



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 16 OF 2015**

**MARGARET WANJIRU T/A PEGGY PHONES.....PLAINTIFF**

**VERSUS**

**PETER KAMAU T/A KANDARA GENERAL STORES..1<sup>ST</sup> DEFENDANT**

**PIUS KAIGOYA.....2<sup>ND</sup> DEFENDANT**

**EVANS MAABI T/A MURPHY MERCHANTS.....3<sup>RD</sup> DEFENDANTS**

**RULING**

1. In her Notice of Motion dated 5/2/2015 and filed under certificate of urgency together with the plaints, the plaintiff has sought in the main an order of temporary injunction to restrain the defendants from letting out or leasing the suit premises to any third party pending determination of the suit and a mandatory injunction that the plaintiff be ordered restored to the suit premises.

2. The application was supported by the affidavit of the plaintiff/applicant to which affidavit the applicant has annexed a landlord's notice to terminate and a Reference by the plaintiff to the Business Premises Rent Restriction Tribunal. According to those documents there is apparently pending BPRT case No 184/2014. It is therefore contended for the plaintiff that once a reference is filed, the effect of the notice is suspended pending the determination by the Tribunal and that any attempt to terminate the tenancy would be contrary to the law under Cap 301 and therefore illegal null and void. It is equally pointed out that the reason the Defendant gave for seeking to terminate was that they intended to use the premises for own use for a period not less than one year. The plaintiff/applicant therefore cited in support of the application the decision in **KAMAU MUCUNA -VS- THE RIPPLES, CHARLES MWANGI -VS- MOHAMED HASSAN SHEIKH NOOR, HARVEY BAR AND RESTRAURANT -VS- FERNANCO** as well as **VICKY MONGI -VS- EISTHER NGUNA CIANDA** all to the effect that dispossession that is contrary to the law cannot be used to let the dispossessor enjoy the advantage illegally acquired.

3. In opposition to the application the Defendant filed a replying affidavit sworn by the 2nd defendant to the effect that the application had been overtaken by events in that the premises had been since taken over in management by one LAMU INTERNATIONAL INVESTMENTS who has since let out the premises to a third party and that the applicants goods were pledged as security for a debt owing to the 1st defendant by one JOHN GACHEHE KAMAU. The defendant accuses and faults the plaintiff/applicant for non-

disclosure of material facts.

4. On 16/3/2015 the parties appeared before the court when it was ordered that they file written submissions within 14 days. The plaintiff did file submissions dated 14/7/2015 but the defendant had not filed by the time this matter came up for hearing on the 13/10/2015. On that day Mr. Mwakisha for the plaintiff attend court but Mr. Magiya did not attend but sent Mr. Were to hold his brief and pray for an adjournment to enable him file the submissions. That application was opposed and subsequently declined by the court.

5. The application therefore proceeded without submissions by the defendant as well as without oral argument on the defendants' behalf.

**Determination:**

6. The application seeks mandatory as well as restrictive injunction as against the defendants. The onus on the applicant to be entitled to those orders is not in doubt. For mandatory injunction, the requirement is that the applicant demonstrates that the case is very strong and clear or where it is shown that the defendant has attempted to steal a march on the plaintiff. For a temporary restraining order the principles are those as enunciated in **GIELLA -VS- CASSMAN BROWN**.

7. In this matter, the two orders sought are related and can be considered together in that If I grant prayer 3 and reinstate the plaintiff to the premises, then it would follow that the premises would not be available to let and thus prayer No. 2 would be taken care of.

**Is the plaintiff entitled to an order of mandatory injunction?**

Section 4(1) of the Cap 301 provides:-

***“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.”***

and section 6(1) provides:-

***“A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal.***

8. These two provisions to me shed light on the trite of the plaintiffs tenancy to the effect that once the Reference was filed, the effect of the notice by the Defendant was put on hold pending determination by the tribunal. That determination is said by the plaintiff to be pending and the defendants have said nothing to the contrary. If thus remains pending and only it will determine the fate of the plaintiffs tenure. To that extent, the plaintiff remains a tenant of the 1st defendant and continues to enjoy all rights and privileges a tenant is entitled to order cap 301. One of such rights is to have the reference determined under the law in conformity with Article 50 of the constitution. To the extent that the defendants now contend that the tenancy has been terminated otherwise would be to, as it were, steal a march against the plaintiffs. That is not lawful and even where it can be proved, to have been so stolen, it is the duty of the court to ensure that such a thief of a legal march is not left to enjoy the benefits of his impropriety and unlawful Act. Being fully persuaded by the decision by Mwera J, in **MUCUNA -VS- RIPPLE** as wholly upheld by the court of appeal I hold that the right to access justice and be heard is inalienable and incapable of limitation and that where an attempt is made at infringing on that right like in this case, the court ought to stand against such attempt and guarantee that right.

9. For that reason I grant to the plaintiff an order of mandatory in terms of prayer 3 and direct that she shall forthwith and unconditionally be reinstated into the premises unhindered and be allowed to enjoy the peaceful occupation thereof.

**Is the plaintiff entitled to a temporary injunction**

10. I have held that the plaintiff's controlled tenancy on the suit premises remain pending the determination by the Tribunal of the Reference duly filed. Having found that the Applicant is such a tenant *and* that she is entitled to the benefits of the law and demand for due process, I hold that to allow the Respondent to interfere with such rights would be unlawful. To that extend I find and hold that the plaintiff seeking to protect a right as a tenant whose landlord has sought to terminate otherwise than by legal mean has demonstrated a *prima facie* case.

11. On whether or not damages would be an adequate remedy, I am of the view that to deny a citizen his guaranteed legal constitutional protection is an extreme and harsh step that must be frowned upon. Frowned upon for it portends a situation where so long as one is endowed of financial muscle he would offend and trod upon others rights and always demonstrate ability to pay. That would fly on the face of the constitutional dictate against the discrimination and equally before the law. It shall open a window by which the financially strong would flout the law with abandon so long as they can pay damages. That has the inevitable prospects of a lawless society where monetary power and other ignoble considerations rather than civility and obedience to the rule of law would reign supreme.

12. It is not difficult to imagine the extent of anarchy and dissent that would then ensue with resultant disruption of smooth operation of orderly and legitimate commerce. Such is the scenarios all civilized societies seek to obviate by surrendering to the dictates of the rule of law and due process. In any event the defendant having failed to justify their actions as lawful, there is no material upon which I can base a finding that damages would be an adequate remedy.

13. For the findings foregoing, I find for the plaintiff applicant and grant to him orders of injunction in terms of prayers 2 & 3 of the notice of Motion dated 5<sup>th</sup> February 2015 pending the hearing and determination of this suit.

14. I grant to the plaintiff/applicant the costs of this application to be paid by the defendants/Applicants.

**Dated, signed and delivered at Mombasa this 18th day of December 2015.**

**P.J.O.OTIENO**

**JUDGE**

In the presence of

No appearance for the plaintiff.

No appearance for the defendant.

**JUDGE**