



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 1185 OF 2013

GEORGE JOSEPH KANGETHE T/A KANGETHE & CO. ADVOCATES.....PLAINTIFF

VERSUS

PAN AFRICAN LIFE ASSURANCE LIMITED.....1ST DEFENDANT

REGENT AUCTIONEERS2ND DEFENDANT

RULING

The 1st Defendant is the registered owner of Pan Africa House on L.R. No. 209/927 Nairobi. The Plaintiff has for the last 25 years been a tenant of the 1st Defendant occupying an office space measuring approximately 1,600 square feet on a part of the 4th floor. There are four applications coming up for determination, three of which have been filed by the Plaintiff and one by the Defendant. Of the four applications, the latest dated 28/2/2014 filed by the Plaintiff sought orders of reconnection of electricity to the suit premises.

This application was disposed of on 10/3/2014 when the court ordered that the Landlord does reconnect the electricity upon receipt of payment of **Kshs. 242,484/-**

Plaintiff's Application dated 1/10/2013

The application is brought under **Order 40 of the Civil Procedure Rules, Section 1A & 3A of the Civil Procedure Act, and Section 4 and 6(1) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Cap 301**. The Plaintiff seeks an order that a temporary order of injunction be granted restraining the Defendants from levying distress upon the Plaintiff and/or interfering with the demised premises and/or evicting the Plaintiff and/or in any manner interfering with the Applicant's quiet possession of the demised premises, to wit, 4th Floor Pan Africa House on **L.R. No. 209/927**, until the hearing and determination of the suit.

The application is premised on grounds that the 1st Defendant has instructed the 2nd Defendant to levy distress illegally upon the Plaintiff in a move aimed at terminating the Plaintiff's tenancy and therefore that the tenancy of 25 years is at risk of being terminated irregularly by the 1st Defendant arbitrarily levying inexplicable service charge. The Plaintiff avers that the 1st Defendant has disregarded a Reference **Tribunal Case No. 474 of 2011** it has filed challenging, inter-alia, the 1st Defendant's unilateral increase

of rent and service charge. It is the Plaintiff's averment that the purported proclamation is on disputed service charge and not rent and therefore the same is incapable of being distressed. The Plaintiff avers that he has paid and is still paying the undisputed rental sum. Further that it stands to suffer irreparable loss and damage caused by the illegal acts of the Defendants.

The application is supported by an affidavit sworn by **George Joseph Kangethe**, a Partner with the Plaintiff Company. He deposes that the Plaintiff has been performing all the tenants' obligations as required by law and in turn enjoying quiet possession of the demised premises. The deponent states that in December 2007, the parties executed a Lease Agreement for a period of 6 years whose term included payment of rent and service charge but that the tenant was entitled to be consulted and have particulars amounts that would be charged as service charge. It is deposed that the Defendant did not register the said Lease as required by **Section 107 of the ITPA Act** but that the Plaintiff continued to pay rent and perform other obligations as a periodic tenant.

The deponent states that the tenant faithfully paid the agreed rent and the service charge without any complaints from the Landlord until 8/6/2011, when the landlord claimed **Kshs. 536,338/-** as arrears of service charge and gave notice to terminate the tenancy. The deponent referred to a letter dated 21/6/2011, annexed and marked **GJK4** and deposed that the Landlord terminated the Lease Agreement with effect from 1/8/2011. Despite of this, he deposes that the Plaintiff continued to pay rent which the Landlord continued to receive. Following the levy of service charge, the deponent states that the Plaintiff filed a reference at the **Business Premises Rent Tribunal (BPRT)** which is yet to be determined. The deponent states that the Landlord on 5/9/2012 changed the Electricity Billing System by sub-metering the demised premises but continued to claim service charge on a higher rate. Further that the Landlord continues to claim different figures as purported arrears.

