



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 365 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PETER ROESTER – OTT.....CLAIMANT

-Versus-

DIOCESE OF KAKAMEGA (REGISTERED TRUSTEES)....RESPONDENT

RULING

By an application dated 5th June 2017 and filed on 8th June 2017, the respondent/applicant seeks orders that this court's orders of 11th December 2015 (temporary injunction) be set aside/discharged and/or varied and that costs of the application be in the cause. The application is made under Order 40, rule 7 of the Civil Procedure Rules and Sections 1A, 3A and 63 of the Procured Act. The grounds upon which the application is grounded are the following: -

- (i) That the claimant is not a medical doctor and he misrepresented his professionalism to the applicant.
- (ii) The claimant is paying rent in cash or in kind as anticipated in the agreement and the applicant is not getting any benefit from the claimant whatsoever.
- (iii) The claimant has had since August 2015, a period of about 2 years, a reasonable period to get alternative house.
- (iv) The applicant requires the house to house its employees.
- (v) The claimant is no longer an employee of the applicant as he works elsewhere and his continued stay in the applicant's house within the hospital is prejudicial.
- (vi) The applicant stand to suffer substantial loss.
- (vii) The applicant misled the court on several issues including that on repairs and furnishing of the house.
- (viii) The reliefs sought meets ends of justice.

The application is supported by the affidavit of Fr. Rev. Kizito Sabatia sworn on 5th June 2017. In the affidavit, Fr. Rev. Sabatia deposes that he claimant misrepresented to the applicant that he is a medical doctor, that the claimant has never paid rent in cash or kind since he occupied the house, that the claimant misled the court as he never spent Kshs.1,853,362/= on repairs or furnishing the house or at all and that the claimant now works elsewhere.

Fr. Rev. Sabatia further deposes that the respondent needs the house for occupation by other employees. He deposes that the claimant's advocates having filed an application to cease acting for him, the finalisation of the case is likely to be delayed. He deposes that the claimant has denied the respondent's agents access to inspect the house. He deposes that the orders sought to be set aside/vacated are prejudicial to the respondent, that the claimant has had sufficient time to look for another house and is a non-Kenyan whose stay in the hospital premises raises serious legal issues including working permit.

The claimant filed two affidavits in response to the application. In the replying affidavit sworn on 22nd June 2017, he deposes that the matters deposed in the affidavit in support of the application are untrue and/or made in ignorance. He deposes that the orders sought to be set aside/vacated are intended to be in force pending determination of the claim, that there are no orders barring him from working to earn a living, that change of advocates is his constitutional right and that the lease agreement for the house does not provide for inspection by the respondent's agents.

In the claimant's further affidavit sworn on 14th July 2018, he deposes that the respondent does not require the house he occupies for accommodation of its employees as it does not have a housing crisis. He deposes the respondent has rented out three house to non-employees while eight houses are vacant. He has attached photographs of the eight houses to support his contention.

Submissions

The application was disposed of by way of written submissions. Both parties reiterated and expounded the matters in their respective affidavits in the submission they filed.

Determination

I have considered the grounds and affidavit in support of the application. I have also considered the affidavits filed by the claimant, the submissions by both parties and the authorities cited.

The issue for determination is whether the respondent has justifiable grounds to warrant the setting aside/vacation of the orders of this court of 11th December 2015.

In the ruling of 11th December 2015, I stated the grounds for grant of the orders granted therein as follows:-

*"I do agree that in cases where housing is given as part of the terms of employment, the right to housing is extinguished upon the coming to an end of the employment contract irrespective of whether the termination was unfair or unlawful as was held by this court **Rosabel Wagicugu Nyamu -vs- Karutuni & Others** as well as in the case of **Joab Mehta Oduia -vs- Coffee Development Board of Trustees**. I however find the cases distinguishable from the present case where there was a separate and distinct tenancy agreement with specific terms. The tenancy agreement has a fixed term from 1st September 2013 to 31 August 2018. The terms thereof provided for the claimant to pay in kind for his tenancy.*

There was a legitimate expectation the part of the claimant that having complied by his obligations under the tenancy agreement by carrying out repairs and furnishing the house as specified in tenancy agreement, the respondent would give him peaceful and quiet possession of the premises until the expiry of the term thereof. The claimant alleges he has expended a substantial amount in the sum of Kshs.1,853,362/= pursuant to the tenancy agreement. The respondent does not deny this but states that he did so for his own luxury and comfort and in excess of what was agreed in the tenancy agreement. These are matters of a fact that must be subjected to hearing.

Having expended a substantial amount in the renovations and the furniture, the claimant stands to suffer substantial loss if he is forced to vacate the premises in accordance with the notice served upon him by the respondent.

By its promise contained in the tenancy agreement, the respondent is estopped from denying the contents of the tenancy agreement by way of promissory estopped. The respondent is also bound by equitable estopped as the claimant has on the respondent's premise expended substantial amounts of money to make the premises suitable and comfortable for his occupation on the understanding that he will occupy the premises for the period agreed.

I find that the claimant has demonstrated that he is likely to suffer substantial loss should orders of injunction restraining the respondent from interfering with the claimant's occupation of the material premises not be granted pending the hearing and determination of his claim."

In the present application, among the grounds given by the respondent in support of the application are that the claimant is not a Medical Doctor, that he is now working elsewhere, that he is a foreigner, that he has never paid rent in cash or kind, that he did not expend any money to renovate the house and that he has had sufficient time to look for an alternative house. All these are issues that were either addressed in the ruling of 11th December 2015 or are not relevant.

For instance, the issue of expenditure on renovation was admitted by the respondent and is part of the condition in the lease agreement. The amount spent by the claimant in the renovation is a matter for determination in the main suit.

The deposition that the respondent requires the house cannot be valid in light of the claimant's averments that there are three houses occupied by non-employees and eight vacant houses.

For the foregoing reasons, I find no merit in the application and dismiss the same with costs to the claimant.

In view of the fact that the tenancy agreement in contention is set to expire on 15th July 2018, the claimant will be expected to vacate the premises on the date of expiry unless he enters into a new lease agreement with the respondent.

For the avoidance of doubt therefore, the orders of 11th December 2015 will lapse on 15th July 2018.

DATED AND SIGNED AT NAIROBI ON THIS 20TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 5TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE