



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. E449 OF 2021

KENYA MEDICAL RESEARCH INSTITUTE.....PLAINTIFF/APPLICANT

VERSUS

JENIFER MUTHOKI MBUVIDEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. Vide Notice of Motion Application dated the 22nd December 2021, the Plaintiff/Applicant has sought for the following Reliefs;

i.(Spent).

ii. *Pending the hearing and determination of the Application herein, the Honorable Court be pleased to grant an order of Temporary Injunction to restrain the Defendant/Respondent from entering upon, remaining on, operating and/or otherwise carrying out business within the staff canteen erected at L.R No. 209/10362, herein after referred to as the suit property.*

iii. *Pending the hearing and determination of the Suit herein, the Honorable Court be pleased to grant an order of temporary injunction to restrain the Defendant/Respondent from entering upon, remaining on, operating and/or otherwise carrying out business within the staff canteen erected at L.R No. 209/10362, herein after referred to as the suit property.*

iv. *The Honourable be pleased to grant an order of Mandatory Injunction directed to and/or against the Defendant/Respondent to vacate and hand over vacant possession over and in respect of L.R No. 209/10362 to and in favor of the Plaintiff/Applicant.*

v. *Costs of the Application be provided for.*

2. The subject Application is premised on the grounds contained at the foot thereof and same is further supported by the Affidavit of one Antony Wachira, sworn on the 22nd December 2021, and in respect of which the deponent has enumerated various grounds, upon which the orders sought are grounded.

3. Upon being served with the Application, the Defendant/Respondent herein proceeded to and instructed counsel who filed a notice of appointment of advocate and thereafter lodged a Notice of Preliminary Objection. For clarity, the Defendant/Respondent did not file any Replying Affidavit and hence, same essentially relied on the preliminary objection to oppose the subject Application.

DEPOSITIONS BY THE PARTIES

PLAINTIFF/APPLICANTS CASE

4. Vide Supporting Affidavit sworn on the 22nd December 2021, one Antony Wachira has averred as hereunder;

5. On or about the 1st July 2000, the Plaintiff/Applicant herein entered into and/or executed a Lease Agreement with the Defendant/Respondent, whereby the Plaintiff/Applicant demised to and/or in favor of the Defendant/Respondent the staff canteen situated on L.R no. 209/10362, whereby the Defendant/Respondent was to operate the staff canteen for a period of two years.

6. It was further averred that the 2-year period and/or duration lapsed on or about the 1st July 2002, but despite the lapse, the agreement to

Lease was neither renewed nor extended.

7. Further, it has been averred that despite the lapse and/or termination of the duration of the lease, the Defendant/Respondent herein has failed and/or refused to vacate and/or hand over vacant possession over and in respect of the suit premises.

8. On the other hand, the deponent has averred that owing to the fact that the lease agreement had lapsed, same proceeded to and issued the Defendant/Respondent with various Notices to vacate the premises, but same has failed and/or neglected to vacate the suit premises to date.

9. Nevertheless, it has also been averred that the Defendant/Respondent has also commenced to sell alcohol within the suit premises and as a result, same has affected the operations of the Plaintiff/Applicant, insofar as the alcohol is sold to the staff of the Plaintiff/Applicant during working hours and in this regard, the operations of the Plaintiff/Applicant have been put into jeopardy.

10. Other than the foregoing, it has also been averred that despite the fact that the Defendant/Respondent has remained in occupation of the suit premises, same has failed and/or neglected to pay the rents and/or Mense profits and in this regard, the Defendant/Respondent is therefore a trespasser on the suit premises, without any lawful cause and/or basis.

11. Based on the foregoing, the Plaintiff/Applicant has therefore sought for the Reliefs contained at the foot of the Application dated the 22nd December 2021 and essentially, an Order for Mandatory Injunction.

DEFENDANTS/RESPONDENTS CASE:

12. In opposition to the Application dated the 22nd December 2021, the Defendant/Respondent filed a Notice of Preliminary Objection, wherein same stated as hereunder;

i. The Environment and Land Court has no Jurisdiction with respect to this matter as the tenancy falls within the provisions of Section of the Landlords and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.

ii. The admission that the Defendant/Respondent has been on the premises for 18 years without a lease satisfies the conditions of Section 2 of the Landlords and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya and the Respondent is classified as a control tenant within the said provision.

iii. The Prayers being sought in the Application and the suit in general cannot be granted by this Honourable court under Section 4 of the Landlords and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya as the proper forum for the grant of such orders is the Business Premises Rent Tribunal established under Section 11 of the Landlords and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.

iv. This Suit has been brought in clear disregard of the above statutory provisions and same is an abuse of the Due Process of this Court.

SUBMISSIONS BY THE PARTIES:

13. On the 21st February 2022, the matter came up for hearing of the Application dated the 22nd December 2021, whereupon submissions were made in respect of both the Application and the Notice of preliminary objection, the latter dated 15th February 2022.

14. In support of the Application, counsel for the Plaintiff/Applicant submitted that the Plaintiff/Applicant entered into and executed a Lease Agreement with the Defendant/Respondent, which was dated the 1st July 2000.

15. It was further submitted that the Lease Agreement under reference was for a period of 2 years and same was subject to renewal, but the Agreement was never renewed or at all.

16. Be that as it may, Counsel for the Plaintiff/Applicant further submitted that even though the Lease Agreement was never renewed, the Defendant/Respondent remained in occupation of the suit premises to date, albeit, without any lawful basis or at all.

17. It was further submitted that the Defendant/Respondent has also failed to pay rents over and in respect of the premises and that in this regard, the activities by and/or at the instance of the Defendant/Respondent, constitutes and/or amounts to Trespass.

18. Finally, it was submitted that on or about 9th April 2020, the Defendant/Respondent herein filed a Reference before the Business Premises Rent Tribunal, as well as an Application for temporary injunction, whereby the Defendant/Respondent sought to restrain and/or prohibit the Plaintiff/Applicant from recovering vacant possession of the suit premises.

19. However, the Plaintiff/Applicant further submitted that upon the filing of the said proceedings, a Preliminary objection was taken as pertains to jurisdiction and the Preliminary objection was sustained vide Ruling of the Business Premises Rent Tribunal dated the 26th November 2021.

20. In the premises, the Plaintiff/Applicant contended that the Defendant/Respondent is not a protected tenant and in any event, the provisions of the *Landlords and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya*, do not apply to the Defendant/Respondent.

21. On her part, the Defendant/Respondent submitted that the lease agreement having long lapsed and same not having been renewed, the continued occupation of the suit premises by the Defendant/Respondent therefore brought same within the scope and/or confines of **the Landlords and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya**.

22. It was further submitted that to the extent that the relationship between the Plaintiff/Applicant and the Defendant/Respondent was not regulated by any written Agreement, same was therefore a controlled tenancy.

23. Further the Defendant/Respondent submitted that the dispute between the Plaintiff/Applicant and the Defendant/Respondent can only be addressed and/or dealt with by the Business Rent Tribunal and not the Environment and Land Court.

24. Owing to the foregoing, the Defendant/Respondent thus contended that this Honourable Court is not seized of the requisite Jurisdiction to entertain and/or adjudicate upon the subject suit. In this regard, the Defendant/Respondent has contended that the entire suit and the subject Application ought to be struck out with Costs.

ISSUES FOR DETERMINATION

25. Having reviewed the Notice of Motion Application dated the 22nd December 2021, the Affidavit in support thereof, as well as the Preliminary Objection dated the 15th February 2022, and having similarly considered the oral submissions that were rendered by and/or on behalf of the Parties, the following issues are germane for Determination

- i. *Whether this Honourable Court is seized of Jurisdiction to entertain the subject matter.*
- ii. *Whether the Defendant/Respondent is a Protected tenant in the suit Premises.*
- iii. *Whether the Plaintiff/Applicant has established Special and Exceptional Circumstances to warrant the grant of orders of Mandatory Injunction.*
- iv. *Whether the Plaintiff/Applicant is entitled to orders of Temporary injunction.*

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether this Honourable court is seized of Jurisdiction to entertain the subject matter.

26. The Defendant/Respondent herein has contended and or otherwise submitted that the dispute between the Plaintiff/Applicant and the Defendant/Respondent, touches on and/or concerns a dispute over a controlled tenancy and in this regard, it has been submitted that the dispute ought to be placed before the Business Premises Rent Tribunal for hearing and determination.

27. Owing to the foregoing, the Defendant/Respondent, has therefore submitted that this court is thus not seized of the requisite Jurisdiction to entertain and/or adjudicate upon the subject Dispute.

28. On the other hand, the Plaintiff/Applicant has submitted that the tenancy and/or otherwise relationship between the Plaintiff/Applicant and the Defendant/Respondent, is not a control tenancy and therefore the Business Premises Rent Tribunal is not seized of Jurisdiction.

