



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 39 OF 2014

JUST LOOKING COMPANY LIMITED1ST PLAINTIFF

GUOYI COMPANY LIMITED.....2ND PLAINTIFF

VERSUS

REDEEMED GOSPEL CHURCH

CITY VICTORY TEMPLE.....1ST DEFENDANT

DEFUNCT CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

NAIROBI COUNTY GOVERNMENT.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

The Plaintiffs’ Case

The application before the Court is brought by the Plaintiffs by way of a Notice of Motion dated 17th June 2013 pursuant to the provisions of section 1A, 1B, 3A of the Civil Procedure Act and Order 40 Rules 1, 2, 3, and 4 of the Civil Procedure Rules. The Plaintiffs are seeking orders of a temporary Injunction restraining the Defendants from enforcing the enforcement notice dated 24th May, 2013 pending the determination of Business Tribunal case No. 632, 633 and 634 of 2012:

The grounds for the application as detailed out in the supporting affidavit sworn on 17th June 2013 by Tabitha Wairimu Mwathi, a director of the 1st Plaintiff, are that the Plaintiffs are the lessees of the 1st Defendant under a controlled tenancy as encapsulated in the Landlord and Tenant (Shops, Hotel and Catering establishments) Act. Further, that on or about 1st August 2012, the 1st Defendant issued them with a notice to vacate contrary to the provisions of the said Act, whereupon the Plaintiffs filed a complaint at the Business Premises Tribunal as mandated by the law, the cases being 632, 633 and 634 of 2012. In addition, that the 1st Defendant was subsequently restrained by the said Tribunal from evicting the Plaintiffs pending the determination and hearing of the complaint. However, that the 1st Defendant has colluded with the 2nd Defendant to issue an enforcement notice to the Plaintiffs that the business premises was to be demolished. The deponent attached copies of the termination notices, the tribunal’s order, and the enforcement notice.

The Defendants' Responses

The 1st Defendant response to the Plaintiffs' application is in a replying affidavit sworn on 12th November 2013 by Pastor John Bankosky, a registered Trustee of the 1st Defendant. The deponent states that after they acquired the suit premises they applied for change of user of the same. He attached the application for change of user, public notice of the same and approval granted by the 2nd Defendant.

The deponent conceded that the termination notices issued to the Plaintiffs on 1st August 2013 were irregular, and stated that the same were withdrawn by consent of the parties, and annexed a consent to that effect dated 23rd September 2013. Further, that the 1st Defendant then issued proper statutory notice in accordance with section 4 of the Landlords and Tenants (Shops, Hotels and Catering Establishments) Act and the Plaintiffs have not obtained by restraining or adverse orders to date. He annexed copies of the new notices.

The 2nd and 3rd Defendants opposed the Plaintiffs' application in a replying affidavit sworn on 8th August 2013 by Mrs. R.K. Muema, the 2nd and 3rd Defendant's Director of City Planning. The deponent stated that under the Physical Planning Act, the 2nd and 3rd Defendants are mandated to control all development within its area of jurisdiction, and that the suit premises, which are in plot number 209/2614 situated at Biashara Street/Tubman Road fall within the 2nd and 3rd Defendants' jurisdiction.

The deponent confirmed that on or about the August 2012, an application for change of use was submitted to the 2nd Defendant in respect of the suit premises from commercial to religious use, and which was approved by way of a notification of approval of development permission date stamped 24th August, 2012 which she annexed. Further, that the aforesaid change of use meant that the suit property would be utilized exclusively for religious purposes, and any other change thereof could require the approval and or permission of the 2nd and 3rd Defendants as envisaged under Section 33 of the Physical Planning Act.