The deponent states that the Landlord on 18/9/2013 issued a 3 day notice to vacate the premises and on 24/9/2013, the 2nd Defendant, without due regard to the reference at the **BPRT**, forcefully entered the premises and made inventories of the assets and subsequently issued a proclamation of Attachment of Movable Property. The deponent states that the Plaintiff is apprehensive that the Landlord will proceed to evict, obstruct access or in any other way interfere with his possession in enforcement of the unlawful notice. Thus that in such eventuality, the tenant would suffer great loss and detriment as his operations as a law firm would be disrupted.

In support of the application, the Plaintiff annexed a copy of the Lease Agreement between itself and the 1st Defendant; Correspondence over alleged arrears of service charge; Correspondence over termination of lease agreement and notice to vacate the premises; receipts evidencing payment of rent and service charge; copies of Statement of Account; and copies of proclamation undertaken by the 2nd Defendant.

This application was opposed by **Emma Wachira**, the Company **Secretary**, and **Chief Legal Officer** with the 1st Defendant who swore a Replying Affidavit on 14/11/2013. The deponent admitted that the parties executed a lease agreement for a period of 6 years which lapsed on 30/9/2013. Further, that the Plaintiff was issued with a notice of over 1 year to the effect that the Lease would not be renewed upon its lapse. The deponent outlined the terms of the lease as follows: the period of lease was 6 years commencing on **1/10/2007**; the quarterly service charge for the first year would be **Kshs. 96,000/-** and thereafter the service charge would be revised every subsequent year as provided under clause **2(c)**; interest would be charged at a rate of 3% per month on rent and service charge or other moneys payable under the lease if the same is not paid within 14 days; The tenant would reimburse the landlord in addition to the rent paid for operating expenses of the building as a service charge to be calculated on a pro rata basis of the area of the floor space of the premises in relation to the whole building; All payment received from the tenant would be applied to the payment of the following on a priority basis **(a) amount of service charge outstanding (b) interest caused on arrears of rent (c) rent outstanding (d) legal and other professional or auctioneer's charges payable.**

It is deposed that the Plaintiff has been in arrears for a long period of time and has failed to pay electricity bills among other amounts in breach of the terms of the lease totaling to an unpaid sum of **Kshs. 2,465,910.12/-**. It was also deposed that the service charge payable by the tenants in the entire property

are audited and forwarded to all tenants within the premises but the Plaintiff has failed to pay his portion. The deponent stated that the Plaintiff had come to court with unclean hands because: the Plaintiff has failed to disclose that the lease lapsed on 30/9/2013 and that there was prior notice that the lease would not be renewed; has declined to give vacant possession even after the lapse of the period of the lease; has failed to explain his refusal to pay for electricity consumption since October 2012; has failed to disclose material facts with the intention of misleading the court.

1st Defendant's application dated 13/11/2012

This application is brought under **Order 20 Rules 1 & 4, Order 21 Rule 8, Order 25 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules together with Sections 1A, 1B, 3A and 6 of the Civil Procedure Act**. The 1st Defendant prays for orders that:

1. *Spent*
2. *There be stay of all proceedings herein pending the hearing and determination of Nairobi, Milimani Misc. Appl. No. 960 of 2013 filed at the Chief Magistrates' Court in Nairobi.*
3. *In the alternative to (2) above, there be a stay of all proceedings herein pending the hearing and determination of the Tribunal Case No. 474 of 2011 at the Business Rent Tribunal in Nairobi.*
4. *Costs of the application be borne by the Plaintiff.*

The application is premised on grounds that there is a tenancy dispute between the parties herein over the subject area and the same subject in **BPRT Tribunal Case No. 474 of 2011 CMCC Milimani Misc. Appl. No. 960 of 2013** in which the Plaintiff enjoys interim orders. The 1st Defendant avers that the filing of the suit herein before the withdrawal of all previous suits over the same subject matter and involving the same parties herein is an abuse of the court process. Additionally the Plaintiff's partner, an officer of the court, has a duty in law and professionally to disclose all material facts before filing of the present suit. It is averred that the Plaintiff was given ample notice of the lapse of his lease without renewal but the Defendant continues to be prejudiced by the Plaintiff's refusal to pay outstanding rent or vacate the suit property. The 1st Defendant further avers that the court has no jurisdiction to determine the dispute between the parties.

