



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.94 OF 2014

NATIONAL OIL CORPORATION OF KENYA..... PLAINTIFF

VERSUS

ROBERT OBEGI ONGERA..... 1ST DEFENDANT

VIVO ENERGY KENYA LIMITED 2ND DEFENDANT

RULING

1. Background;

By a written lease dated 19th December 2003 between Robert Obegi Ongera, the 1st defendant herein and Somken Petroleum Company Ltd (hereinafter referred to only as “Somken”), the 1st defendant leased to Somken all that parcel of land known as LR No. SareAwendo/280 (hereinafter referred to as “the suit property”) for a term of 10 years with effect from 1st January 2004 on terms and conditions that were set out in the said lease. It was a term of the said lease that the 1st defendant would renew the same for a further term of ten (10) years upon expiry provided that Somken made a written request for such renewal three (3) months before the expiration of the lease and as at the date of such request, Somken is not in breach of any term of the lease. The rent for the new lease was to be agreed upon by the parties.

2. On 2nd August 2008, Somken with the consent of the 1st defendant assigned its interest in the said lease to National Oil Corporation of Kenya Limited, the plaintiff herein. Under the terms of the deed of assignment executed between Somken, the 1st defendant and the plaintiff, the plaintiff took over and assumed all the rights, benefits and obligations of Somken under the lease in relation to the suit property. The lease between Somken and the 1st defendant which was assigned to the plaintiff was to expire by effluxion of time on 1st January, 2014. Sometimes in November, 2011, the 1st defendant and the plaintiff commenced negotiations with a view to entering into a new lease over the suit property the term of which was to commence upon the expiry of the then existing lease. It seems from the correspondence exchanged between the parties that it is the plaintiff who had approached the 1st defendant for the renewal of the said lease. It is not clear from the material on record as to how the plaintiff had expressed its intention to renew the lease to the 1st defendant. The fact that it is the plaintiff who had approached the 1st defendant for the extension of the lease on new terms can be implied from the 1st defendant’s letter dated 29th November 2011 to the plaintiff in which the 1st defendant had set out the proposals which the

- plaintiff is said to have put forward and the 1st defendant's counter-proposal. According to the contents of the said letter, the plaintiff had proposed to lease the suit property for a further term of 15 years with effect from 1st January, 2014 at an annual rent of kshs. 660,000.00 and on other terms and conditions that were set out in the said letter. Some of the terms and conditions that were proposed by the plaintiff were not accepted by the 1st defendant. The 1st defendant accepted the term that the plaintiff had proposed for the new lease and the commencement date. However, the proposed rent and the mode of payment thereof were not accepted by the 1st defendant.
3. In the said letter dated 29th November 2011, the 1st defendant made a counter-offer to the plaintiff on the terms of the new lease which the plaintiff also found unacceptable. Between 23rd March 2012 and 25th September 2013, the 1st defendant and the plaintiff engaged in further negotiations with a view to reaching an agreement on the terms of the new lease. The negotiations were carried out through a series of meetings between the 1st defendant and the plaintiff's employees or agents. It has been claimed by the plaintiff which claim is disputed by the 1st defendant that at their last negotiation meeting which was held on 25th September 2013, the 1st defendant agreed to grant to the plaintiff a new lease over the suit property for a term of 15 years at a monthly rent of 115,000.00 revisable after 10 years and payable five (5) years in advance for the first five years and thereafter yearly until the expiry of the term. From the material before me, there seems to have been further communication between the 1st defendant and the plaintiff over the new lease between 25th September 2013 when the 1st defendant and the plaintiff are said to have had their last negotiation meeting and the time when the original lease expired on 1st January, 2014.
 4. By the time the 1st defendant was negotiating the terms of a new lease with the plaintiff, the 1st defendant was at the same time engaged in parallel negotiations with the 2nd defendant for the same purpose. On 27th February 2014, the 1st defendant entered into a lease with the 2nd defendant over the suit property for a term of 15 years with effect from 1st February, 2014 at an annual rent of kshs. 2,600,000.00 and on other terms and conditions that were set out in the said lease. The 1st defendant also created a charge over the suit property dated 27th February 2014 to secure an advance rent of kshs. 13,000,000.00 that was to be paid by the 2nd defendant to the 1st defendant under the said lease. Both the lease and the said charge in favour of the 2nd defendant were registered against the title of the suit property on 27th February 2014. The deal between the 1st defendant and the 2nd defendant was sealed after the plaintiff had informed the 1st defendant through a letter dated 7th February 2014 that the plaintiff had decided to renew the lease over the suit property on terms that were set out on the said letter which the 1st defendant was called upon to accept by 17th February, 2014. The 1st defendant seems to have ignored and/or rejected the terms that were put forward by the plaintiff for the renewal of the lease which were less favourable compared to what the 2nd defendant seems to have put forward. After executing a new lease in favour of the 2nd defendant, the 1st defendant wrote to the plaintiff on 3rd March 2014 informing the plaintiff of this development and demanding that the plaintiff do give vacant possession of the suit property within seven (7) days to enable the 2nd defendant to take possession. The 2nd defendant also wrote to the plaintiff on 5th March 2014 informing the plaintiff of the 2nd defendant's interest in the suit property and demanding that the plaintiff do vacate the suit property within 14 days.

