



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS APPLICATION NO. 63 OF 2014**

**IN THE MATTER OF : LANDLORD TENANT (SHOPS, HOTELS AND  
CATERING ESTABLISHMENTS) ACT CAP 301, LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF : THE BUSINESS PREMISES RENT TRIBUNAL,  
MOMBASA**

**AND**

**MSABAHA VICTORY SECONDARY SCHOOL ..... TENANT/APPLICANT**

**V E R S U S**

**GAETANO GRASSO ..... LANDLORD/RESPONDENT**

**RULING**

1. **MSABAHA VICTORY SECONDARY SCHOOL** is tenant of **GAETANO GRASSO**. The relationship as such is governed by the Landlord and Tenant (Shop, Hotels and Catering Establishments) Act Cap 301. Any dispute involving that relationship should be referred to the Business Premises Rent Tribunal (BPRT). For sometime now there has not been a chairperson to sit at that Tribunal. Parties have had to seek temporary orders before the High Court while awaiting the appointment and sitting of the Chairperson at the Tribunal.
2. The Tenant approached this Court under those circumstances. The Landlord instructed auctioneers, Murphy Merchant to attach tenants goods in respect of rent arrears of Kshs. 333,500/-. The said auctioneer proclaimed the tenants goods. That provoked the tenant to file Notice of Motion dated 14<sup>th</sup> March, 2014.
3. By that Notice of Motion the tenant seeks restraining orders to stop the landlord from attaching its goods “pending the hearing and determination of the Applicant’s (tenant’s) intended reference against the Respondent (landlord) at the Business Premises Rent Tribunal.”
4. Jackson Omondi Gege deponed in the affidavit dated 14<sup>th</sup> March 2014, in support of the

application as follows-

- **That the intended attachment and sale of the said goods shall occasion substantial and irreparable loss which cannot be compensated by way of costs, if this application is not heard ex parte and on priority basis.**
  - **That I know of my own knowledge that we have about Thirty Seven (37) students in form one, Forty (40) students in form two, Thirty Eight (38) students in form three and Forty Eight (48) students in form four; who are enjoying their constitutional right to education and therefore they ought not be inconvenienced by the Respondent's malicious actions.**
  - **That the intended attachment and sale will therefore grossly disrupt the learning activities and syllabus thereof at the Applicant's subject premises thus occasioning loss and prejudice to students and parents who are innocent third parties.**
  - **That the Applicant has been unable to file a Reference against in the Business Premises Rent Tribunal at its sub-registry at Mombasa as the Tribunal is yet to commence its operations in a circuit since the newly appointed Chairman is yet to be formally deployed.**
  - **That the Applicant is now before this Court to seek for temporary restraining orders pending the filing, hearing and determination of the intended Reference against the Respondent herein before the Business Premises Rent Tribunal at Mombasa.**
5. The Landlord in his replying affidavit alluded to a previous BPRT matter filed by the tenant, being **Tribunal Case No. 20 of 2012**. That matter seems to have been concluded by the parties consent dated 16<sup>th</sup> August 2012. By that consent the tenant agreed to settle the rent arrears by payment of instalments. That the tenant having made certain payments remained with a balance of arrears of Kshs. 33,500/- as at February 2014. In addition the tenant was in arrears for the rent of March and April 2014 bringing the total arrears to Kshs. 183,700.00.
6. The Landlord threw "cold water" to the tenants deposition that it had not filed its reference at the Tribunal because of a lack of a Chair by deposing in the replying affidavit as follows-
- **THAT the Applicant is being dishonest in paragraph 9 of the supporting affidavit claiming he has been unable to file a reference at the tribunal as the tribunal is yet to commence and yet my advocate on record informs me which information I verily believe to be true, that she filed 2 complaints on 3<sup>rd</sup> April 2014 in BPRT No. 39 of 2014 Abubakar Mohamed –Vs- Kariuki Stanley and 28<sup>th</sup> march 2014 in BPRT No. 35 of 2014 respectively at the Tribunal's sub-registry in Mombasa. Therefore the Tribunal is operational and the applicant could have filed a reference but failed to do so. Annexed herein are copies of the complaints marked as "GG 2" and "GG 3".**
  - **THAT the tenant/applicant did not even annex a copy of their reference for good measure and to show that they had every intention to file the reference.**
  - **THAT the tenant/applicant has come to Court to seek equity with unclean hands.**
  - **THAT the tenant/applicant failed/refused and/or neglected to disclose all material facts to the Honourable Court in order to obtain the injunctive orders.**
  - **THAT the Orders sought by the tenant/applicant are unjust to landlord/respondent who has the right to receive rent for his property and failure to pay by the tenant then levying distress is a remedy legally available to him.**
7. Parties provided written submissions to the Notice of Motion. Both parties attempted to give evidence through their submissions which cannot be allowed because is tantamount to Counsel giving evidence from the Bar.

