REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 158 OF 2014

AL-RIAZ INTERNATIONAL LIMITED.....PLAINTIFF

-versus-

GANJONI PROPERTIES LIMITED..... DEFENDANT

RULING

Introduction

1. The Application before court is the Notice of Motion dated 31st December 2014 in which the Plaintiff/Applicant is seeking temporary injunction to restrain the Defendant, its employees, agents and/or servants from evicting or in any other way interfering with the Plaintiff's quite possession and enjoyment of the suit premises namely Plot No. MOMBASA BLOCK XX/340 (hereinafter "the suit premises") pending hearing of the suit *inter partes*.

2. The parties herein entered into a lease agreement pursuant to which the Defendant leased out the suit premises to the Plaintiff for a period of five years from 1st January 2010. The monthly rent was payable as follows:

i. From 1st January 2010 to 31st December 2010 Kshs. 254,000/= per month
ii. From 1st January 2011 to 31st December 2011 Kshs. 269,000/= per month
iii. From 1st January 2012 to 31st December 2012 Kshs. 300,000/= per month
iv. From 1st January 2013 to 31st December 2013 Kshs. 330,000/= per month
v. From 1st January 2014 to 31st December 2014 Kshs. 360,000/= per month

3. On 4th October 2014, the Defendant, through its advocates, Kiarie Kariuki & Company Advocates, wrote to the Plaintiff informing it that the lease was due to expire on 31st December 2014 and that the Defendant would only renew the lease on condition that the Plaintiff agreed to pay new rent of Kshs. 600,000/= per month with effect from January 2015 which new rent was subject to a yearly increment of 10%. According to the said letter, the Plaintiff was to confirm whether he was agreeable to the said terms by 15th November 2014 otherwise the Plaintiff was to vacate the suit premises on 31st December 2014.

4. The Plaintiff neither confirmed its acceptance of the said proposed terms nor vacated the suit premises. Instead, the Plaintiff, on 31st December 2014, filed this suit and the present application in which it seeks to restrain the Defendants from evicting it from the suit premises. The application is supported by the Affidavit of REHAN RIAZ MALIK, the Plaintiff's director, sworn on 31st December 2014. The Plaintiff also filed a Further Affidavit sworn by the same deponent on 30th March 2015 and Written Submissions on the application dated 28th April 2015.

The Plaintiff's Case and Submissions

5. The application is premised on 8 grounds as follows:

i. That by a letter dated 4th October 2014, the Defendant gave the Plaintiff notice to vacate Plot No. MOMBASA BLOCK XX/340 by 31st December 2014.
ii. That the relationship between the parties is a controlled tenancy and as the purported notice does not comply with sections 4 and 7 of the Landlord and Tenant (Shops Hotels and Catering Establishments) Act Cap. 310 Laws of Kenya, the same is irregular and unlawful.
iii. That the Plaintiff has no outstanding rent arrears.
iv. That the Defendant's demand for payment of Kshs. 600,000/= rent so as to renew the tenancy and increment of more than 300% is totally unreasonable as the Defendant has been in the premises for over 10 years and the purported increase of rent without leave of the business premises tribunal is illegal.
v. That the Plaintiff has heavily invested in the premises and has over 100 vehicles therein. The Plaintiff has many customers and a capricious eviction would destroy the said business irreparably and and permanently destroy the Plaintiff's good will and relations with its customers.
vi. That if the orders sought are not granted, the Defendant may at any time enter into the premises and and/or commit acts of harassment against the Plaintiff or otherwise evict the Plaintiff.
vii. That if the Plaintiff is so harassed, forced to vacate or evicted from the premises, it would occasion the Plaintiff irreparable loss and damage.
viii. That if the orders sought are granted, the Defendant will suffer no prejudice considering that the Plaintiff will continue fulfilling its tenancy obligation.

6. In a nutshell, the Plaintiff's submission is that the tenancy relationship between the parties herein is a controlled one falling under the purview of the Landlord and Tenants (Shops Hotels and Catering Establishment) Act, Cap. 301 of the Laws of Kenya ("Cap. 301"). According to the Plaintiff, the Defendant's letter dated 4th October 2014 sought to terminate the tenancy without following the procedure laid down in sections 4 and 7 of Cap. 301.