However, that contrary to the permitted use of the suit property for religious purposes, the occupants thereof converted the suit property use to commercial, which change of use was not sanctioned by the 2nd and 3rd Defendants as required by law. Consequently, an enforcement notice dated 24th May, 2013 was issued pursuant to section 30 of the Physical Planning Act, notifying the occupants of the aforesaid illegality and requiring them to remedy the illegality. The deponent attached a copy of the enforcement notice. The deponent stated that the occupants and/or owners of the suit premises have failed to comply with the statutory notice and instead opted to perpetuate the illegal use of the premises by instituting the suit herein.

The deponent further stated that the 2nd and 3rd Defendants were unaware of the pending Business Premises Tribunal complaints lodged by the Plaintiffs, and neither was the issuance of the enforcement notice informed by the issues raised in the subject tribunal complaints. The deponent averred that the issuance of the said notice was in discharge of the statutory mandate of the 2nd and 3rd Defendants to control all developments within its area of jurisdiction, and was made in good faith and within the law, and not influenced by any ulterior motives or ill will.

The Submissions

The parties herein were directed to file written submissions on the Plaintiffs' application. The Plaintiffs' counsel in submissions dated 7th February 2014 argued that the Plaintiffs have established a *prima facie* case as they are protected tenants within the ambit of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, and that the power to determine if a termination notice is valid is the preserve of the Tribunal set up under the said Act. He relied on the ruling in **South Coast Fitness & Sports Centre vs Onjiko's Supermarket Limited (2005) e KLR** in this regard.

Further, that the complaint they made before the tribunal is still pending and that it is only one of the applicants who sought to withdraw their suit. The Plaintiffs submitted that if the enforcement notice is implemented, it will constructively terminate the tenancy and there will be nothing for the Tribunal to arbitrate.

The Plaintiff's counsel further submitted that the Plaintiffs will suffer irreparable harm if the injunction sought is not granted as they have been conducting their operations at the suit premises since 198, and have accumulated considerable goodwill which if lost through disruption of their businesses cannot be compensated by way of damages. Lastly, that the balance of convenience tilts in their favour, as they are likely to suffer greater harm than the Defendants.

The 1st Defendant did not file written submissions.

The 2nd and 3rd Defendants' counsel filed written submissions dated 7th March 2014, wherein he reiterated that under section 29 of the Physical Planning Act, the 2nd and 3rd Defendants are mandated to control all developments within its area of jurisdiction, and that the enforcement notice was issued in discharge of its statutory mandate under section 38 of the said Act to control developments within its area of jurisdiction. Further, that the Plaintiffs have not appealed to the relevant committee against the issuance of the enforcement notice as provided for under section 13 (1) of the Physical Planning Act. The counsel relied on the decision of this court in **Jeremiah Nyandusi Abuga & 17 Others vs The City Council of Nairobi (2013) e KLR** to this effect.

The Issues and Determination

I have considered the application, the affidavits filed by the parties, and the submissions made by Counsel. The issue to be determined is whether the Plaintiffs have established the necessary conditions for the temporary injunction sought to issue. The principles for the grant of an interlocutory injunction are settled and were set out in the case of **Giella – v – Cassman Brown & Co. Ltd. [1973] EA 358.** They are that first, the applicant must show a *prima facie* case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer an irreparable injury which could not adequately be compensated in damages; and thirdly that if the court is in doubt it should decide the application on a balance of convenience.

A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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 in their Plaint dated 17th June 2013 claim that they are a controlled tenancy within the meaning of section 2(b)(ii) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, and that the Defendants have issued illegal eviction notices against them, with respect of which restraining orders are sought. A determination of the question as to whether the Plaintiffs have shown a *prima facie* case therefore revolves on whether or not that their tenancy is a controlled tenancy, so as to bring into effect the provisions of section 4 of the said Act as to termination of such tenancies.

Section 2 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act defines a controlled tenancy as follows:

“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 five years; or

(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:

It is not disputed that at the time the termination notice was first issued to the Plaintiffs on 1st August 2012 there was a subsisting tenancy between the Plaintiffs and 1st Defendant. The application by the 1st Defendant for change of user was made thereafter, on 8th August 2012, and approval granted on 24th August 2012 after the initial notice of termination had been issued. It is also conceded by the 1st Defendant that the said termination notice of 1st August 2012 was not issued validly and was contrary to the provisions of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act .

