



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC MISCELLELLANOUS APPLICATION NO. 105 OF 2013

RAPID COMMUNICATIONS LIMITED.....PLAINTIFF

VERSES

KANUBHAI S. PATEL..... DEFENDANT

RULING

The Applicant's Case

The application before the Court is brought by the Applicant by way of a summons dated 31st October 2013, pursuant to the provisions of section 12(1)(a) and 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The Applicant is seeking the following orders:

1. That the Respondent, his servants and/or agent be restrained from evicting the Applicant from the premises known as L.R. No. 1870/VI/86/3, along Cedar Road, Off Lentana Road, Westlands, Nairobi (hereinafter referred to as the suit premises).
2. That the Honourable Tribunal do determine whether or not the tenancy at L.R. No. 1870/VI/86/315 is a controlled tenancy.

The grounds for the application are that the Respondent leased to the Applicant the suit premises to use as an office by way of a lease agreement signed on behalf of the Applicant on 16/1/2013. Further, that the said premises has since been occupied by the Applicant as an office employing over sixty (6) people. However, that the Respondent has purported to terminate the lease agreement and now required that Applicant to vacate the premises.

The Applicant expounded on these grounds in a Supporting Affidavit sworn on 31st October 2013 by Rohit Mediratta , its Group Chief Operations Officer. The deponent states that said lease agreement was to be for a term of one (1) year from the 1st day of February 2013, and that the monthly rent is Kshs.400,000/= which has been paid upto date. However, that by way of an e-mail of Monday, June 24, 2013 one Shreeti Patel, the Respondent's daughter-in-law wrote to him among other Company executives, requiring that the Applicant vacates the premises on 30th October, 2013. The deponent annexed a copy of the said e-mail. Further, that in view of the complex nature of the Applicant's business which houses many computer servers, the short notice was bound to disrupt its business.

The deponent averred that the Applicant's tenancy is deemed to be a controlled tenancy pursuant to section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, and that its lawyer did on 28/10/2013 write to the Respondent pointing out this legal position. Further, that the Respondent responded through his lawyers that he stood by the termination notice issued on 16th June, 2013, and subsequently with his own letter dated 31/10/2013 indicated that the Applicant was to vacate

the suit premises by midnight 31/10/2013.

The deponent stated that the Applicant's advocates then wrote to the Respondent and his lawyers requiring them not to undertake their intended illegal action. The Applicant now fears that the Respondent may take illegal action to the detriment of its business. The deponent annexed the correspondence referred to in the foregoing.

The Respondent's Case

The Respondent initially filed a Notice of Preliminary Objection dated 5th November 2013 on the ground that the summons was defective and bad in law, since this court lacks jurisdiction to hear and determine a complaint instituted under section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The said objection was dispensed with by this Court for reasons that the Business Rent Tribunal established under section 12(4) of the said Act has not been operational, and in any event the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act does not oust the jurisdiction that this court is granted to hear and determine the dispute herein under Article 162(2) of the Constitution and section 13 of the Environment and Land Act.

The Respondent proceeded to oppose the Applicant's application in a Replying Affidavit he swore on 15th January 2014. He stated that he and his my wife own a residential house erected on Land Reference No. 1870/VI/86 Cedar Road, off Lantana Road, Westlands, Nairobi pursuant to a Grant No. I.R. 56330 dated 28th August 1992, a copy of which he annexed. Further, that pursuant to a lease agreement dated 15th January 2013, he and his wife rented the suit premises to the Applicant for a term of one (1) year from 1st February 2013. He also annexed a copy of the said lease agreement.

The Respondent stated that the suit premises were to be used as a residential property as per the said Grant, and as a result the tenancy to the Applicant was for such purposes only. He stated that on 24th June 2013, one Mrs. Shreeti Patel, on his and his wife's behalf issued a termination notice to the Applicant, informing that its tenancy would terminate on 30th October 2013. Further, that the Termination Notice gave the Applicant over four (4) months' notice and was necessitated by the fact that the Respondent was seeking to have the permitted use of the property changed from residential flats to that of an office park.

The Respondent averred that no objection to the termination notice was received from the Applicant until 28th October 2013, which was two (2) days before the expiry of the Notice. Further, that on that day he received a letter from the Applicant's Advocates intimating that the Applicant would not comply with the termination notice as the same purportedly violated the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The Respondent also referred to the correspondence subsequently exchanged between the parties as explained by the Applicant herein above, and attached the said correspondence.