7. The Plaintiff also submitted that the rent demanded by the Defendant of Kshs. 600,000/- per month is more than 300% and is therefore totally unreasonable.

8. The Plaintiff further submitted that if the Defendant is not stopped from evicting it from the premises, it will suffer irreparable loss because the eviction will result to huge loss to its business in which it has invested heavily and has built a good relationship with customers.

The Defendant's Response and Submissions

9. The Defendants opposed the application through a Replying Affidavit sworn by CLEMENCE WAZA MASINDE, the Defendant's Legal Officer sworn on 24th February 2015. The Defendant also filed its Written Submissions on 6th May 2015.

10. The Defendant's response was that the lease agreement of the parties at Clause III (e) provided that the provisions of Cap. 301 were inapplicable to the lease and the tenancy created therein and therefore the issue of controlled tenancy does not arise. The said Clause provided as follows:

> ***"It is the express intention of the parties to exclude this lease and the tenancy it creates from the operation of the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap. 301 of the Laws of Kenya."***

11. According to the Defendant, its letter of 4th October 2014 was not a notice to vacate the premises because the Plaintiff was simply being reminded as per the agreement of the parties that the lease was expiring on 31st December 2014. That the lease agreement had no option of renewal and the Defendant was at liberty to lay down its conditions for the renewal of the same.

12. The Defendant further submitted that the proposed rent increment to Kshs. 600,000/= per month was not equivalent to more than 300% increment because the Plaintiff in the last year of its lease was paying rent of Kshs. 360,000/= per month.

13. The Defendant submitted that the Plaintiff did not meet the conditions necessary for the grant of temporary injunction as was laid down in the case of **GIELLA vs CASSMAN BROWN & COMPANY LIMITED [1973] E.A 358**.

The Issues for Determination

14. In my view, the main issue for the court's determination is whether the Plaintiff has satisfied the conditions necessary for the grant of temporary injunction. I am aware that at this stage the court is not mandated to delve into the merits of the case itself. However the court is under obligation to consider whether the Plaintiff has satisfied the conditions necessary for granting of temporary injunction. Those conditions were laid down in the now well known case of **GIELLA v. CASSMAN BROWN & CO. LTD [1973] EA 358 at page 360** where Spry J. held that:-

> *"**The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

15. I will start with the first principle which is whether the Plaintiff has established a *prima facie* case with a probability of success. In order to answer that question I will address my mind to the following questions:

i. Whether tenancy relationship between the parties herein was a controlled one subject to the provisions of Cap. 301.
ii. Whether the Defendant by writing the letter dated 4th October 2014 breached the provisions of Cap. 301.

Analysis and determination

Whether tenancy was a controlled one

16. The Plaintiff submits that the tenancy between the parties was a controlled one subject to the provisions of Cap. 301. The Defendant's on the other hand contends that the agreement between the parties herein expressly ousted the provisions of Cap. 301 at Clause III (e).

17. Section 2 of Cap. 301 defines a controlled tenancy as follows:

> ***"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"***

18. The tenancy relationship between the parties herein was for five years which means that it falls under the category described in **Section 2 (b) (i)** of Cap. 301.

19. In my view, the provisions of section 2 of Cap. 301 are clear. Thus, if a tenancy satisfies any of the conditions provided at section 2, the tenancy automatically becomes a controlled one and subject to the provisions of Cap. 301 and it does not matter whether the parties had agreed that the provisions of Cap. 301 shall not apply to their relationship. Whether the tenancy relationship between the parties herein was a controlled one, which is subject to the provisions of Cap. 301, is a matter of law and cannot be ousted by agreement between parties because that would amount to contracting outside the law. The tenancy relationship between the parties herein was therefore a controlled one and subject to the provisions of Cap. 301.