8. As stated before parties relationship is regulated by Cap 301 which requires that when a Notice is given, either to terminate tenancy or a service enjoyed by a tenant such notice should be given in terms of Section 4 of Cap 301. If the tenant does not wish to comply with such notice, Section 6 mandates such a tenant to file a reference at the Tribunal. Section 6 provides as follows-

**“6. (1) 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:**

**Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this Section.**

**(2) A Tribunal to which a reference is made shall, within seven days after the receipt thereof, give notice of such reference to the requesting party concerned.”**

9. The tenant, herein has not, to date, filed a reference as set out in Section 6. In those circumstances, as rightly submitted by the landlord the tenant is seeking restraining orders **“until such time they (tenant) decide to file a reference at the Tribunal ....”** This is because although the Tribunal lacks a Chair, the Tribunal has been receiving documents filed by parties. There was therefore nothing preventing the tenant from filing a reference.
10. As correctly submitted what the tenant seeks by Notice of Motion is an

injunction. The tenant needed to meet the principles of **GIELLA –Vs- CASSMAN BROWN & COMPANY LTD [1973] EA 358**. Those principles were discussed in the case **KARENBYPASS ESTATE LIMITED –Vs- PRINT AVENUE AND COMPANY LIMITED (2014)eKLR** as follows-

**“6. The principles governing the grant of prohibitive injunctions are well**

**settled. A litigant must rise to the threshold laid in Giella Vs Cassman Brown and Company Limited [1973]EA 358. Those principles are first, that the applicant must show a prima facie case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has acted in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya commercial Bank and another [2004]1 KLR 80, Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012]**

**e KLR, George Munge Vs Sanjeev Sharma & 3 Others HCCC ELC 677 of 2011 [2012]e KLR.**

**7. The conditions outlined in Giella’s case (supra) are sequential “so that**

**the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed” Kenya Commercial Finance Company Ltd Vs Afraha Education Society [2001]1 E.A. 86.”**

11. The Tenant’s Notice of Motion “trips” at the very first principle. There

is no case or reference in existence for the Court to determine that there is a prima facie case with probability of success. And having failed on the first principle and since as stated in that case the principles are sequential the Court cannot go further to consider the other principles. On that

ground alone the Notice of Motion fails.

12.The tenant has an obligation to pay rent to the landlord and this was

very well set out in the case Mombasa HCCC No. 724 of 1995 where it was stated-

**“Their legal status is still that of tenant’s possession. As such they have an equivocal duty to pay rent. I don’t in the premises see that they have made a prima-facie case with the probability of success. This consideration alone is sufficient to dispose of the application. However, even if I am wrong in this view of the matter I am still of opinion that the application must fail for the Plaintiffs cannot surmount the second hurdle, namely that the injury they are likely to suffer cannot be appropriately and adequately be compensated by an award of damages. If the disputed rent is demanded and payment thereof enforced, what loss can the Plaintiff suffer other than the monetary to the extent of the disputed payments.”**

13.In the end the Notice of Motion dated 14<sup>th</sup> March 2014 is without

merit and it is misconceived. It is dismissed with costs to the Respondent.

**DATED and DELIVERED at MOMBASA this 26<sup>TH</sup> day of JUNE, 2014.**

**MARY KASANGO**

**JUDGE**