



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL PETITION NO. 355 OF 2016**

**KENYA INTERNATIONAL FISHERIES DEVELOPMENT**

**AND FISH SUPPLIES AGENCY LTD .....PETITIONER**

**VERSUS**

**THE AGRICULTURAL DEVELOPMENT CORPORATION.....1<sup>ST</sup> RESPONDENT**

**THE AGRICULTURAL FINANCE CORPORATION .....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**RULING**

**APPLICATION**

1. By a Notice of Motion dated 22<sup>nd</sup> August 2016 supported by the Affidavit of its Managing Director, David Ochieng Opon, the Petitioner seeks an interlocutory mandatory injunction to restore its possession of the suit premises from which it contends it was to forcibly evicted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as landlords to the said premises in contravention of section 90 of the Penal Code which creates the offence of forcible entry. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed Grounds of Opposition to the application and a replying affidavit sworn on 2<sup>nd</sup> September 2016 by Rose Kinyua, the Property Manager of the Development House, where the tenancy premises is situate and which is jointly owned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

2. It was common ground that the petitioner had been given possession of the suit premises on the 10<sup>th</sup> March pursuant to a letter of offer for tenancy on the premises dated 29<sup>th</sup> February, 2016 whereupon a Lease Agreement was signed by the petitioner and transmitted to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent for execution, and that the petitioner had paid part of the rent, after issuing two cheques for the payment thereof that had been dishonoured. The respondent had given notice that the offer for the tenancy had lapsed on account of the dishonoured cheques and called for vacant possession of the suit premises in default of which the respondents took possession and stationed guards at the suit premises.

**RESPECTIVE CASES OF THE PARTIES**

3. In the petition, the petitioner takes the view that upon the respondents' failure to sign the formal Lease created for the petitioner who was in possession a protected tenancy within the meaning of the Landlord

and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301 Laws of Kenya, which could only be terminated and eviction order by the Business Premises Tribunal established under the Act.

4. The petitioner further contends that in forcibly evicting the petitioner, changing the locks to the premises and stationing guards to keep away the petitioner's directors and staff, the 1<sup>st</sup> and 2<sup>nd</sup> respondents had, in addition to committing an offence under section 90 of the Penal Code, breached the petitioner's constitutional rights including the right to property, to equality, to fair administrative action and protection of social economic rights, and that the Police in failing to investigate despite report the alleged illegal eviction had breached the petitioner's right to equal protection of law and fair administrative action and that the respondents were together in breach of the principles of Article 10 of the Constitution.

5. The Respondent Landlords' case was that there was no tenancy created, the petitioner having defaulted on the payment of the security deposit, equivalent of a quarter's rent and service charge, under the tenancy agreement which was a condition before the taking up possession of the lease premises and that the respondents were therefore entitled to re-enter the premises and take possession from the petitioner when it refused to deliver vacant possession, and that in issuing dishonoured cheques the petitioner had committed offences.

### **SUBMISSIONS**

6. Counsel for the Respondents – Mr. Ngoge for the Petitioner, Mr. Ngaira for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Mr. Mogosso for the 3<sup>rd</sup> Respondent made oral submissions on 2<sup>nd</sup> September 2016, and ruling was reserved.

7. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents denied having forcibly evicted the petitioner and claimed to have moved in to secure the premises following the fleeing of the petitioner's director when the respondent's officials went to the premises.

8. Further, objection was taken as to place of suing by counsel for the respondent that the Petition was really not a constitutional but a tenancy dispute which was therefore a commercial matter which ought to have been filed in the commercial rather than the constitutional Division of the Court. Counsel for the petitioner responded that the petition was within the competence of the constitutional court because the acts of the respondents had violated the provisions of the constitution set out in the Petition and it was for the respondents who ought to have obtained an order of the court from the commercial division for the eviction of the petitioner as a tenant.

### **ISSUES FOR DETERMINATION**

9. The issues for determination in this application are:

- a. Whether the constitutional court has can entertain the petition based on the alleged tenancy dispute; and if so,
- b. Whether a tenancy arose in the circumstances of the case or only an offer which had lapsed existed between the parties; and
- c. Whether the court would make an order for mandatory injunction at the interlocutory stage.

### **DETERMINATION**

#### *Jurisdiction of the Constitutional Division of the Court*

10. It has not been suggested that the Constitutional and Human Rights Division of the Court has no jurisdiction on the matter of tenancies on the reverse, the Commercial Division of the Court has

jurisdiction to deal with constitutional matters as may arise in the course of dealing with commercial matters. It is noteworthy that the Divisions of the High Court are created for the efficient handling of the different types of cases in accordance with the overriding principle of expeditious disposal of the disputes. In my view, it would be a negation of the right to access to justice to drive a petitioner who has a reasonable cause of action from the judgment seat on account of the place of filing of his cause between different divisions of the same court or different courts of competent jurisdiction.