29. Before delving to determining whether or not the Relationship between the Plaintiff/Applicant and the Defendant/Respondent, creates a Controlled tenancy, it is important to reproduce the provisions of **Section 2 of the Landlords and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya**, which provides as hereunder;

2. Interpretation.

(1) For the purposes of this Act, unless the context otherwise requires—

“catering establishment” means any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises;

“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;

“hotel” means any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable consideration;

“landlord”, in relation to a tenancy, means the person for the time being entitled, as between himself and the tenant, to the rents and profits of the premises payable under the terms of the tenancy;

“Minister” means the Minister for the time being responsible for matters relating to commerce;

“receiving party” means a tenant or a landlord of a controlled tenancy to whom a tenancy notice is given;

“reference” means a reference to a Tribunal under section 6 of this Act;

“rent” includes any sum paid as valuable consideration for the occupation of any premises, and any sum paid as rent or hire for the use of furniture or as a service charge where premises are let furnished or where premises are let and furniture therein is hired by the landlord to the tenant or where premises, furnished or unfurnished are let with services;

“requesting party” means a landlord or a tenant of controlled tenancy by whom a tenancy notice is given; “service charge” means a charge for any services rendered; “services” in respect of any tenancy means the use of water, light or power, conservancy, sewerage facilities, sweeper, watchman, telephone or other amenity or facility available to the tenant, save and except the supplying of meals, and the right of access to any place or accommodation accorded to the tenant by reason of his occupation of the premises comprised in the tenancy;

“shop” means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money’s worth;

“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;

“tenancy notice” means a notice given under subsection (2) or subsection (3) of section 4 of this Act;

“tenant” in relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding, and includes a sub-tenant; “Tribunal” means a Tribunal appointed under section 11 of this Act.

30. Having reproduced the foregoing provisions, it is also imperative to take cognizance of the fact that the Plaintiff/Applicant herein is a statutory Corporation or better still a Governmental agency, created pursuant to an Act of Parliament and therefore same is wholly government funded and owned.

31. On the other hand, it is also important to note that the Plaintiff/Applicant herein is a Research institute which is funded by the tax payers money and is charged with the mandate of carrying out and/or undertaking Medical Research into various medical aspects and the outcome of such research, is used by the Government of the Republic of Kenya for purposes of disease prevention and/or cure.

32. For the avoidance of doubt, the Plaintiff/Applicant herein is created under the state corporation Act, Chapter 446 Laws of Kenya, as well as the Science Technology and Innovations Act, 2013, which essentially underline that the Plaintiff/Applicant is a Governmental organization, better referred to as a Parastatal.

33. Having found and held that the Plaintiff/Applicant is a governmental organization, the issue that then arises is whether a tenancy entered into with the Plaintiff/Applicant, can fall within the scope of the *Landlords and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya*.

34. In my humble view, the proviso to section 2 of the Act, (Supra) excludes and/or exempts tenancy entered into between the Government and by extension, Government agencies, including the Plaintiff/Applicant herein.

35. In support of the foregoing observation, I rely on and adopt the decision in the case of **Forthhotel Limited T/Coast Car Park & Amvesment Centre v Tourism Finance Corporation [2015] eKLR** where the Court observed as hereunder;

12. The proviso to Section 2 (1) of Cap 301 reads thus :-

“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”.

In the plaint, the Applicant described the respondent as “a statutory body established under the laws of Kenya offering tourism finance services”. It is within the applicant's knowledge that the respondent is a government corporation. To begin with, the case law cited by the applicant all which were persuasive did not relate to a government body.

35. On the basis of the foregoing position, I would be inclined to dismiss the Preliminary objection and to hold that the Tenancy and/or relationship between the Plaintiff/Applicant and the Defendant/Respondent did not culminate into and/ or birth a control tenancy.

36. Nevertheless, there is a second aspect to the Preliminary objection herein, which also merits my consideration and/or attention.

37. It is important to note that on or about 9th April 2020, the Defendant/Respondent herein filed and/or lodged a Reference before the Business Remises rent Tribunal, whereupon same sought for orders of Temporary Injunction to restrain and/or prohibit the Plaintiff/Applicant from recovering vacant possession of the suit premises. See **Tribunal Cause Number 378 of 2020 (Nairobi)**.

