



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

**AT MOMBASA**

**CIVIL SUIT NO. 34 OF 2008**

**RISING STAR COMMODITIES LIMITED  
..... PLAINTIFF**

**V E R S U S**

- 1. ALIRAZA KARIM**
- 2. MOHAMED HUSEIN JAFFER**
- 3. MEHBOOB LADAK**
- 4. GULAMABBAS KHAKU**
- 5. MASUMALI MEGJI**
- 6. NAUSHAD MOHAMED JIWA (as Trustees of the  
KHOJA SHIA ITHNA ASHERI JAMAT .....  
.....DEFENDANTS**

**AND**

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

**AT MOMBASA**

**CIVIL SUIT NO. 99 OF 2009**

- 1. ALIRAZA KARIM**
- 2. MOHAMED HUSEIN JAFFER**
- 3. MEHBOOB LADAK**
- 4. GULAMABBAS KHAKU**

5. MASUMALI MEGJI

6. NAUSHAD MOHAMED JIWA (as Trustees of the

KHOJA SHIA ITHNA ASHERI JAMAT .....  
....DEFENDANTS

V E R S U S

RISING STAR COMMODITIES LIMITED .....  
PLAINTIFF

**RULING**

1. By a lease dated 24<sup>th</sup> September 2004 the Trustees of THE KHOJA SHIA ITHNA ASHERI JAMAT (**the Trustees**) let to Rising Star Commodities Ltd (**Rising Star**) their premises on **Msa/Block 1/260 (the property)** for a term of five (5) years and 1 month from 1<sup>st</sup> January 2004.
2. By suit **HCC No. 34 of 2009** Rising Star sued the Trustees seeking judgment for Kshs. 7,971,030/- for alleged damage caused to its goods when the roof and wall of the property allegedly seeped in rain water. During the subsistence of that suit the Trustees attempted to distress for rent against Rising Star. Rising Star obtained an ex parte order on 11<sup>th</sup> November 2008 restraining the trustees from distressing for rent and also restraining them from interfering with Rising Stars quiet possession of the property. That order has been extended upto day.
3. When the term of the lease terminated on 31<sup>st</sup> March 2009 the trustees file **HCCC No. 99 of 2009** seeking judgment for vacant possession of the property which the trustees alleged is still occupied by Rising Star upto date.
4. There are two applications being considered in this Ruling. The first is in HCCC No. 34 of 2008 Chamber Summons dated 11<sup>th</sup> November 2008. It was filed by Rising Star. The ex parte order referred to above was issued on the basis of that application. Rising Star by that application seeks to restrain the Trustees from pursuing distress for rent and from interfering with their quiet possession until **HCCC No. 34 of 2008** is heard and determined.
5. The second application was filed by the trustees in **HCCC No. 99 of 2009**. It is a Notice of Motion dated 1<sup>st</sup> April 2009. By that application the Trustees seek an order directing Rising Star to quit and deliver up vacant possession to the Trustees.
6. I will begin by considering the Notice of Motion in **HCCC NO. 99 of 2009** because there is no dispute between the parties with regard to the contention of the Trustees that the term of the lease terminated and that Rising Star has however continued to be in possession of the property.
7. Rising Star in opposition to that application is two folds. Firstly that the suit as well as the applications are incompetent because they are supported by the affidavit of FAZLEABBAS M. BHANJI the CEO of the Trustees who has sworn the affidavits without the authority of the Trustee. In this regard I can confirm that on the day the plaint in **HCCC No. 99 of 2009** was filed the authority of the Trustees was given to Fazleabbas M. Bhanji. That authority is in the following terms-

**“We, ALIRAZA KARIM, MOHAMED HUSEIN JAFFER, MEHBOOB LADAK, GULAMABBAS KHAKU, MASUMALI MEGJI, SULTAN JETHABHAI and NAUSHAD MOHAMEDALI JIWA (Trustees of the KHOJA SHIA ITHNA ASHERI JAMAT) the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Plaintiffs herein do hereby authorize FAZLEABBAS M. BHANJI the Chief Executive Officer of the Board of Trustees of**

**the KHOJA SHIA ITHNA ASHERI JAMAT to swear Affidavits on our behalf and KHOJA SHIA ITHNA ASHERI JAMAT in respect of Court proceedings against RISING STAR COMMODITIES LIMITED.**

**DATED at MOMBASA this 1<sup>st</sup> day of April 2009.**

**SIGNED BY:-**

1. **ALIRAZA KARIM**
2. **MOHAMED HUSEIN JAFFER**
3. **MEHBOOB LADAK**
4. **GULAMABBAS KHAKU**
5. **MASUMALI MEGJI**
6. **SULTAN JETHABHAI**
7. **NAUSHAD MOHAMEDALI JIWA.”**