The application is supported by an affidavit sworn by Emma Wachira, the Company Secretary, and Chief Legal Officer with the 1st Defendant. She deposes that the Lease executed between the Plaintiff and the 1st Defendant was for a period of 6 years which lapsed on 30/9/2013. It is her deposition that prior to the lapse of the lease period, ample notice of over 1 year was issued to the Plaintiff to the effect that the lease would not be renewed. The deponent contended that the suit herein is an attempt to use the court to extend the tenancy without any legal justification, as well as to convert their tenancy to that of a protected tenant hence the Plaintiff's refusal to surrender the suit premises even after the lapse of the lease period. They maintained that the suit is an abuse of the court process having been filed in the existence of other matters involving the same parties over the same subject matter. Further that the Plaintiff's actions are prejudicial to the 1st Defendant's operations as the suit premises had been planned for other use.

The application was opposed by the Plaintiff who swore a Replying Affidavit and filed Grounds of Opposition both dated 17/12/2013. The Plaintiff reiterated the contents of his earlier affidavit and deposed that whereas he is desirous of prosecuting the reference at the Tribunal, there has not been a substantive chairperson since June 2013. As a result, it necessitated the filing of **Misc. Appl. No. 960 of 2013** which is not a suit, in its strict sense due to the urgency. The Plaintiff deposed that the High Court, as established under Article 165 of the Constitution has unlimited original jurisdiction in civil and criminal matters and further that it is one of competent jurisdiction empowered by the Constitution to hear any dispute, including the one herein, until such a time the tribunal resumes its seating.

It was deposed by the Plaintiff that the 1st Defendant attempts to circumvent the provisions of the law by instructing the 2nd Defendant to proclaim his assets unlawfully; disregarding a reference made to the BPR Tribunal and levying distress for rent based on fictitious figures; disregarding the fact that he is a protected tenants under the meaning of Cap 301 Laws of Kenya; and purporting to evict him without following the due procedure of the law.

Plaintiff's application dated 29/11/2013

The Plaintiff prays for an order that pending the hearing and determination of the application, an order do issue directing the Plaintiff to deposit rent due in arrears in Court or as the court may ably direct. The application is premised on grounds outlined in the application and supported by an affidavit sworn by Kangethe George Joseph. The Plaintiff avers that the 1st Defendant has refused and/or declined to accept the Plaintiff's rent payment for the month of October 2013 an action calculated to defeat the Applicant's right to lawfully occupy the demised premises. Further that the 1st Defendant's action is in flagrant disregard of the Court's orders of 18/10/2013 and it should therefore be compelled to accept rent payment. The Plaintiff avers that unless the court issues an order for the deposit of such rent amount in court as is demanded by the 1st Defendant on a month to month basis, his tenancy of 25 years is at risk of being terminated irregularly.

In its submission filed on 4/6/2014, the Defendant submitted that it adopted its response to the Plaintiff's application dated 1/10/2013 in response to this application.

These applications were canvassed by way of written submissions. Mbigi Njuguna & Co. Advocates for the Plaintiff filed submissions dated 7/7/2014, wherein counsel submitted that based on the material presented to court, there are sufficient grounds for granting temporary injunction. Counsel submitted that pursuant to the provision of **Section 107 of the Indian Transfer Property Act**, the lack of registration invalidated the lease agreement thus, the Plaintiff's continued possession and payment of rent was governed by Section 106 of the said Act, hence a periodic tenancy of month to month subject to Cap 301 Laws of Kenya. In support of this submission, counsel cited the authority of **Bains v Chogley (1949) EACA 27**. Counsel submitted that even if the subject lease agreement did not become a periodic tenancy, it was terminated before the conclusion of its term. Reference was made to a letter addressed to the Plaintiff dated 21/6/2011 terminating the Lease Agreement with effect from 1/8/2011, for failure to pay service charge. It was submitted that the period from the said date of termination that the Plaintiff continued to occupy the premises and payment of rent which was duly accepted by the Defendant was outside of the lease agreement and thus a controlled tenancy.