Whether the Defendant breached Cap. 301

20. Having found that the provisions of Cap. 301 were applicable to the subject tenancy, the next issue to address is whether by writing the letter dated 4th October 2014, the Defendant breached the provisions of Cap. 301. The said letter was as follows:

> *"4th October 2014*
>
> *Al-Raiz International Ltd*
>
> *P.O. Box 94063*
>
> ***MOMBASA***
>
> *Dear Sir,*
>
> *RE:* ***LEASE ON MOMBASA/BLOCK XX/340***
>
> ***LESSOR GANJONI PROPERTIES LTD TO AL-RAIZ INTERNATIONAL CO.***
>
> *We refer to the above matter wherein your lease is due to expire on 31st December 2014.*
>
> *Please note that our client will only consider renewing the lease if you do agree with the following terms:*
>
> 1. *That the rent from January 2015 shall be Kshs. 600,000/= per month payable half yearly in advance.*
> 2. *That an increment of 10% will be effected every year.*
>
> *Please confirm the above before 15th November 2014 and if the same is not acceptable to you please do prepare to vacate on 31st December 2014 by which date you must have repaired the premises to the same condition that you found them as spelt out in the lease.*
>
> *Yours faithfully,*
>
> *KIARIE KARIUKI & CO. ADVOCATES*
>
> *KIARIE KARIUKI*
>
> *bc. Client"*

21. Section 4 of Cap. 301 provides as follows:

"(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.

(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

(3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.

(4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:

Provided that—

(i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;

(ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;

(iii) the parties to the tenancy may agree in writing to any lesser period of notice.

(5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice."

22. On a *prima facie* basis, it seems that the Respondent did not comply with the above provisions of Cap. 301 because the letter in issue talks of new rent of Kshs. 600,000/= per month from Kshs. 360,000/= in default of which the Plaintiff was to vacate the premises by 31st December 2014. It does appears that the Defendant attempted to alter the terms of the tenancy without complying with section 4 of Cap. 301. On a *prima facie* basis therefore, the Plaintiff has established a case with probability of success and laid a basis for granting temporary injunction.

23. The acceptable practice adopted by the courts is that the principles in **Giella** are applicable sequentially implying that once the first condition is not satisfied, the court is not under any obligation to consider the remaining two conditions. That approach was reiterated by the Court of Appeal (Makhandia, Ouko & M'inoti, JJ.A.) in the case of **HASSAN HURI & ANOTHER V JAPHET MWAKALA [2015] eKLR** as follows:

"Although it has been stated before that the three principles in Giella must be approached and applied sequentially, so that the second and third conditions must not be considered once the first condition is not established, the courts have traditionally considered all the conditions, one after the other. For instance a court will have a finding on the existence of a *prima facie* case, then proceed to determine whether damages would be adequate compensation *in lieu* of injunction and finally the balance of convenience. We reiterate this Court's recent decision in Nguruman

> ***"It is established that all the above three conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) Vol.I EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is adequate remedy and the respondent is capable of paying, no injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without hurdles in between."***

24. The plaintiff in its grounds in support of its application stated that it has been in subject premises over ten year in which period it has had a good relationship with its customers, and that if the defendant was not restrained from evicting it would irreparably destroy the plaintiff's good will.

25. I am satisfied that the plaintiff has on a balance of probability shown that it will suffer irreparable harm if an injunction is not granted, and thereby has satisfied the second principle of granting an injunction.

Conclusion

26. I**n the end, the court makes the following orders:**

i. **The Defendant/Respondent, its employees, agents and/or servants are hereby restrained from evicting or in any other way interfering with the plaintiff's quiet possession and enjoyment of the suit premises namely Plot No. MOMBASA BLOCK XX/340 pending hearing and determination of this suit.**
ii. **OCS Central Police Station shall ensure that peace prevails in relation to the tenancy of the plaintiff.**
iii. **The Plaintiff is awarded costs of the Notice of Motion dated 31st December 2014.**

Dated and delivered at Mombasa this 24th day of August 2015

MARY KASANGO

JUDGE

24.8.2015

Coram

Before Justice Mary Kasango

C/Assistant –

For: Appellant:

For Respondent:

Court

The judgment is delivered in their presence/absence in open court.

MARY KASANGO

JUDGE