



IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC MISCELLANOUS APPLICATION NO. 77 OF 2014

EUNICE NJERI T/A SUNCROSS CAFE.....1ST APPLICANT

LEONARD NDIRANGU KARUGA

t/a SHALON ELECTRICALS.....2ND APPLICANT

VERSUS

MICHAEL WAINAINA

t/a NGURISH INVESTMENTS LTD.....RESPONDENT

RULING

The Applicants' Notice of Motion

The Applicants are seeking the various orders reproduced herein below in an application filed in court by way of a Notice of Motion dated 6th March 2014:

1. That this Court temporarily withdraws Tribunal Cause No. 334 and 335 of 2013, and admits and hears the Notice of Motion Application dated 3rd March 2014 filed at the Business Premises Tribunal.
2. That this Court orders a mandatory injunction against Respondent directing it to demolish the iron sheet parameter erected on L.R No. 209/3011/9 Top-in-One Building and to grant access to the business premises of the Applicants pending herein and determination of the reference filed at the Business Premises Tribunal.
3. That this Court grants a temporary injunction against the Respondent restraining it from interfering with the Applicants' quiet enjoyment of occupation over the Shop located on the premises known as L.R No. 209/3011/9 Top-in-One Building (hereinafter "the suit premises") pending the hearing and determination of the references filed in the Business Premises Tribunal.
4. That upon hearing and disposal of this application this Court retransfers back Cause No. 334 and 335 of 2013 to the Business Premises Tribunal (hereinafter "the Tribunal") for hearing and disposal of the pending Reference.
5. That the OCS Kamukunji Police Station be directed to ensure compliance with the Orders granted herein.

The said Notice of Motion is filed pursuant to the provisions of Order 51 of the Civil Procedure Rules and section 18 (1) (b) (i) and (ii) of the Civil Procedure Act. The grounds for the application are stated in the said Notice of Motion and in a supporting affidavit sworn on 6th March 2013 by Moses Muchoki, the Applicants' Advocate. The Applicants state in this regard that they have been running a Restaurant and

Shop respectively on the ground floor of the premises known as L.R. No. 209/3011/9 also known as Top-in-One Building (hereinafter “the suit premises”), and have been in uninterrupted occupation of the premises for the last 30 years and have been paying the rent and all service charges due to the 1st Respondent and/or its authorized agent.

However, that the Respondent issued a notice dated 11th March 2013 asking the tenants to vacate the premises within fourteen (14) days to enable it carry out the renovations as demanded by the City Council of Nairobi. The Applicants state that they opposed the notice to vacate and duly filed a reference to the Tribunal which reference is still pending hearing. Further, that the Respondent moved to the suit premises at midnight on 3rd March 2014 and erected an iron sheet parameter wall on the premises thereby hindering access by the Applicant’s to their business premises.

The Applicants aver that the Respondent is taking advantage of the operational challenges and administrative loopholes at the Tribunal to frustrate them as the Chairman of the Tribunal though appointed has not yet reported to his new station. The Applicants annexed as evidence the application filed under certificate of urgency at the Business Premises Tribunal on the 3rd March 2014.

The Respondent’s Response

The Respondent’s response is in two Replying Affidavits both sworn on 25th March 2014 by Michael Wanaina Ngure, a Director of the Respondent, and David Kamotho, a building foreman instructed by the Respondent to undertake renovation works on the suit premises.

The first aforementioned deponent stated that the Respondent is the landlord/proprietor of the suit premises, and that on 25th January 2013 it received a twenty one (21) days’ notice dated 25/1/2013 from the City Council of Nairobi under Section 119 the Public Health Act to conduct renovations and/repairs in the suit premises. The deponent further stated that on 12th March 2013 he submitted a report to the National Environmental Management Authority (NEMA) regarding the proposed renovation of the suit premises and was issued with an Environmental Impact Assessment License dated 30th May 2013 for a period of 24 months, within which time the project was required to commence. He annexed a copy of the said notice and licence.

The deponent averred that since then the Respondent has been unable to comply with the said notice as the Applicants have been in occupation of the building, and that as a result he was charged with the offence of failing to comply with a notice issued under the Public Health Act. The deponent further averred that the Respondent procured a mortgage loan of Kshs.60,000,000/= to purchase the suit premises which loan attracts monthly installments payments of Kshs.1,029,224/= which are to be recovered from rental income from the suit premises. He annexed a copy of the Charge Sheet and of the Mortgage Account Statement dated 18/1/2013.

The second deponent stated that the Respondent instructed him on 17th January, 2014 to undertake construction and renovation works on the suit premises. Further, that on 5th February 2014 the Respondent’s director, one Michael Wainaina Ngure, gave him a copy of an agreement dated 4th February 2014 whereby the Applicants agreed to immediately give the Respondent access to their respective premises to enable construction work to immediately commence at the premises.