Rising Star learned Counsel Mr. Khagram also submitted that even if the authority was given to Bhanji by the Trustees, such authority did not meet the requirements of Clause 27:8 of the Constitution of The Khoja Shia Ithna – Asheri Jamaat. That Clause is in the following terms-

**“The Trustees shall not proceed to a Court of Law for the doing of an act for which the leave of Court of Law is required in accordance with the laws of the country where properties or investments are situated unless they are so authorized by a resolution of THREE-FOURTHS of the members present and voting at a Special General Meeting of the Jamaat convened for the said purpose. They may, however, enter defence prior to obtaining the said approval.”**

In other words the argument by Rising Star is that Bhanji did not get authority from three-fourth of the members.

8. A closer look at that Clause seems to suggest that such authority is only required where the leave of the Court is required to file a suit. In the case of HCCC No. 99 of 2009 such leave was not a requisite. Secondly in my humble view objection under that Clause 27:8 can only be raised by the members of Jamaat and not by an outsider. I would therefore hasten to say that Rising Star has no locus to object to the suit on the basis of that Clause. Rising Star after all did not argue that the Trustees had no capacity to bring the action in HCCC No. 99 of 2009. Further Rising Stars argument seems to suggest that only parties in an action can swear affidavits when it argued since the Constitution of The Khoja Shia did not provide for the position of a CEO and that Bhanji had no basis to swear the affidavit. Such an argument is in my view is faulty. Any person can swear an affidavit to tender evidence in a case so long as necessary authority is given by the parties and as correctly submitted by the Trustees Section 24 of the Trustees Act Cap 167 donates power to the Trustee to employ agents or other persons to act for them. That Section provides-

**“1. Section 24(1) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether an advocate, banker, stock broker or other person, to transact any business or do any act required to be transacted or done in the execution of the trust or the administration of the testator’s or interstate’s estate, including the receipt and payment of money, and shall be entitled to be allowed and paid charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.**

**2. Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing or cultivating or otherwise administering,**

**any property, real or personal, movable or immovable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside Kenya or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes, and shall not, by reason only of their having made the appointment, be reasonable for any loss arising thereby.”**

9. As result of my finding hereof the Preliminary Objection filed by Rising Star dated 27<sup>th</sup> April 2009 is dismissed with costs to the Trustees.

10. The second limb of opposition to the Notice of Motion of 1<sup>st</sup> April

2009 is that Rising Star continued possession of the property was in accordance with exparte injunction issued in **HCCC No. 34 of 2008** referred to above. Rising Star submitted that they cannot be termed as trespassers. The Trustees countered that argument by submitting that a Court cannot rewrite the parties contract. Trustees submitted that the Court cannot extend the lease between the parties which terminated on 31<sup>st</sup> March 2009. Trustees relied on the case the Court of Appeal in that case stated-

**“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah, J.A in the case of Fina Bank Limited –V–Spares & Industries Limited (Civil Appeal No. 51 of 2000) (unreported)-**

**‘It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.’”**

11. As stated before there is no controversy on whether or not the lease

term terminated. It is accepted by all parties it terminated on 31<sup>st</sup> March 2009. There is no basis in my view to restrain the Trustees from obtaining vacant possession of their property. That is very clear from the material before. However what is not clear is what each party owes the other. Rising Star has prayed for but has not proved its claim for damages. The Trustees also have prayed for rent arrears but have not proved that Rising Star has rent arrears. In view of that I find that the following orders will well meet the justice that both parties seek.

12. I grant the following orders-

- a. **HCCC No. 34 of 2008 shall be consolidated with HCCC No. 99 of 2009. The lead file shall be HCCC NO. 34 of 2008.**
- b. **The Trustees of the Khoja Shia Ithna Asheri Jamat are hereby restrained from levying distress for rent against Rising Star Commodities Limited until final determination of this suit.**
- c. **Rising Star Commodities Limited are hereby ordered to give vacant possession of premises on MSA/BLOCK 1/260 within fourteen (14) days from this date hereof. In default leave is hereby granted to the Trustees of the Khoja Shia Ithna Asheri Jamat to evict them.**
- d. **The costs of the Chamber Summons dated 11<sup>th</sup> November 2008 and Notice of Motion dated 1<sup>st</sup> April 2009 shall be in the cause.**

e. The Preliminary Objection dated 27<sup>th</sup> April 2009 is dismissed with costs to the Trustees of the Khoja Shia Ithna Asheri Jamat.

Ruling by:

MARY KASANGO

JUDGE

DATED and DELIVERED at MOMBASA this 20<sup>TH</sup> day of FEBRUARY, 2014.

.....

JUDGE