38. Following the lodgment of the said reference, a Preliminary Objection was taken pertaining of the Jurisdiction of the Tribunal, to hear and to entertain the Reference and the objection was heard and disposed of vide Ruling delivered on the 26th November 2021, whereby the tribunal found that same was not possessed of the requisite Jurisdiction to entertain the Dispute between the Plaintiff/Applicant and the Defendant/Respondent.

39. Suffice it to note, that the Defendant/Respondent herein, is aware of the outcome and/or the Decision of the Tribunal, whereby the Tribunal found and held that same was not seized of the requisite jurisdiction to entertain and/ or handle the Dispute between the Plaintiff/Applicant and the Defendant/ Respondent over the subject Tenancy.

40. In any event, during the proceedings herein, the court enquired from the Defendant/Respondent's counsel whether same had filed an Appeal against the Decision of the tribunal and the response was in the negative.

41. Clearly, the Defendant/Respondent is aware that the tribunal has ruled that same does not have jurisdiction to deal with the subject matter, but nevertheless, the Defendant/Respondent, by sidewind now wants the court to find and hold that the Tribunal has such Jurisdiction.

42. In my humble view, the Defendant/Respondent is playing lottery with the Due process of the Court and the Preliminary Objection herein, is not only misconceived, but amounts to an abuse of the Due process of the court.

43. In short, the Preliminary objection is Devoid of Merits.

ISSUE NUMBER 2

Whether the Defendant/Respondent is a protected tenant in the suit premises.

44. It is common ground that the Plaintiff/Applicant and the Defendant/Respondent entered to and executed a lease agreement over and in respect of the staff canteen, which was for a period of 2 years, lapsing on the 1st July 2002.

45. It is also common ground that upon the lapse of the lease agreement, same was neither renewed nor extended. In this regard, the continued relationship between the Plaintiff/Applicant and the Defendant/Respondent, became one of a Periodic tenancy, terminable by the Issuance of One-Month Notice.

46. In support of the foregoing observation, I adopt and reiterate the decision in the case of **Ram International Limited v Maasai Mara University [2021] eKLR**, where the court stated as hereunder;

I concur with the persuasive case of Ukwala Supermarket (Eldoret) Limited v Amritral Sojpar Shah Wholesalers Limited [2017] eKLR where the court held as follows;

I do find that there was no written agreement between the plaintiffs and the defendant. What existed was a contract between the defendant and previous owners and therefore, written agreement was not binding to the plaintiff. I do agree with the plaintiff that the relationship between the plaintiff and defendant was a periodic tenancy.

A periodic tenancy is a tenancy that continues for successive period until the tenant gives the landlord notification that he wants to end the tenancy. The period depends on how the rent is paid. For calendar month, it becomes monthly tenancy. If rent is paid quarterly, it becomes a quarterly tenancy and if paid yearly, a yearly tenancy..

47. As concerns the subject matter, the Plaintiff/Applicant has tendered in evidence that same issued and served termination Notices dated the 23rd March 2020, whereupon same sought to recover and/or obtain vacant possession.

48. For the avoidance of doubt, the letter dated the 23rd March 2020, was duly served upon the Defendant/Respondent and same was

thereafter responded to vide letter dated the 15th April 2020, which was signed by one Dun Mbuvi, for and/or behalf of the Defendant/Respondent.

49. To the extent that the tenancy relationship between the Plaintiff/Applicant and the Defendant/Respondent was periodic in nature and to the extent that the Plaintiff/Applicant has issued and served the termination notice, the tenancy agreement/relationship between the Plaintiff/Applicant and the Defendant/Respondent therefore lapsed and/or stood extinguished.

50. Owing to the foregoing, it is my finding and holding that upon the lapse of the duration of the notice which was issued vide letter dated the 23rd March 2020, the Defendant/Respondent herein ceased to have any Right and/or entitlements to and in respect of the Suit premises.

51. Consequently and in the premises, the Defendant/Respondent, does not appear to hold any lawful basis or at all, in respect of the suit premises.

ISSUE NUMBER 3

Whether the Plaintiff/Applicant has established Special and Exceptional circumstances to warrant the grant of orders of Mandatory Injunction.

52. The suit property, undeniably belongs to and is registered in the names of the Plaintiff/Applicant and in this regard, the Plaintiff/Applicant holds exclusive and absolute rights to occupy, possess and/or use same, to the exclusion of all and sundry.

53. On the other hand, the Defendant/Respondent herein can only remain in occupation of the suit property or a portion thereof, with the consent and/or permission of the Plaintiff/Applicant and not otherwise.

