REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 125 OF 2013

MOSES N. GITONGA …….. 1ST PLAINTIFF

NJOROGE WAMUNYUA T/A LIKIA GUEST HOUSE…..2ND PLAINTIFF

V E R S U S

GEORGE GATHECA KINYANJUI ……..…. 1ST DEFENDANT

SURE AUCTIONEERS …… 2ND DEFENDANT

RULING

1. The parties herein are in agreement with that the Plaintiff is a protected tenant under the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap 301.

2. The Plaintiffs by their plaint seek prayers of declaration that the Defendant's distress for rent arrears is null and void and for an injunction to restrain the Defendant from levying for distress for rent arrears.

3. The Plaintiffs filed an interlocutory application by Notice of Motion dated 28th November 2013. Plaintiffs seek by that application temporary injunction restraining the Defendant from distressing for rent arrears pending determination of **BPRT Case No. 96 of 2013**.

Plaintiffs' Arguments

4. The Plaintiffs have been tenants at Defendants premises **Mombasa/Block XX/148** since 1992. It is a business premises. In the years they have been tenants they have not failed to pay rent.

5. The Defendant issued the Plaintiffs with a notice under Cap 301 seeking termination of the Plaintiffs' tenancy. The Plaintiffs filed a reference in respect of that notice and that reference is part heard before the BPRT. It is to be noted that there has not been a Chairperson at BPRT for now almost a year and consequently no matters before that Tribunal are proceeding for hearing.

6. The Plaintiffs case is also that the Defendant served them with a notice dated 28th June 2013 for increase of rent from Kshs. 40,000/- per month to Kshs. 150,000/- per month. That notice was served on 9th July 2013. That the notice of increase of rent was invalidated by the late service. The Plaintiffs therefore filed a complaint in BPRT Case No. 96 of 2013 seeking a declaration that the notice for increase of rent was defective. That complaint has not been heard due to lack of a

Chairperson at the Tribunal. It is in that background Plaintiffs seek interlocutory injunction.

Defence Arguments

7. That he has been subjected to a lot of frustration by the Plaintiffs for almost 14 years since he purchased the suit property because he had not received a return of his investment. It was in that background he sought to increase the rent from Kshs. 40,000/-to Kshs. 150,000/- per month. The increase was after valuation was carried out and a guide of the increment was given to him. Defendant denied the allegation that Plaintiffs were served with notice of increment of rent as they alleged but that rather they were served on 28th June 2013. The person served on behalf of the Plaintiffs declined to acknowledge receipt. According to the Defendant the Notice for Increment of rent legally took effect and he was justified to distress for rent; and that because the Plaintiffs failed to file a reference within time against the Notice of Increment of rent this Court has no jurisdiction to entertain this case.

Issue

8. The issue for determination is whether this Court has jurisdiction to entertain this matter and if so whether the Plaintiff is entitled to the prayers sought.

Jurisdiction

9. It is not in dispute that this suit relates to a controlled tenancy. Both parties admit that fact and agree that there are pending in the BPRT two suits relating to the subject matter herein, to wit, **BPRT Case No. 29 of 2005: Njoroge Wamunyua & Moses N. Gitonga Vs. George Gatheca Kinyanjui** and **BPRT Case No. 96 of 2013: Njoroge Wamunyua & Moses N. Gitonga t/a Likia Guest House Vs. George Gatheca Kinyanjui**. It is therefore common ground that the right forum to ventilate the dispute between the parties herein is the BPRT.

10. However, the orders sought in the Application and the Plaint are

orders of injunction. It is trite law that the BPRT does not have jurisdiction to grant orders of injunction. In the case of **Republic Vs Business Premises Rent Tribunal & another & Exparte Davies Motor Corporation Limited [2013] eKLR**, **Odunga, J**. held as follows:

> **"The issue for determination is therefore whether the Respondent had jurisdiction to grant an order of injunction. On my part I agree that the spirit of the Act which is to ensure the protection of tenants of controlled tenancies from eviction or exploitation would be rendered nugatory if the Tribunal was not similarly granted the jurisdiction to preserve the status quo between the landlord and the tenant pending the determination of the dispute before it. It is however not for this Court to grant to the Tribunal powers which it does not have. As was held by the Court of Appeal in Italframe Ltd vs. Mediterranean Shipping Co. [1986] KLR 54; [1986-1989] EA 174:**
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> > **"It is not competent to any court to proceed upon an assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes. If blunders are found in legislation, they must be corrected by legislature, and it is not the function of the Court to repair them. Thus while terms can be introduced into a statute to effect to its clear intention by remedying mere defects of language and to correct obvious misprints or misnomers no provision which is not in the statute can otherwise be implied to remedy an omission... It is one thing to introduce terms into an Act of Parliament in order to give effect to its clear intention by remedying mere defects of language. It is quite another thing to imply a provision which is not in the statute in order to remedy an omission, without any ground for thinking that you are carrying out what Parliament intended. It is not the function of the Courts to repair the blunders that are to be**

found in legislation. They must be corrected by the legislature."