The said deponent further stated that on 28th February, 2014 he paid to Nairobi City Country a sum of Kshs.30,000/= and Kshs.51,992/= as hoarding fees, and was duly issued with receipts for the same which he annexed. Further, that on 3rd March 2014 he started to fence off the property and brought on site the relevant material for purposes of commencing the said construction and renovation as per approval received from Nairobi City Council.

The Submissions

This Court issued directions that the parties do file and exchange submissions on the Applicants' Notice of Motion. The counsel for the Applicants filed submissions dated 6th May 2014 wherein he relied on the decisions in **Kenya Breweries vs Washington Okeyo (2002) 1 E.A 109** and **Locabail International Finance Ltd vs Agro- Export & Another, (1986) 1 All. E. R. 901** to argue that their case was clear and ought to be decided at once as the Applicants' rights have been violated, and that they are incurring losses and damages as they can no longer carry on their businesses due to the Respondent's actions.

The counsel further submitted that they had met the requirements for the grant of a temporary injunction as stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** with regards to showing a *prima facie* case, suffering irreparable injury and the balance of convenience tilting in their favour, as they had shown that they have been in occupation of the suit premises for over 30 years, and that have been locked out of the premises. The counsel also relied on the decisions in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 1215**, **Samson Khasiani Amusibwa vs Alphose Musotsi Ambali & 2 Others (2005) e KLR** and **Central Bank of Kenya & Another vs Uhuru Highway Development Ltd & 4 Others, (2000) KLR 382** in this respect.

The Advocate for the Respondent filed submissions dated 30th May 2014, and averred that the application is brought under the wrong provisions of the law and should be struck out, and ought to have been brought under Order 40 of the Civil Procedure Rules. The counsel reiterated the facts of the Respondent's case and submitted that the application has been overtaken by events, as the Respondent had commenced construction and renovation on the suit premises pursuant to approvals received from the Nairobi City Council. Further, that the prayers sought cannot therefore issue, and he relied on the decisions in **Kenya Power & Lighting Company Ltd vs Justice (Rtd) David M. Rimita, (2014) eKLR** and **Locabail International Finance Ltd vs Agro- Export & Another, (1986) 1 All. E. R. 901** in this regard.

The Issues and Determination

I have read and carefully considered the pleadings, annexed evidence and submissions made by the parties herein. The first issue to be determined is whether this court can withdraw and retransfer Tribunal Cause No. 334 and 335 of 2013 which is pending at the Business Premises Rent Tribunal. Although such withdrawal of proceedings in a subordinate court and retransfer is allowed under section 18(1) of the Civil Procedure Act, this court notes that the circumstances giving rise to the prayer have since changed, and the Business Premises Rent Tribunal is now operational. There is thus no longer any need to have the suit filed therein transferred to this Court.

As regards the remaining prayers for a temporary and mandatory injunction, I agree with the Respondent that the Applicants ought to have made their application pursuant to the provisions of section 63 of the Civil Procedure Act and Order 40 of the Civil Procedure Rules. However, I also find that the failure to cite the said provisions in their Notice of Motion is not fatal, and this Court has the powers to grant interlocutory orders as are necessary in the interests of justice in supplemental proceedings under sections 3A and 63 of the Civil Procedure Act, pending the hearing of the suit at the Business Premises Rent Tribunal

I will therefore proceed to determine the Applicants' Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, and also to determine if the Applicants have in addition shown any special circumstances to entitle him to the mandatory injunctions sought as held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**.

The principles in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Applicants have established a *prima facie* case.

A prima facie case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215** 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 Applicants state that they have been in occupation of the suit premises for 30 years, and have availed evidence of rent paid with respect to the suit premises from September 2013 until January 2014. They allege that their rights have been infringed by the Respondent blocking access to the said premises. The Respondent admits that the Applicants were their tenants until February 2014 when they agreed to vacate the premises. I note that the Applicants did not in this regard produce any evidence of payment of rent for February 2014, and have not disputed the averments that they agreed to vacate the premises in February 2014.

In addition, I am of the view that since the Respondent have shown that they are required to comply with the law with regard to the renovation of the suit premises, and have brought evidence of notice dated 25/1/2013 from the City Council of Nairobi under Section 119 the Public Health Act to conduct renovations and/ or repairs on the suit premises. This court cannot in the circumstances issue orders that will aid in the contravention of the law. Therefore even if the Applicants may have a *prima facie* case, damages will have to be an adequate remedy in the circumstances.

The question as to whether the Applicants have met the threshold for the grant of orders of the mandatory injunction therefore also does not arise, as it was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. As explained in the foregoing, the Respondent is required by the law to renovate the suit premises, and the Applicants cannot in the circumstances be allowed back to the premises until this is done.

The prayers sought in the Applicants’ Notice of Motion dated 6th March 2014 are therefore denied for the foregoing reasons, and the Applicants shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____5th____ day of ____August____, 2014.

P. NYAMWEYA

JUDGE