The Respondent stated that the Applicant failed, refused, and/or neglected to comply with the termination notice, and that given that the said notice has since expired, the Applicant's continued stay thereon is now unlawful and amounts to trespass. The Respondent contended that arising from the illegality of the tenancy of the Applicant, the City Council of Nairobi on 18th November 2013 issued an Enforcement Notice on the Applicant's for using the building as an office without an approval, which Notice he annexed. Further, that in further breach of the Lease Agreement, the Applicant has not paid rent for the months of October 2013, November 2013, December 2013 and January 2014 which aggregates to a total of rent arrears of Kshs.1,600,000/=.

The Submissions

The parties herein were directed to file written submissions on the Applicant's summons. The Applicant's counsel in submissions dated 6th February 2014 disputed that the lease agreement was drawn by the Respondent contrary to section 34 of the Advocates Act as he is not qualified to do so.

The Counsel however proceeded to rely on clauses 2(z)(ii) and 4(h) of the said lease agreement to argue that the premises were to be used as an office by the Applicant, and not as residential premises. Further that the lease agreement was for a term of 1 year from 1st February 2013 and termination by giving 3 months' notice, and was thereby a controlled tenancy. Lastly, the counsel submitted that the enforcement notice relied upon by the Respondent was with respect to making of alterations and extensions without approval, and not the use of the premises as an office.

The Respondent's counsel filed written submissions dated 21st March 2014 wherein he admitted that the Respondent entered into a lease agreement with the Applicant dated 15th January 2013 for a term of one year from 1st February 2013. He averred that the said lease agreement was not a lease and did not confer any registrable interest in land, and did not therefore qualify as one of the conveyancing documents that can only be drawn by an Advocate under section 34 of the Advocates Act. He further argued that owing to the Applicant's failure to hand over vacant possession of the suit premises after 31st October 2013, the Respondent filed ELC No 1333 of 2013 on 5th November 2013 seeking vacant possession.

The Respondent's counsel submitted that the Applicants current use of the suit premises contravenes the law as the permitted use of the premises as indicated in the grant thereof is for residential purposes, and as such is against the provisions of section 30 (1) & (2) of the Physical Planning Act. Further, that as a result of such unlawful use, the Respondent had been issued with an Enforcement Notice by the Nairobi City Council pursuant to section 38 of the Physical Planning Act. Counsel also relied on the decisions in **Hashmukh Khethsi Patel vs Tinga Traders Ltd (2002) e KLR** and **Wanaina Kenyanjui & 2 Others vs Andrew Ng'ang'a (2013) e KLR** to argue that injunction orders, being equitable in nature, cannot be granted in violation of the law.

The counsel further submitted that the Applicant's tenancy, being for a residential house, made the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act inapplicable pursuant to section 2 of the said Act. Further, that the Applicant unlawfully converted the use of the suit premises into offices. The counsel also submitted that the Applicant was statutorily barred by section 6 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act as the termination notice had taken effect. It was contended in this respect that the termination notice was issued to the Applicant on 24th June 2013 and informed the Applicant that its tenancy would determine on 30th October 2013.

However, that the Applicant did not file its complaint until 1st November 2013, two days after the termination notice had taken effect. The counsel relied on the Court of Appeal decision in **Jitendra Mathurdas Kanabar & 2 Others vs Fish and Meat Limited (1997) e KLR** in this respect. It was also submitted that the document executed between the parties was a lease agreement or an agreement to lease, and did not confer any registrable interest in land. It therefore did not qualify as one of the conveyancing documents that can only be drawn by an Advocate under section 34 of the Advocates Act.

Lastly, counsel for the Respondent submitted that the Applicant had already enjoyed the term of the lease as the lease agreement was for a period of one year commencing 1st February 2013 and thus expired on 31st January 2014. The counsel relied on the decision in **Japhet Omanga vs Japheth Angila (2005) e KLR** in this regard. Further, that the Applicant had come to court with unclean hands as he had failed to disclose that he had been paying rents in arrears and upon distress.

