



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 334 OF 2014

SAMSON MWANGI IKINYA.....1ST PLAINTIFF/APPLICANT
AGNES NJERI GITATA.....2ND PLAINTIFF/APPLICANT
HELLEN WACHUKA KINGIRI.....3RD PLAINTIFF/APPLICANT
PETER MUIGAI.....4TH PLAINTIFF/APPLICANT
ANTONY NJUGUNA MBUGUA.....5TH PLAINTIFF/APPLICANT
LUCY GITATA.....6TH PLAINTIFF/APPLICANT
GRACE WANJIRU.....7TH PLAINTIFF/APPLICANT
MARY THUKU.....8TH PLAINTIFF/APPLICANT
ANN NJERI KARIUKI.....9TH PPLAINTIFF/APPLICANT

VERSUS

PARAGON PROPERTY

CONSULTATIONS1ST DEFENDANT/RESPONDENT

ACK ST. JAMES CATHEDRAL

KIAMBU.....2ND DEFENDANT/RESPONDENT

RULING

The application for this court's consideration is the Notice of Motion dated 17th March 2014, brought under *Order 40 Rule 1 & 2, Order 50 Rule 1 and 3 of the Civil Procedure Rules and Sections 3,3A, 63 (c) and (f) of the Civil Procedure Act*, seeking for orders that this court be pleased to issue a temporary injunction restraining the Respondents, their agents and /or employees from removing the applicants goods, proceeding with distress for rent or in any way interfering with the applicants quiet possession of the rented premises pending the determination of the Reference at the Business Rent Tribunal .

This application is premised on the grounds stated on the face of the application and the supporting affidavits of **Simon Mwangi Ikinya, Agnes Njeri Gitata, Hellen Wachuka Kigiri, Peter Muigai, Anthony Njuguna Mbugua, Lucy Gitata, Grace Wanjiru, Mary Thuku and Njeri Kariuki**, who are tenants of the 2nd Respondent and depose more on the same statements.

The supporting affidavit of Samson Mwangi Ikinya deposed that he is a tenant of a shop in **Bishop Peter Njenga Shopping Complex** in Kiambu Municipality/Block 11/159, in Kiambu Town, which he pays a monthly rent of Ksh 7,000/= and the 2nd Respondent is the owner of the premises. The 1st Respondent is the appointed agent for the 2nd Respondent. That sometime in May 2013, the 2nd Respondent through the 1st Respondent served him with a letter of intention to review rent which he believes does not constitute the valid, proper and legal notice to increase rent. He filed a Reference at the **Business Rent Tribunal**, but was informed that the Tribunal was not sitting and that he should seek redress at the Magistrates Court. He avers that while hearing of his application was pending the Respondents through Pyramid Auctioneers issued a proclamation purportedly for distress for rent yet he has been paying rent and he is not in any arrears. When he moved to the Magistrates Court his application was dismissed for want of jurisdiction. He further avers that when the application at the Magistrates Court was dismissed, the Respondents issued a new notice demanding for rent arrears which are yet to be canvassed at the Business Rent Tribunal. He states that the Chairman of the Tribunal was appointed vide Gazette Notice 714 dated 3rd February 2014, but has not taken office. He feels that the Respondents, are frustrating him on the knowledge that the Tribunal is not hearing matters and therefore calls upon this court to intervene and protect the tenants from the Respondents until they are given an opportunity to defend their case at the tribunal.

This application is opposed. The 1st Defendant/Respondent through Elizabeth Nganga, the Deputy Manager, swore a Replying Affidavit on 2nd April 2014, stating that the 1st Defendant/Respondent was engaged by the 2nd Defendant/Respondent, as managing agents over its property, **Bishop Njenga Shopping Complex**, situate on the parcel of land known as **Title No Kiambu Municipality Block 11/1159**, and that she was aware that the plaintiffs/Applicants were tenants of the said property. She added that the other plaintiff had lodged complaints at the Business Rent Tribunal over the rent of the 2nd Respondent's property but not the 5th Plaintiff/Applicant therefore no order can be given with meaningful effect in favour of the 5th Applicant. She further averred that the plaintiffs failed to pay their rent as and when it fell due and the 2nd Defendant/Respondent exercised its legal rights to distress for rent and thereafter some of the tenants paid their outstanding rent.

