



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC MISCELLANOUS APPLICATION NO. 136 OF 2014

SAMUEL IRURA NDERITU

T/A DIK DIK RESTAURANT.....APPLICANT

VERSUS

PETERSON MARIRA..... RESPONDENT

RULING

The Applicant's Notice of Motion

The Applicant is seeking the various orders reproduced herein below in an application filed in court by way of a Notice of Motion dated 7th May 2014:

1. That the Respondent be ordered to remove the fence encircling the Applicant's business premises and re-build the canopy thereon, or in alternative the Applicant to remove the said fence and rebuild the destroyed canopy.
2. That the Respondent be prohibited and/or stopped forthwith from unlawfully intercepting, harassing, intimidating and/or evicting, or in any manner whatsoever interfering with the Applicant's quiet occupation and lawful enjoyment of the suit premises being Plot 389 Zimmerman A-1.
3. That the Court declares the illegal threats of eviction by the Respondent against the Applicant null and void for want of compliance of the law.
4. That the O.C.S Kasarani Police Station to oversee compliance of these orders.
5. That the rent to be suspended from the day the suit premises were closed until they are lawfully opened.

The grounds for the application are stated in the said Notice of Motion and in a supporting affidavit sworn on 7th May 2014 by the Applicant. The Applicant states in this regard that he is a protected tenant and that the Respondent who is his landlord, has illegally closed and locked the suit premises by erecting an illegal fence which is occasioning him hardship. The Applicant stated that he had lodged a complaint in the Business Premises Tribunal, being Nairobi Tribunal case No. 247 of 2014, but that at the time the Tribunal was not in session. Further, that he had paid his rent for May 2014, and he attached copies of the receipts. He also attached photographs showing the photos showing the illegal fence and destroyed canopy.

The Respondent's Response

The Respondent's response is in a Replying Affidavit he swore on 19th May 2014, wherein he stated that the fence encircling the business premises for Shop A1 is not illegal, the same having been duly sanctioned by the Nairobi City Council, and he annexed a copy of the licence dated 17/4/2014. The Respondent explained that the fence was necessitated by the drilling of a borehole after he obtained the necessary approvals, and that all tenants including the Applicant had been informed of, and recommended the same.

Further, that the borehole drilling necessitated the closure of Shop A1 because the borehole was located at the entrance of the shop, and the work involved heavy machine work and redoing of the pavement. The Respondent also averred that the Applicant has come to Court with unclean hands, and the orders sought are unreasonable because he had failed to settle rent and utility bills on time many times, particulars of which were provided in the replying affidavit.

The Issues and Determination

This Court issued directions that the parties do file and exchange submissions on the Applicants' Notice of Motion. The Advocates for the Applicants filed submissions dated 27th May 2014 while the Advocate for the Respondent filed submissions dated 13th June 2014. 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 the threshold for the grant of the temporary injunction sought has been met on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**. The second issue is whether the Applicant has 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 Applicant has 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 Applicant in his submissions relied on section 4 of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, to argue that the suit premises were closed without proper notice and contrary to the said section. Further, that he had shown a *prima facie* case by proving tenancy, possession and occupation.

The Respondent on the other hand argued in his submissions that the Applicant had not met the threshold for the grant of injunction orders, as he is not deeming of the protection offered by the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act due to his constant default in payment of rent and failure to clear the service charges accruing from water and electricity, which was contrary to section 7(1) of the said Act. Further, that the Applicant having voluntarily locked the suit premises and declined alternative accommodation, will not suffer any irreparable harm

I note in this regard that the Applicant did not dispute having been consulted on the construction of a borehole on the suit premises as shown by annexure “PNN 3” attached to the Respondent's Replying Affidavit. However, the Respondent also admitted to putting up the fencing around the suit premises, and

did not dispute removing the canopy on the premises. Further, the Respondent also conceded that the Applicant is a protected tenant, and did not produce any evidence of a notice of termination of the tenancy as is required by section 4 of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act before a protected tenant can be removed from rented premises. To this extent I find that the Applicant is entitled to occupation and possession of the suit premises, and has thereby shown a *prima facie* case.

I also note that the Respondent's counsel made oral submissions in Court on 15th July 2014 during the hearing of the Applicant's Notice of Motion to the effect that the hoarding surrounding the suit premises has since been removed, although he did not provide any evidence of the same. In addition the Respondent's Advocate also stated in court that the Applicant now has access to the suit premises. In the circumstances therefore, the Respondent will not be prejudiced in any manner if the prayers for access to the suit premises are granted.

However, as regards some of the mandatory injunctions sought particularly as to the rebuilding of the canopy, this is not a clear case where such orders can issue as there was insufficient evidence before the court as to the stage of construction of the borehole. The final orders sought by the Applicant will require verification of completion of the construction of the borehole, and can also only be granted after the hearing of the Applicant's complaint at the Business Premises Tribunal.

I will accordingly allow the Applicant's application only to the extent of the following orders:

1. That the Respondent by himself or through and/or servants and or his agents or servants or employees shall forthwith provide the Applicant full access to the premises known as Plot 389 Zimmerman A-1.
2. That upon default by the Respondent, the payment of rent and charges due from the Applicant shall be suspended and shall only resume when the Applicant is granted full and uninterrupted access to the said premises.
3. That pending the hearing and determination of Nairobi Business Premises Tribunal, Case No. 247 of 2014 or until further orders, the Respondent by himself or through his servants, agents and/or employees be and is hereby restrained from evicting or in any other manner whatsoever interfering with the Applicant's peaceful occupation and enjoyment of the suit premises known as Plot 389 Zimmerman A-1, but only subject to prompt payment by the Applicant of all rent and charges due.
4. The Respondent shall meet the costs of the Applicant's Notice of Motion dated 7th May 2014.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____2nd____ day of ____October____, 2014.

P. NYAMWEYA

JUDGE