Counsel submitted that the Plaintiff stood to suffer irreparable loss that cannot adequately be compensated by damages due to the nature of the business, the loss of clients, business and the dent in the image of the Plaintiff's Law firm. It was further submitted that the balance of convenience titled in favour of the Plaintiff whose business and livelihoods of his staff will be greatly prejudiced.

In respect to the Defendant's application for stay, counsel submitted that the suit at the lower court is not a substantive suit. Further that Cap 301 does not give the Tribunal power to execute its own orders and decrees and thus are transferred by way of Miscellaneous Applications to the Magistrate's Court for enforcement. It was counsel's submission that the Magistrates' Court's jurisdiction in protected tenancies is very limited in that sense. Counsel also submitted that at the time of instituting this suit, the tribunal had no Chairman and parties were advised to seek assistance in ordinary courts.

Muriu Mungai & Co. Advocates for the Defendant filed submissions dated 4/6/2014. In respect to the 1st Defendant's application dated 13/11/2013, counsel submitted that in view of **Section 6 of the Civil Procedure Act** there should not be concurrent proceedings in different judicial forums over the exact same subject matter between the same parties. Counsel also submitted that allowing the issues to be ventilated in one court will be furthering the overriding objective in civil disputes as contained in **Sections 1A & 1B of the Civil Procedure Act**. In support of the submission, counsel cited the case of **Thiba Min Hydro Co. Ltd v Josephat Karu Ndwiga ELC Case No. 596 of 2013 (2013) eKLR** where

the Court held:

it is not the form of in which a suit is framed that determines whether it is sub-judice. Rather it is the substance of the suit and looking at the pleadings in both cases, I am satisfied that the claim herein can perfectly be litigated Kerugoya CMCC No. 176 of 2013 and there can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub-judice rule but would also be in violation of the overriding objective to the Civil Procedure Act which require under Section 1B that there be an efficient use of available judicial and administrative resources.

In respect to the Plaintiff's application dated 1/10/2013, counsel submitted that there was indeed a valid Lease Agreement between the parties but that the same expired on 30/9/2013, when the Plaintiff was not offered an option for renewal. Consequently, therefore there is currently no tenancy agreement between the parties. Further that the Defendant's actions after the termination of the Lease Agreement manifestly indicates that it had no intention to continue in tenancy with the Plaintiff. Counsel submitted that the Plaintiff's allegations of irregular termination of the tenancy and levying unjustified service charge are inaccurate and misleading, as the service charge was contractual and the Plaintiff was supplied with audited statements relating to the service charge. Additionally, the Plaintiff's insistence of its 25 year lease is at risk is immaterial.

It was submitted for the 1st Defendant that the allegation that it has disregarded the reference filed at the BPR Tribunal is misleading. This submission, notwithstanding, counsel submitted that the BPR Tribunal pursuant to its preamble lacks jurisdiction to deal with this matter. It was submitted that the lease had a defined period of time and as such the Plaintiff's tenancy was not periodic as alleged by the Plaintiff. As regards the Miscellaneous Application filed at the Chief Magistrates Court, counsel submitted that it is not in contention that the Plaintiff obtained court orders therefrom which orders the Defendant has always obeyed by holding off its intended proclamation. Further that the Defendant filed a Replying Affidavit on 27/9/2013 to the said application.

On the foregoing, counsel submitted that the Plaintiff had failed to establish a prima facie case with chances of success to warrant the issuance of injunctive orders. It was also submitted that the lease having been validly terminated with the Plaintiff having been served with a 1 year notice but refused to surrender vacant possession, there would be no justification that the Plaintiff stands to suffer loss or injury. Moreover that it is the Defendant who continues to suffer loss with the Plaintiff's continued occupation. Counsel further submitted that the balance of convenience tilts in favour of the Defendant which complied with the terms of the lease between the parties, issued a termination notice which the Plaintiff has declined to honor.