Therefore whereas it is my view that by not expressly granting the Tribunal the power to grant orders of injunction Parliament made a blunder since it rendered the intention and objective of the whole Act a mirage, based on the authorities from the Court of Appeal I am unable to find that the Tribunal is empowered under section 12 of the Act to grant orders of injunction.

In Narshidas & Company Limited vs. Nyali Air Conditioning and Refrigeration Services Limited Civil Appeal No. 205 of 1995, the Court of Appeal held that a controlled tenant confronted with an illegal threat of forcible eviction cannot go to the Business Premises Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. Similar holdings were made in Caledonia Supermarket Ltd vs. Kenya National Examinations Council (supra) and Tiwi Beach Hotel Ltd vs. Julian Ulrike Stamn (supra). It follows that by granting orders of injunction the Respondent acted outside its mandate." (emphasis mine)

11.It therefore follows that the Plaintiff could not have obtained the

orders sought in this case in the cases pending in the BPRT since the BPRT has no jurisdiction to grant reliefs of injunction.

12.Precedence shows that the right forum is to seek orders of injunction

in the High Court even if there is a case pending in the PBRT. This was the holding in the case of **S. N. T/A Baby Steps Kindergarten Vs Hasham Lalji Properties Ltd & Another [2008] eKLR**, where **Nambuye, J**. (as she then was) held that the High Court has jurisdiction to entertain an application for injunction even if the dispute arises from tenant landlord relationship governed by the Landlord, Tenant, Shops Hotels and Catering Establishment Act, Cap. 301. The learned Judge held as follows:

"Issue of jurisdiction arises because it is common ground that the dispute arises from a tenant and land lord relationship which relationship is governed by the land lord, tenant, shops, hotels, and catering Establishment Act Cap 301 Laws of Kenya. It is trite law and this court has judicial notice of the fact that the said Act has an inbuilt dispute resolution mechanism to some extent. This mechanism does not cover disputes seeking such equitable reliefs. The court of appeal in its decision in the case of NARSHIDAS & COMPANY LTD VERSUS NYALI AIR CONDITIONING AND REFRIGERATION SERVICES LTD NARIOBI CA 205/1995 where the centrol theme in the decision is that a controlled tenant confronted with an illegal threat of forceable eviction cannot go to the business premises rent tribunal established under the Act as that tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. The CA went on to state that the superior court has jurisdiction not only to entertain the application for the injunctive relief but also to grant the same. On that basis this court is satisfied that it is properly seized of the matter."

13.A similar holding was made in the case of **Reuben Gitonga**

M'Mugambi v Kenyatta National Hospital [2005] eKLR where **Ojwang, J.** (as he then was) held that the High Court can provide interlocutory relief even if the matter was before the BPRT.

14.In my view, the Application (and the Plaint) for orders of injunction

pending hearing and determination of the cases pending in the BPRT is properly before this court. The High Court is an appropriate forum as the Plaintiff could not apply to the BPRT for orders of

injunction. This court is enjoined by Section 3A which has been invoked by the Applicant, to exercise its inherent power and to make such orders as may be necessary for the ends of justice.

15. Having established that the Application is properly before this court, it

is my view that the same should be determined on the basis of the principles of injunction as laid down in the 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."**

Are Plaintiffs entitled to prayers sought

16. From the material placed before Court I do find that the Plaintiffs have

met the first condition of **GIELLA V CASSMAN BROWN** (supra). The Plaintiffs alleged that the Notice to Increment was served on 9th July 2013. There is no evidence as alleged by Defendant that the Notice was served on 28th June 2014. Further from the evidence before Court, it is seen that Plaintiffs have been in occupation of the suit property since 1992. They run a hotel business there. In my view if any injunction was not granted the injury the Plaintiffs may suffer may not be compensatable with an award of damages. Moreover since there are outstanding matters before the BPRT interim measure of protection ought to be granted to the Plaintiffs. Having made that finding I do hereby make the following orders-

a. **An injunction is hereby issued restraining the Defendants, their employees or agents from levying distress, removing and or selling and distraining goods or in nay other way executing the distress Notice of 19th November 2013 pending the hearing and determination of this case or pending the hearing or determination of BPRT Case No. 96 of 2013 whichever occurs first. Such injunction shall terminate within one year from this date hereof unless extended by this Court in accordance with Order 40 Rule 6 of the Civil Procedure Rules.**

b. **The Costs of the Notice of Motion dated 28th November 2013 shall be in the cause.**

DATED and DELIVERED at MOMBASA this 3RD day of APRIL, 2014.

MARY KASANGO

JUDGE