



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO. 319 OF 2010

BETWEEN

THE BOARD OF TRUSTEES OF KENYA POSTAL CORPORATION OF KENYA

STAFF PENSION SCHEME APPELLANT

AND

TIMOTHY WERE 1ST RESPONDENT

ROBERT MATANO 2ND RESPONDENT

WINFRED K. MUTISO 3RD RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi

(Apondi, J.) delivered on the 30th day of September, 2010

in

H.C.C.C. No. 714 of 2009)

JUDGMENT OF THE COURT

[1]. This is an appeal from the ruling of the High Court, **(Muga Apondi, J.)** granting an interlocutory injunction restraining the appellant from increasing rent for dwelling premises pending the hearing of a suit filed by the respondents.

[2]. By a plaint filed on 28th September 2009, by the respondents in their own names, the latter alleged that the applicant had by a notice dated 24th July, 2009 increased the rent for the premises leased to the three respondents and twenty seven other tenants from Kshs.16,000/= per month to Kshs. 37,000/= in breach of **section 34** of the **Retirement Benefits (Occupational Retirement Benefits Scheme) Regulations, 2000**. The respondents averred that the said Regulations required the appellant to renovate and have the premises valued before increasing the rent which the appellant had neglected to do.

Although the respondent brought the suit in their individual names they averred in the body of the plaint

that the suit was brought on their own behalf and on behalf of thirty (30) other members of the Postal Corporation of Kenya Staff Pension Scheme.

The reliefs sought in the plaint were a permanent injunction restraining the appellant from interfering with the respondents' quiet possession of suit premises located on **LR. Block 23/251/133**, Dennis Pritt Road, Nairobi and a declaration that the notice increasing the rent was null and void.

[3]. The respondents filed a separate application seeking a temporary injunction to restrain the appellant from effecting the notice to increase rent pending the hearing and determination of the suit, and, leave to prosecute the suit on behalf of 30 other tenants.

The application was supported by the affidavit of **Timothy Were** - 1st respondent (to which he annexed several documents) and also by a further affidavit sworn by the same person.

[4]. The application was opposed on the grounds contained both in the replying affidavit and in a further affidavit of **Deborah Jepchumba Limo** - the Pension Scheme Administrator and Secretary to the Board of the appellant in the replying and further affidavit it is deponed *inter alia*, that:

(i) The suit premises were vested in the appellant scheme to offset liabilities of the former employer, Kenya Posts and Telecommunications Corporation, to its Pension Scheme in lieu of payment of cash equivalent, which scheme has 3,000 members;

(ii) Twenty two (22) of the respondents are not members of the scheme;

(iii) The primary responsibility and duty of the appellant is to generate the best return of investments from its properties for overall benefit of the Retirement Benefits Scheme and its wider membership of over 3,000 individuals;

(iv) The occupation of the premises by the respondents is solely based on the tenancy agreements and in event of failure to pay rent, the appellant as landlord is entitled to exercise its rights under the law;

(v) The premises were renovated and valued before the notice to increase rent was issued.

[5]. The respondents stated in the two supporting affidavits that they are pensioners and members of the appellants scheme; that no repairs were done on the premises; that the valuation done by the appellant's valuer did not determine the rent to be paid in respect of each house and that the respondents' valuer had determined the rent payable as Kshs.19,000/= per month.

[6]. The High Court after considering the principles for granting interlocutory injunction stated in **Giella vs Cassman Brown & Co. Ltd [1973] EA 358** concluded;

“in this particular case, it is obvious that the balance of convenience is definitely tilted in favour of the applicants who are actually the sitting tenants. The Court also is of the considered opinion that the applicants have raised weighty legal issues which need to be canvassed before court makes a fair and impartial decision.”

[7]. The appeal is based on twenty grounds the essence of which is that the learned Judge erred in law in finding that the criteria for granting an interlocutory injunction had been met and in failing to apply the principles of freedom of contract. **Mr. Gachanja**, learned counsel for the appellant, made oral submissions in supporting the appeal. **Mr. Mogikoyo**, who was the counsel for the respondent, did not attend the hearing of the appeal although a hearing notice had been duly served upon him.

[8]. The principles for granting an interlocutory injunction are well established, firstly, the applicant must show a *prima facie* case with a probability of success, secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not

adequately be compensated by an award of damages; and thirdly, if the court is in doubt, it will decide the application on balance of convenience. We appreciate that an injunction is an equitable remedy and that in granting the injunction the court was exercising discretionary jurisdiction. We also recognize that an appellate court can only interfere with the exercise of discretion by trial court on the well established principles set out. (See **Mbogo vs. Shah [1968] EA 93**).

[9]. In the instant case, the appellant is the registered proprietor of the suit premises comprising of residential flats leased to the respondents. The premises are vested on the appellant as a pension scheme for the benefit of over 3,000 pensioners. The respondents do not occupy the premises as of right as pensioners but as tenants of the pension scheme and their relation with the appellant is that of landlord and tenant.

[10]. The basis of the respondents claim is that the appellant increased the rent before two conditions precedent were met – firstly, before renovating the premises and, secondly, before the valuation of the premises. The appellant maintained that it had met the conditions. The respondents disputed that the two conditions were met. Regarding the valuation condition, the respondents accepted the fact that valuation was done but disputed its accuracy. Indeed, the respondents accepted that the rental value was not Shs.16,000/= per month which they were paying but Shs.19,000/= according to valuation by their valuer. The facts on which the respondents’ claim was based were seriously disputed. The respondents’ claim pending in the High Court is mainly grounded on issue of facts. The learned Judge did not identify the weighty legal issues to which he referred, and, we are unable to discern any. In the premise, we agree that the respondent did not establish a *prima facie* case with a possibility of success.

[11]. Nor did the respondents show that unless the injunction was granted they might otherwise suffer irreparable injury which cannot be compensated by an award of damages. If they paid the increased rent and their suit ultimately succeeds, the appellant would refund the difference or offset it against future rents.

[12]. Finally, the learned Judge erred in assessing where the balance of convenience lies. The rents are paid into a pension scheme for the benefit of over 3,000 pensioners. The balance of convenience was in favour of the numerous pensioners and not in favour of the tenants.

[13]. For those reasons, we are satisfied that the learned Judge did not exercise his discretion judicially. In the result, the appeal is allowed with costs. The Ruling of the High Court dated 30th September, 2010 is set aside and the application dismissed with costs to the appellant.

Dated and delivered at Nairobi this 19th day of October, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

G.B.M. KARIUKI, SC

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JUDGE OF APPEAL

I certify that this a true copy of the original

DEPUTY REGISTRAR