The 1st Defendant however averred that a second termination notice was validly issued under section 4 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act. The said section provides as follows:

4. (1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.

(2) 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 or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

(3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.

(4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:

Provided that -

(i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;

(ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;

(iii) the parties to the tenancy may agree in writing to any lesser period of notice.

(5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.

(6) A tenancy notice may be given to the receiving party by delivering it to him personally, or to an adult member of his family, or to any servant residing with him or employed in the premises

concerned, or to his employer, or by sending it by prepaid registered post to his last known address, and any such notice shall be deemed to have been given on the date on which it was so delivered, or on the date of the postal receipt given by a person receiving the letter from the postal authorities, as the case may be.

The said notices provided as evidence by the 1st Defendant show that they were dated 26th July 2013, and terminated the Plaintiffs' tenancy from 1st October 2013 and thereby gave the necessary 2 months' notice. In addition the Plaintiffs acknowledged receipt of the same, with the 1st Plaintiff showing that it received the notice on 29th July 2013.

The Plaintiffs however argue that the complaint and injunction by the Business Premises Tribunal is still subsisting, and therefore still in force. In this regard I have perused the consent entered into by the parties in the said proceedings which was annexed as exhibit 2 to the 1st Defendant's replying affidavit. It is signed by Advocates for the Respondent who is the 1st Defendant herein, and Advocates for the three Applicants, who included the two Plaintiffs herein. There is no indication in the said consent that the Advocate for the Applicants was only acting for one of the Applicants, and it is specific in the said consent that the Applicants were to be paid costs of Kshs 50,000/-. The Plaintiffs have in addition not brought any evidence to support their averment that the withdrawal was only by one of the Applicants in the complaints before the Tribunal.

I therefore find that the Plaintiffs have not established a *prima facie* case for the foregoing reasons. I also particularly note in this regard that the Plaintiffs failed to disclose the fact of the withdrawal of the proceedings in the Tribunal, and of the subsequent notices issued by the 1st Defendant. The Plaintiffs are therefore not deserving of the exercise of this Court's discretion and of the equitable remedy sought, as they have not come to court with clean hands.

Lastly, I also agree with the 2nd and 3rd Defendants' submissions that that the Plaintiffs' recourse lies with the relevant Liaison Committee in light of the provisions of section 38 of the Physical Planning Act, which provides the procedure for challenging an enforcement notice. The procedure entails first making an appeal to the relevant Liaison Committee under section 13 of the Act. Appeals from the relevant Liaison Committee lies to the National Liaison Committee and it is only after this process that further appeals lie in this Court under section 38(6).

While the procedure provided for under section 38 of the Physical Planning Act cannot oust the jurisdiction of this Court that is granted by the Constitution under Article 162 (2) (b) and by section 13 of the Environment and Land Court Act, it is also the position as stated by the Court of Appeal in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425** that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. This court will however defer to statutory or alternative remedies when they are applicable or appropriate.

In the present case the remedy sought directly falls within the jurisdiction of the said liaison committee, as the 2nd and 3rd Defendants allege that the Plaintiffs' use and occupation of the said properties is not approved. The 2nd and 3rd Defendants are empowered by section 33 of the Physical Planning Act to grant or refuse development permission, including change of user of premises. Appeals from their decisions in this respect lie to the relevant liaison committee, which is thus the appropriate procedure and remedy at available to the Plaintiffs at this stage.

The prayers in the Plaintiffs' Notice of Motion dated 17th June 2013 are therefore denied for the foregoing reasons. The Plaintiffs shall bear the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____3rd____ day of ____June____, 2014.

P. NYAMWEYA

JUDGE