As regards the Plaintiff's application dated 29/11/2013, it was submitted for the Defendant that whereas the Court has jurisdiction to grant an order that rent owing to the Defendant be deposited in court pending the outcome of the suit, it would be unjust for such an order to be made in the circumstances herein since the Plaintiff's intention with such kind of an order is to convert its expired tenancy with the Defendant to a controlled tenancy and thus reside forcefully in the Defendant's premises unfairly, unjustifiably and to its detriment.

Having now considered the above pleadings and affidavits in support of thereof, it is without doubt that there are three concurrent suits, a reference filed at the BPR Tribunal, a Miscellaneous Application filed at the Chief Magistrates' Court and the instant suit. All these are in respect to the Plaintiff's tenancy in the subject property. Before I delve into the merits of the injunction application, it is proper for the court to address itself on the pending suits and way forward, not only for good order, but also as required of it by the provisions of Section 6 of the Civil Procedure Act. In that regard, I will first determine the Defendant's application dated 13/11/2013.

It is the Defendant's contention that the tenancy dispute, subject matter in this suit, is the subject of a reference and a suit at the lower court. The Defendant prays that this suit be stayed pending the outcome of the reference at the BPR Tribunal or the suit at the lower court. In submissions, counsel for the

Defendant submitted at length stating that the suit is sub-judice within the meaning of **Section 6 of the Civil Procedure Act** and that the Plaintiff's action for instituting this suit without withdrawal of the other suits is an abuse of the court process. In response to the application, the Plaintiff averred that the lack of a Chairman at the Tribunal necessitated him to apply for injunction orders at the lower court but due to the limited jurisdiction the Chief Magistrates' Courts have over protected tenancies, he opted to institute the present suit.

It is not in contention that there is a tenancy dispute. Whereas the Plaintiff claims to be a protected tenant within the meaning of **Cap 301** Laws of Kenya, the Defendant contends that the tenancy had a period of 6 years as provided in the Lease which was terminated vide a notice upon the lapse without an option for renewal. The Plaintiff does not dispute a reference was filed at the Tribunal but maintains that the same is non-existent in view of lack of a sitting chairman. This Court appreciates that there lacked a Chairman at the tribunal for a considerably long time, however, pursuant to **Gazette Notice No. 714 Vol. CXVI-No.15 dated 3/2/2014 Pg. 235**, a Chairman, **Denis Silas Mbichi Mboroki**, has been appointed for a period of 3 years commencing 1/8/2013. It is therefore untrue for the Plaintiff to state that the tribunal is non-existent. Whereas this court has jurisdiction to entertain disputes related to environment as well as use, occupation and title to land by virtue of **Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act, 2012. The BPR Tribunal** is now in operation and has jurisdiction to entertain such a matter. Pursuant to **Section 6 of the Civil Procedure Act**, I find that it is proper to stay this suit.

As regards, the Plaintiff's applications for injunction and depositing of rent at the court, it is noteworthy to state that the interim orders of injunction were made ex-parte. In that regard, the same was made devoid of the knowledge that there were interim orders made by the lower court in **CMCC Milimani Misc. Appl. No. 960 of 2013**. In view of the subsistence of the lower court orders, which are yet to lapse, and have not been varied, discharged and/or set aside, it will be improper for this court to issue similar orders. Consequently, the interim injunction orders made by this court on 18/2013 are discharged. The prayer for payment of the rent, pending hearing of the suit, is within the ambit of the BPR Tribunal.

The decision of the court on the three applications is as follows:

1. *The Plaintiff's applications dated 1/10/2013 and 29/11/2013 are dismissed.*
2. *The Defendant's application dated 13/11/2013 is hereby allowed to the extent that the suit herein is stayed pending the outcome of the reference at the BPR Tribunal.*
3. *Costs of the application shall be in the cause.*

Dated, Signed and Delivered this 7th day of **October, 2014**

L.N. GACHERU

JUDGE

In the Presence of:-

Mr. Waweru holding brief Mbigi for the Plaintiff/Applicant

None attendance the Defendant/Respondent

Kamau: Court Clerk