



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. 52 OF 2015**

**SAKINA OMAR MOHAMED**

**DIHAH BHOKE MAKINI BOTH T/A**

**ORANGE ROAD RUNNERS..... APPELLANTS**

**V E R S U S**

**1. AKSHRAP HOLDINGS LIMITED**

**2. AKSHRAP REAL ESTATE LIMITED**

**3. ELAM NGASE LUMWAJI T/A**

**DOMICILE AUCTIONEERS SERVICES.....RESPONDENTS**

**RULING**

The Appellants in this appeal were the Plaintiffs in the lower Court while the Respondent was the Defendant. It is a landlord tenant dispute. The lower court was moved to stop the eviction of the Appellants from the premises owned by the Respondent. While the interim orders were granted in the first instance, they were later vacated by a ruling delivered on 28<sup>th</sup> November 2013 with the directive that the Appellants be evicted from the premises. They then applied for review of the ruling which application was dismissed on 30<sup>th</sup> January 2015.

The Appellants have now appealed to this court against that ruling. The business premises stand on L.R. No. 209/12042/57, Alpha Centre, Nairobi (No. 57). The Appellants have pleaded that the tenancy is a controlled one under the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap. 301. According to the Appellants, the Respondent attempted to evict them after expiry of the lease which they resisted and continued paying the rent which the Respondent continued accepting. They contend that it therefore amounts to a controlled tenancy and therefore cannot be haphazardly evicted from the premises.

Together with the Memorandum of Appeal, the Appellants filed Notice of Motion dated 12<sup>th</sup> May, 2015. It seeks the main order of temporary injunction to protect their possession of the premises pending disposal of the appeal. The application is supported by the affidavit of one Sakina Omar Mohamed, the first Appellant.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have opposed the application by grounds of opposition filed on 26<sup>th</sup> May

2015. They are –

- i. That the application is incompetent and incurably defective as the same is brought in contravention of Section 79G of the Civil Procedure Act.
- ii. That the application is bad in law and is a gross abuse of the Court process.
- iii. That it is misconceived and vexatious as the Applicants have not offered any security which is a mandatory requirement under Order 42 Rule 6 of the Civil Procedure Rules.
- iv. That the Application lacks merit as the Applicants are seeking an equitable remedy and have not come to this honourable court with clean hands.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing, including the authorities cited.

**“Controlled tenancy”** is defined in Section 2 of Cap. 301 as -

**“...a tenancy of a shop, hotel or catering establishment-**

**(a) Which has not been reduced into writing; or**

**(b) which has been reduced into writing and which-**

**(i) is for a period not exceeding five years;**

**or**

**(ii) contains provisions for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or**

**(iii) relates to premises of a class specified under subsection (2) of this section:**

**Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy.”**

It is common ground that the Appellant’s formal written lease expired but they continued to occupy the premises without a written lease, paying monthly rent without fail.

It is contended for the Appellant’s, that the premises is leased out for purposes of carrying out its clearing and forwarding transport business among others, which they have heavily invested in and carried out substantial partitions at a cost of Kshs. 8,000,000/-. The Appellant’s tenancy has not been reduced into writing since 31<sup>st</sup> March 2013. It appears therefore, *prima facie*, that the tenancy is controlled under Cap. 301.

Cap. 301 is an Act of Parliament passed -

**“to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.”** See the preamble to the Act.

The provisions of Cap.301, again *prima facie*, must thus supersede any other statute, including land registration and conveyancing statutes like the **Indian Transfer of Property Act, 1882**, where the issue is protection of a tenant. But all these are issues to be properly canvassed and determined at the hearing of the appeal. For now, it is satisfactory that the Appellant has demonstrated a *prima facie* appeal with a probability of success.

The Appellant must also demonstrate that it stands to suffer irreparable loss unless the temporary injunction sought is granted. The Appellant says that it has been conducting its clearing and forwarding and transport business in the premises where it has heavily invested in partitioning.

The material now before the court shows that the Respondent has received rent from the Appellants without fail for the eight (8) years they have rented the premises. The reason for attempting to evict the applicants is that the Respondent allegedly wants to give the premises to a new tenant. This issue would be neither here nor there if the Respondent followed the procedure for termination of a controlled tenancy set out in Cap.301.

Such a business coming to a sudden stop on account of a notice of termination of tenancy that may turn out to be unlawful, may involve a loss that may not be possible to quantify at this stage. A clearing and forwarding business must entail storage of expensive machinery depending on the nature of goods being dealt with. The Appellant is entitled to requisite statutory notice so that it may know what to do with its equipment upon termination of the tenancy.

In these circumstances, I am satisfied that the Appellant stands to suffer irreparable loss unless the temporary injunction sought is granted. In the circumstances I allow the application and grant prayer c) of the application pending disposal of the appeal.

*Dated, signed and delivered at Nairobi this 15<sup>th</sup> Day of June, 2016.*

**A. MBOGHOLI MSAGHA**

**JUDGE**