continues to suffer irreparably due to the Respondent's arbitrary and unjust actions.

The Respondent opposed the application through a replying affidavit sworn on 22nd April 2015 by **Marion Rono (Mrs.)**, the Director Housing and Community Development of the Respondent. The Respondent admits that it summoned the Plaintiff to its offices on 22nd January 2015 but contends that it was upon discovery that the Plaintiff had entered into a sublease contrary to the law governing the parties. The Respondent further contends that when the Plaintiff presented her documents, they revealed that she became a tenant on 26th June 2014 yet her rental card indicates that her tenancy commenced on 1st October 2013 which is an anomaly.

According to the Respondent, the Plaintiff had sublet the suit premises to **Bernard Mwenda Gitonga** who lived in the premises with his wife at a consideration of Kshs 40,000/- per month yet the county rents the same at Kshs 14,000/- per month. The Respondent contends that subletting a county residential house is a breach of condition 13 of the tenancy agreement which provides that a tenant shall not assign, underlet or part with possession of the premises or any part thereof without the previous written consent of the Council.

It is the Respondent's averment that after realizing the mistake, the Plaintiff unsuccessfully attempted to evict the subtenant on 29th February 2015 and that on 8th March 2015, the subtenant vacated the premises on his own volition. The Respondent contends that it secured the house on 9th March 2015 to prevent it from being vandalized and that on the same day, the Plaintiff forcibly entered the premises with a group of people and left one man to stay in the house who was later apprehended by its security officers and taken to Kilimani Police Station. The Respondent stated that the Plaintiff was not living in the suit premises, and denied evicting her and averred that the Plaintiff had no household goods in the suit premises which was locked after the sub tenant left.

The application was canvassed by way of written submissions. The Plaintiff in submissions dated 28th April 2015 reiterated the facts as pleaded and averred that it was not in contention that there was an effective tenancy agreement between the parties with an elaborate legal procedure for determination. Counsel argued that there was no breach of agreement and even if there was such breach, there are elaborate and sufficient legal procedures to follow to demand compliance or issue a termination/vacation notice. It is the Plaintiff's submission that by blatantly ignoring the legal process and proceeding to lock and evict her, the Respondent's action was unjustified and illegal.

The Plaintiff submitted that it was not in dispute that there was a subtenant in the premises but contended that the subtenant was inherited and that during the transfer of the premises, the previous tenant did not give her vacant possession. Counsel stated that the Plaintiff sought the assistance of the Respondent to evict the sub-tenant and that it was with the help of the Respondent's officer that the Plaintiff was able to evict the sub tenant.

It was submitted that upon inheriting the sub-tenant, a sub-tenancy relationship automatically accrued between the Plaintiff and the subtenant. Counsel argued that there was no direct link between the Respondent and the sub-tenant and that the Respondent's assertion that the sub-tenant was introduced by the Applicant was false. The Plaintiff argued that there was no reason for the Respondent to lock up the premises when there was a known tenant in occupation duly paying rent in time.

Counsel submitted that if the Respondent's major concern with the Plaintiff was the subletting, the Respondent ought to have been satisfied with the moving out of the subtenant and the subsequent move in by the Plaintiff. It was further submitted that existence of subtenants in premises let out by the Respondent is a common phenomenon and that it was therefore unfair for the Respondent to isolate a single subletting and victimize the Plaintiff. Counsel contended that there were outsiders interested in the suit premises who were colluding with the Respondent's employees to frustrate the Plaintiff in a bid to

have her surrender the premises illegally.

The Respondent filed submissions dated 4th May 2015 where it argued that there is no occupation or enjoyment of the suit premises by the Plaintiff to be protected to warrant issuance of temporary injunction. Counsel submitted that the Plaintiff had not established a case fit for grant of temporary injunction as settled in the case of **Giella vs. Cassman Brown (1973) EA 358**. The Respondent relied on the case of **Mrao vs. First American Bank & 2 others (2003) KLR 125** for the definition of what constitutes a prima facie case.

It is the Respondent's submission that the Plaintiff sub let the suit premises to Bernard Mwenda Gitonga and that it did not matter whether or not she inherited the sub-tenant from the previous tenant. Reference was made to condition 13 of the tenancy agreement and it was submitted that there was a repudiatory breach of the tenancy agreement which entitled the Defendant to discharge the agreement. Counsel submitted that the Plaintiff's assertion that she sought the intervention of the Defendant to evict the subtenant was unsubstantiated and untrue. The Respondent contended that it discovered the illegal underletting and immediately summoned the Plaintiff to submit her documentation relating to the tenancy.