The Issues and Determination

I have considered the Applicant's application, the affidavits filed by the parties, and the submissions made by the parties' counsel. The first issue that has to be determined is whether the Applicant have brought any evidence to show that the tenancy is a controlled tenancy within the meaning of section 2(b) (ii) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, so as to bring into effect the provisions of the said Act as to termination of tenancies. Section 2 of the said Act 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”

Section 2 of the Act further defines a “catering establishment” to mean 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. A “hotel” is defined to mean 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; while a “shop” is defined as 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.

I have perused the lease agreement relied upon by the parties which they both attached to their affidavits as an annexure. The recital states as follows:

“NOW THIS LEASE WITNESSETH in the consideration of the relit (*sic*) herein reserved and the covenants by the Lessee hereinafter contained the Lessor HEREBY LEASES unto the Lessee the premises for the purposes of establishing, operating and maintaining office accommodation and the usual conveniences connected herewith”

It is clear that the lease agreement was for office accommodation purposes and not residential as claimed by the Respondent. The Respondent cannot in this respect rely on his own irregular act to escape from his obligations under the lease agreement, as he was the one who was aware of the terms of the grant to him with respect to the suit premises. The onus is therefore upon him to regularize the user of the premises.

In addition an office has been defined in the **Black’s Law Dictionary Ninth Edition** at page 1190 as “a place where business is conducted or services are performed.” An office can therefore fall within the definition of a shop in the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act if the services offered therein are for money or money’s worth. The Applicant herein as deponed to and it is not disputed that they are carrying on a business on the suit premises. The tenancy of the suit premises therefore fall within the definition of a controlled tenancy as it was for a term of one year.

I however agree with the Respondent that the tenancy agreements envisaged under section 2 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act do not convey a registrable interest in land and are therefore not in the league of conveyancing documents that require to be drawn by Advocates under section 34 (1) the Advocates Act. Indeed such tenancy agreements need not be in writing under section 2 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act.

The second issue is whether the Applicant has established the necessary conditions for the temporary injunction sought to issue. The principles for the grant of an interlocutory injunction are settled and were set out in the case of **Giella – v – Cassman Brown & Co. Ltd. [1973] EA 358.** They are that first, the applicant must show a *prima facie* case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer an irreparable injury which could not adequately be compensated in damages; and thirdly that if the court is in doubt it should decide the application on a balance of convenience.

A determination of the question as to whether the Applicant has demonstrated a *prima facie* case revolves

on whether or not the termination notice by the Respondent was validly issued under section 4 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act. The said section provides as follows:

4. (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.

(6) A tenancy notice may be given to the receiving party by delivering it to him personally, or to an adult member of his family, or to any servant residing with him or employed in the premises concerned, or to his employer, or by sending it by prepaid registered post to his last known address, and any such notice shall be deemed to have been given on the date on which it was so delivered, or on the date of the postal receipt given by a person receiving the letter from the postal authorities, as the case may be.

It is not in dispute that the lease agreement between the Applicant and Respondent provided for a termination notice of 3 months in clause 4 (h) thereof. It is also not disputed that the termination notice given by the Respondent was for four months. The only issue in contention in my view is whether the date of termination was earlier than the earliest date on which the tenancy would have, or could have been, terminated pursuant to the provisions of section 4 (4)(ii) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act.

In this regard, the lease herein was to have expired on 1st February 2014. According to the notice given by the Respondent, the lease was to terminate on 1st November 2013, and there was thus non-compliance with the provisions of section 4 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act. The Applicant has to this extent shown a *prima facie* case.

However, an injunction being a discretionary and equitable remedy, I note that the Applicant did not respond to the Respondent's averments that the rent as agreed between the parties of Kshs 400,000/= per month for the months of October 2013, November 2013 December 2013 and January 2014 and since the filing of its Application had not been paid, despite his Advocate on record stating that he would file a Further Affidavit with evidence of such payment. I also note that the Applicant has been in possession of the premises after 1st February 2014 when the lease expired.

I therefore find that even though the Applicant has established a *prima facie* case, it is not deserving of the injunction sought as it has not brought any evidence to show that it has been meeting its part of the bargain in terms of payment of rent. The prayer for an injunction in the Applicant's summons dated 31st October 2013 is therefore denied, and the each party shall bear their costs of the said summons.

Dated, signed and delivered in open court at Nairobi this ____28th____ day of____May____, 2014.

P. NYAMWEYA

JUDGE