54. Nevertheless, in respect of the subject matter the Plaintiff/Applicant, who is the lawful owner of the suit premises, has issued and served the requisite termination notice upon the Defendant/Respondent. In this regard, it is therefore common ground that the rights and/or interests, if any, that inhered in the Defendant/Respondent has since terminated and/or extinguished.

55. To the extent that the rights and/or interests of the Defendant/Respondent have extinguished, it is therefore imperative to observe that the Defendant/Respondent no longer has a legitimate basis to remain in occupation of the suit premises.

56. Contrarily, the Plaintiff/Applicant herein has a right to immediate recovery and/or vacant possession of the suit premises, which lawfully belongs to her, for her own use. In this regard, no legitimate cause exists to bar, deny and/ or deprive the Plaintiff/Applicant from obtaining vacant possession.

57. Given that the Plaintiff/Applicant has since issued and served the requisite termination notice and given that the Defendant/Respondent has continued to remain in occupation of the suit premises thereof, albeit, without lawful cause, this is therefore a suitable case to warrant the grant of an orders of Mandatory Injunction.

58. At any rate, it was averred that the Defendant/Respondent stopped and has not been paying any rents to and in favor of the Plaintiff/Applicant. Consequently, it is therefore apparent that the Defendant/Respondent is abusing the hospitality, that has been extended unto her by the Plaintiff/Applicant and same is therefore not entitled to any Equitable protection.

59. Suffice it to say, that the Plaintiff/Applicant has established and/or met the threshold to warrant the grant of an order of Mandatory Injunction and in this regard, it is important to take cognizance of the decision in the case of **Nation Media Group & 2 others v John Harun Mwau [2014] eKLR**, where the Honourable Court Of Appeal stated as hereunder;

“We agree with Mr. Mogere that in an application for a mandatory injunction the balance of convenience is not the only principle which an applicant has to satisfy as stated by the learned Judge at page 34 of the ruling. A different and higher standard than that in prohibitory injunctions is required before an interlocutory mandatory injunction is granted. Besides, existence of exceptional and special circumstances must be demonstrated as we have stated, a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases.”

ISSUE NUMBER 4

Whether the plaintiff/Applicant is entitled to orders of Temporary Injunction.

60. The Plaintiff/Applicant is the registered owner of the suit property and by virtue of such ownership, the Plaintiff's/Applicant's rights to and in respect thereof, are Statutorily provided for pursuant to **Section 24 and 25 of the land Registration Act, 2012**

61. On the other hand, the Defendant/Respondent's interest over and in respect of the suit property, which were periodical in nature, have since been determined and/or terminated vide the Notice to terminate dated the 23rd March 2020, which was duly received and acknowledged vide letter dated the 15th April 2020.

62. Having duly issued and served the termination Notice, the Plaintiff/Applicant is therefore entitled to recovery of vacant possession of the suit premises.

63. Nevertheless, the Defendant/Respondent, has failed and/or neglected to hand over vacant possession and has remained in occupation thereof. For clarity, same has continued to infringe upon the Plaintiffs/Applicants rights to the suit property.

64. In the premises, it is my finding and holding that the Plaintiff/Applicant has established and/or proven a Prima facie case, with overwhelming chances of success, to warrant the grant of the orders of Temporary Injunction.

65. In support of the foregoing position, it is worthy to take cognizance of the decision in the case of **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125**, where the Court of Appeal fashioned a definition for “prima facie case” in civil cases in the following words:

“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

FINAL DISPOSITION

66. Having addressed and or dealt with the issues enumerated herein before, I come to the conclusion as hereunder;

- i. *The Notice of Preliminary Objection dated the 15th April 2021 is misconceived and legally untenable.*
- ii. *The Notice of Motion Application dated the 22nd December 2021, is meritorious and same be and is hereby allowed.*

67. In view of the foregoing, an order of Mandatory Injunction be and is hereby issued against the Defendant/Respondent to vacate and hand over vacant possession of the staff canteen, situate on L.R No. 209/10362, to the Plaintiff/Applicant, within 30 days.

68. In default to hand over vacant possession to and in favor of the Plaintiff/Applicant, the Plaintiff/Applicant shall be at liberty to evict the Defendant/Respondent from the suit premises and recover vacant possession, without further notice or at all.

69. Cost of the Application and the Notice of the Preliminary Objection, be and are awarded to the Plaintiff/Applicant.

70. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

IN THE PRESENCE OF;

JUNE NAFULA COURT ASSISTANT