11. It would be a different matter if the issue was one of the jurisdiction of the Court as between the High Court and the courts of equal status established under Article 162 (2) of the Constitution. And even here, as held by the Court of Appeal in ***Prof. Daniel N. Mugendi v. Kenyatta University & Others, CA No 6 of 2012*** and in ***Judicial Service Commission v. Gladys Boss Shollei & Another, CA No 50 of 2014***, involving the Labour and Employment Court, a court of equal status as the High Court under Article 162 (2) of the Constitution, “the High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that the Constitution contemplates enforcement and protection of fundamental rights and freedoms by other courts, other than the High Court.”

12. In the present case, the questions of the breach in fair administrative action and the rule of law presented by the petitioner in his alleged forcible eviction by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in circumstances which may manifest in the criminal offence of forcible entry and that of alleged failure by the Police to investigate and take action on the petitioner’s report thereon are clearly within the competence of the constitutional court, even though the acts may have taken place in the context of a commercial matter of alleged tenancy agreement.

*Whether tenancy arose between the parties*

13. The exact nature of the relationship between the petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> respondents is a matter for determination upon hearing the petition on its full merits. However, at this stage the court must examine whether there is an arguable case for existence of a tenancy which may support the grant of the conservatory order sought.

14. Without prejudice to the findings of the Court upon full hearing of the Petition on the merits, it appears to this court that had the parties been all private persons there would have been merit in the petitioner’s case that its relationship with the 1<sup>st</sup> and 2<sup>nd</sup> respondent is one of protected tenancy under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, having been put in possession and it having paid some money under the tenancy agreement.

15. Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act defines a tenancy as follows:

*““tenancy” means a tenancy created by a lease or underlease, by an agreement for a lease or underlease by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgagor and mortgagee as such;”*

16. See also ***Rogan-Kamper v Robert Grosvenor No. 2*** [1977] eKLR, where it was held by the Court of Appeal for East Africa that –

*“The actual tenancy created by possession and payment of rent is an unwritten tenancy, and is therefore controlled, because the definition of tenancy includes “tenancy agreements” and tenancies created by “operation of law”. Therefore, there is no need in this case to tackle the meaning or operation of section 2(3) of the Act in relation to that part of the definition of tenancy apparently describing a tenancy created by an agreement for a lease.*

*If this tenancy was controlled then in accordance with section 4(1):*

*Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated and*

*no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered otherwise than in accordance with the following provisions of this Act.*

*The provisions of the Act were not followed. Accordingly, there was no lawful termination on 31st May 1971....”*

17. However, if the landlords in this case are government agencies (or **public corporations** as described by the Petitioner at paragraph 2 of the Petition) and, therefore, properly construed as Government for purposes of the Act, then the tenancy will not be a controlled tenancy, which the Act defines as excluding tenancy where government is party—

*““controlled tenancy” means 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 provision 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;”**

18. However, whether or not it was a controlled tenancy for purposes of cap. 301, it would appear to be a tenancy nonetheless under section 57 (2) of the Land Act 2012 which provides as follows:

*“(2) If the owner of land permits the **exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing**, that occupation shall be deemed to constitute a periodic tenancy.”*

19. It does not matter, in my view, that the formal lease was not executed or that petitioner had issued dishonoured cheques before replacing with a cash deposit. While the dishonoured cheques may constitute a criminal offence, this has no effect on the tenancy, as receipt of the part payment of the monies is acknowledged. The petitioner may be prosecuted for the offence but it retains its status as a periodic tenant. If the tenant defaults in the payment of the rent, the landlord’s remedy is in levying distress for rent, or seeking to terminate the tenancy in accordance with section 57 (4) of the Land Act which provides-

*“(4) A periodic tenancy may be terminated by either party giving notice to the other, the length of which shall be not less than the period of the tenancy and shall expire on one of the days on which rent is payable.”*

20. In my view, at no time or circumstance, could it be **lawful**, consistently with the principle of the Rule of Law, to commit an offence to secure a **lawful** objective. While the aggrieved landlord may seek to recover possession of his premises from a tenant who has defaulted in payment of rent or deposit on rent, he must do it in accordance with the provisions of law applicable to the situation.

21. While the tenancy is not a controlled tenancy and the tenant is not a protected tenant under the Landlord and Tenant Act cap. 301, being a tenant in possession he is entitled to protection from forcible eviction by the provisions of section 90 of the Penal Code which makes it an offence to obtain possession of a premises forcefully, notwithstanding that the perpetrator is entitled to possession thereof. I daresay that there is no authority to forcibly evict any person in possession of immovable property whether by a

colour of right or a trespasser.