Counsel submitted that the Plaintiff had all along concealed the sub-tenancy and was immensely profiting by drawing a monthly rent of Kshs 40,000/- as against a monthly rent of Kshs 14,000/- paid to the Defendant. The Respondent contended that it was curious and unbelievable that the Plaintiff being desirous to occupy the suit premises, accepted a tenancy from the previous tenant with a subsisting tenancy and continued remitting rent together with incidental costs without having procured occupation of the same and never raised any complaints with it over the same. Counsel submitted that the Defendant's actions were lawful and contractual and that since the Plaintiff had not shown any right accrued to it that had been violated by the Defendant, a prima facie case had not been established.

The Defendant submitted that the conditions for grant of temporary injunction are sequential, and argued that the Plaintiff having not shown a prima facie case, it would be needless to determine whether irreparable damage would be occasioned to the Plaintiff if the application is denied. The Defendant submitted that the same principle applies to the test as to whether the balance of convenience tilts in favour of the Plaintiff. For this submission, the court was referred to the case of **George Kamande Wainaina vs. Bank of Baroda(K) Ltd & another Nairobi ELC No. 242 of 2014** as well as the case of **Kenya Commercial Finance Company Ltd vs. Afraha Education Society (2001)1 E.A. 86**

Determination

The issue for determination is whether the application has merit. The Plaintiff's application seeks to bar the Defendant from evicting her or from interfering with her occupation and quiet possession of the suit property. It is common ground that the Plaintiff is not in possession of the suit premises since from her own admission, the property was locked by the Defendant on 10th March 2015. The Defendant admits that it secured the house on 9th March 2015 to prevent vandalization. The Plaintiff has sought a prohibitory injunction which is meant to forestall the happening of an event rather than a mandatory injunction which is considered on different principles. See **Alex Wainaina T/A John Commercial Agencies vs. Janson Mwangi Wanjihia Nairobi CA No. 297 of 2014**

The law as to the principles to be applied in the grant of temporary injunction is well settled in case of **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358** which are that an applicant needs to establish that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable loss or damage if the orders are not granted and if the court is in doubt, it will decide the matter on the balance of convenience.

The Plaintiff submitted that she inherited a subtenant from the previous tenant who was eventually evicted with the assistance of the Defendant. This allegation was not substantiated as no evidence was tendered before the Court despite the Defendant's rebuttal and assertion that the Plaintiff sublet the premises in contravention of the conditions of the tenancy. Rule 13 of the condition of the tenancy forbids

the tenant from parting with possession of the premises and rule 18 allows the Defendant to re-enter the premises where there is breach of any of the conditions set out in the Housing Estates Rent Card produced by the Plaintiff as "LWK 3". From the pleadings, the Court is unable to discern whether the sub-tenant was a tenant of the previous tenant as alleged by the Plaintiff or whether the Plaintiff was in breach of the conditions of the tenancy by subletting as stated by the Defendant. The Plaintiff it would appear was paying rent to the respondent even during the period the so called subtenant was in occupation yet the plaintiff did not as much as write a letter about the subtenant. There is every possibility that the subtenant was indeed in occupation with the sanction of the plaintiff. A prima facie case has therefore not been established to warrant the grant of the orders sought. The Plaintiff has also not demonstrated that she stands to suffer irreparable damage which cannot be compensated by an award of damages. The Court of Appeal has stated in the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others (2014) eKLR as follows:-

"On the second factor, that the applicant must establish that he *"might otherwise"* suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury.

Having failed to satisfy the two conditions for grant of a temporary injunction, the court need not consider the balance of convenience as the conditions are to be applied sequentially. See Kenya Commercial Finance Company Ltd vs. Afraha Education Society (2001)1 E.A. 86 and Nguruman Ltd vs. Jan Bonde Nielsen & 2 others Nairobi CA No. 77 of 2012. The upshot of the foregoing is that the application dated 13th March 2014 is dismissed. Costs will be in the cause.

Ruling dated, signed and delivered this 10th day of July 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

.....for the Plaintiff

..... for the Defendant