She further stated also added that the pendency of proceedings before the Business Rent Tribunal does not absolve the applicants of their rental obligations nor does the same prevent a landlord from distress for rent, where the same remain unpaid. Further as at the time of the distress of rent, there was no lawful orders preventing the defendants from distressing for rent therefore the distress for rent was lawful. She also stated that this court lacks jurisdiction to deal with the determination under the **Landlord and Tenants (Shops, Hotels and Catering Establishment) Act**, and as such it ought not to make determinations or delve into matters set out in the said Act. Therefore this application ought to be struck out.

Parties canvassed this application by way of written submissions. The plaintiffs/applicants filed their written submissions on 27th May 2014, stating that since the Chairman of **Business Premises Rent Tribunal**, had not taken up office, the applicants invoked the provisions of Section 15 of the **Landlord and Tenants (Shops, Hotels and catering establishments) Act**, where this Court draws its jurisdiction and cited section 15(2) which bestows appellate jurisdiction upon this court and which states that,

"...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".

adding that no other court has jurisdiction to entertain this matter in the absence of an active Tribunal.

The Respondents filed their submissions on 16th April 2014, stating that this court lacks jurisdiction since the applicants had filed their dispute at the Business Premises Rent Tribunal. They relied on the case of **Alex Kadenge Mwendwa –vs- Grace Mukami & 2 others (2006) e KLR**. Further the Respondents submitted that the prayers sought by the applicants cannot be granted and relied on the case of **Caledonia Supermarket Limited –vs- Kenya National Examination Council (2000) 2 EA 352**, where the court held that an injunction does not lie or avail to a *controlled tenancy* and to that extent the orders sought cannot issue in favour of the applicants.

I have considered the pleadings filed by both parties in this application and this is my findings.

The Respondents' advocate submitted that this court does not have jurisdiction to entertain this claim and that it was only the Business Premises Rent Tribunal which has jurisdiction to deal with the issues raised by the applicants. It is not in dispute that the tenancy agreement between the applicants and the Respondents is not in writing, therefore the dispute between the applicants and the Respondents can only be heard and determined by the Tribunal.

Nevertheless, what is before this court is the application for an injunction pending the hearing and determination of the Reference that is now pending before the Tribunal and it is only the Tribunal that will have to determine whether it was right for the Respondents to issue the purported notice to have rent increased and whether the Respondents can levy distress for rent. The ***Landlord and Tenants (Shops, Hotels and Catering Establishment) Act***, does not give the Tribunal the jurisdiction to grant interim orders of injunction when a matter is pending before it. It is only this court, pursuant to the provisions, of **Section 13(7) (a) of Environment and Land Court Act** that can grant to a party who has filed a Reference at the Tribunal interim orders of injunction as was held in the case of **R -Vs- Business Premises Rent Tribunal & Another, Exparte Davis Mohr Corporation Limited (2013) e KLR**. An Applicant who has filed a Reference in the Tribunal cannot be granted an order of injunction as a matter of course. The Applicant must show that he has a prima facie case with chances of success and that unless the injunctive orders are granted; he is likely to suffer irreparable loss that cannot be compensated by way of damages. If the court is in doubt about the two principles, then it is required to decide the Application on a balance of convenience.

The Respondents have not disputed that it has levied distress on the applicants which averment is captured in the Respondents Replying Affidavit at paragraph 8. Respondents averred that they levied distress because the applicants fell into rent arrears.

Although, on the face of it, the Applicants are entitled to a Notice before the rent increment and subsequent distress for rent it is important for the Applicants to show that indeed they have been paying rent to the Respondents regularly to enable a court of equity to grant them the injunctive orders they have sought for. In the absence of evidence by the Applicants that they been paying to the Respondents the requisite monthly rent, on the one hand, and in view of the fact that the Applicants are entitled to a notice before the rent increase from the Respondents, I shall allow the Applicants' Application dated *17th March 2014*, on condition that the Applicants pay the full rent (rent arrears inclusive) required of them to the Respondent pending the hearing and determination of the Reference in Tribunal case number 36-45 of 2013. Applicants application dated 17th March 2014 is allowed on the above condition. Each party shall bear their own costs.

It is so ordered.

Dated, Signed and delivered this **22nd** day of **October, 2014**

L. GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff/Applicant

M/s Butoyi for Defendant/Respondent

Kamau: Court Clerk

L. GACHERU

JUDGE