22. In *M/S GUSII MWALIMU INVESTMENT CO. LTD & 2 Others v M/S MWALIMU HOTEL KISII LTD* [1996] eKLR, Shah JA. (with whom Tunoi, JA concurred, Lakha JA dissenting on the facts) dealt with not dissimilar circumstances and held as follows:

*“The landlord effectively obtained possession by the said illegal distress. Obtaining of possession in this manner is clearly shown by the fact that on 22nd May, 1995, the landlord informed the interested party, in writing, that the suit premises were ready for occupation by the interested party. The tenant had no choice but to go to the superior court for remedy. The landlord may also have acted illegally, that is, contrary to Section 90 of our Penal Code (Cap 63 Laws of Kenya) which reads.*

*“90. Any person who, in order to take possession thereof, enters on any lands or tenements in a violent manner, whether the violence consists in actual force applied to any other person or threats in breaking open any house or in collecting an unusual number of people, and whether he is entitled to enter upon the land or not (emphasis added) is guilty of the misdemeanour termed forcible entry:*

*Provided that a person who enters upon lands or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry.”*

*I have no hesitation whatsoever in holding that the landlord did all it could to obtain the possession unlawfully and the learned judge was entirely right in making the orders he made. If what the landlord did in this case is allowed to happen we will reach a situation when the landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession.”*

23. Of course, the principles for grant of interlocutory mandatory injunction order sought therein require a more cogent case as discussed below.

#### *Principles for the grant of Interlocutory Mandatory Injunction*

24. There is no dispute that the court can grant an interlocutory mandatory injunction in exceptional and clear cases. See *KAMAU MUCUHA -VS- THE RIPPLES* Civil Application No. NAI. 186 OF 1992 (unreported) and *Gusii Mwalimu* case, supra. The test for the determining whether a clear case exists for the grant of a mandatory injunction at the interlocutory stage may be expressed in the words of Megarry, J. in *SHEPHARD HOMES LTD. VS. SANDHAM* (1970) 2 ALL ER 402 at 412, (1971) Ch 340 at 351, as follows:

*“[O]n motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case **the court must ... feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted;** and this is a higher standard than is required for a prohibitory injunction.”*

25. The petitioner has in my view demonstrated a clear case that it was forcibly evicted from the suit premises, and I feel a high degree of assurance that the injunction will be found to have been rightly granted because of the following factors:

1. The petitioner was in possession of the suit premises.
2. The petitioner has paid and the respondent has acknowledged the payment of the sum of 84,000/- into the respondent's bank account.

3. The 1<sup>st</sup> and 2<sup>nd</sup> respondent did not sue for possession of the suit premises and obtain an order for the delivery thereof by the petitioner.

4. In the alleged measure of securing the premises following alleged flight by the petitioner's directors or employees, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have prevented the petitioner from accessing the suit premises and conducting its operations.

5. The Petitioner has a strong case in breach of the principle of the rule of law by the eviction of the petitioner, or by, what amount to the same thing, the locking out of the petitioner's directors and employees and thus hindering its business operation without following the due process of the law in seeking an order of court therefor.

26. The Court also considers that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are not without remedy for their rights: they can lawfully levy distress or seek an order for eviction and mesne profits if they contend that the petitioner is a trespasser. On the other hand, the court further considers that there is **no constitutional right to occupation of tenancy premises without payment of rent** and, accordingly, the respondent landlords are entitled to levy distress for rent and seek other lawful remedial reliefs in accordance with the law.

27. Parties to a case and their counsel have as part of the overriding objective of the civil process a duty under section 1A (3) of the Civil Procedure Act as follows:

*“(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”*

28. The principle of overriding objective is restated in the case of constitutional applications in Rule 3 (6) of THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 as follows:

*“3(6) A party to proceedings commenced under these rules, or an advocate for such party is under a duty to assist the Court to further the overriding objective of these rules and in that regard to—*

*(a) participate in the processes of the Court; and*

*(b) comply with the directions and orders of the Court.”*

## **ORDERS**

29. Accordingly, for the reasons set out above, the Court grants the petitioner's Notice of Motion dated 22<sup>nd</sup> August 2016 in terms of prayers nos. 2 and 3 thereof.

30. The Court makes further orders, in the interests of 1<sup>st</sup> and 2<sup>nd</sup> respondents' rights to levy distress of unpaid rent, that the petitioner shall not remove any of the goods in the suit premises pending the hearing of the petition.

31. In the interest of implementation of the court order the Counsel for parties shall within three (3) days, in accordance with duty of counsel to assist the court in compliance with orders of the court under section 1A (3) of the Civil Procedure Act and Rule 3 (6) of THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013, oversee the handing-over by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to the petitioner of the suit premises and any facilities thereof including taking any necessary inventories for the return of petitioner's goods and equipment.

32. For avoidance of doubt, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are at liberty to levy distress for arrears of rent in

accordance with the law.

33. For an expedited disposal of the tenancy dispute herein, the Petition shall be heard on priority basis.

34. Costs in the Cause.

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the Presence of:-**

Mr Ngoge for the for the Petitioner

Miss Kimathi for Mr Ngaira for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent

No appearance for the 3<sup>rd</sup> Respondent

Kazungu- Court Assistant.