5. The application before the court;

On receipt of the two (2) letters of demand aforesaid, the plaintiff brought this suit against the 1st and 2nd defendants on 11th March 2014 seeking a permanent injunction to restrain the defendants by themselves, their servants, agents or anyone claiming through them from evicting or otherwise interfering with the plaintiff's tenancy, use and possession of the suit property. In its plaint dated 10th March 2014, the plaintiff averred that the 1st defendant is the registered owner of the suit property and proceeded to reiterate the terms of the lease dated 19th December 2013 between the 1st defendant and Somken and the deed of assignment between Somken and the plaintiff that I

have referred to at the beginning of this ruling. The plaintiff averred that pursuant to the said deed of assignment, the plaintiff had invested approximately kshs. 22million in renovating the suit property before the plaintiff commenced business therein. The plaintiff averred further that the lease between the 1st defendant and Somken that was assigned to the plaintiff expired by effluention of time on 1st January, 2014 before the same was renewed as a result of the 1st defendant's unreasonable demands concerning the terms of the new lease. The plaintiff averred that after the expiry of the said lease, the plaintiff remained in possession of the suit property with the permission of the 1st defendant thereby becoming a periodic tenant whose tenancy could only be determined in accordance with the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment's) Act Cap. 301 Laws of Kenya (hereinafter referred to only as "Cap.301 Laws of Kenya"). The plaintiff averred that in breach of the terms of the plaintiff's periodic tenancy aforesaid, the 1st defendant purported to lease the suit property to the 2nd defendant for a term of 15 years and to charge the same property to the 2nd defendant to secure advance rent payable by the 2nd defendant to the 1st defendant under the said lease.

6. The plaintiff averred that following the purported lease to the 2nd defendant, the 1st defendant had purported to give the plaintiff 7 days notice to vacate the suit property for the 2nd defendant. The plaintiff averred that the purported lease between the 1st defendant and the 2nd defendant and the notice served upon the plaintiff by the 1st defendant were illegal, irregular and unconstitutional in that the said notice was not issued in accordance with the provisions of Cap. 301 Laws of Kenya. The plaintiff averred further that the decision by the 1st defendant to lease the suit property to the 2nd defendant amounted to unjust enrichment. The plaintiff averred further and in the alternative that, the plaintiff is a periodic tenant of the 1st defendant in the suit property pursuant to the provisions of the Land Act 2012 and as such, whatever rights that may have been acquired by the 2nd defendant over the suit property were subject to the rights of the plaintiff.
7. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 10th March 2014. The plaintiff's application was brought on the grounds set out on the face thereof and in the affidavit sworn by David Obado, the plaintiff's manager at its Kisumu depot on 10th March, 2014. With leave of the court, the plaintiff filed a supplementary affidavit sworn by the said David Obado on 1st April, 2014. In the application, the plaintiff sought an order of a temporary injunction to restrain the defendants from evicting or otherwise interfering with the plaintiff's use and occupation of the premises comprised in the suit property pending the hearing and determination of this suit. In the grounds set out on the body of the application, the plaintiff contended among others that the plaintiff is a protected tenant of the 1st defendant in the suit property on which it operates a petrol station. The plaintiff contended that in breach of the plaintiff's right as such tenant, the 1st defendant had issued the plaintiff with a seven (7) days notice of the 1st defendant's intention to terminate the plaintiff's tenancy over the suit property. The plaintiff contended that if its tenancy is terminated it will suffer huge losses in economic terms and in its reputation in the petroleum industry. The plaintiff contended that the purported lease between the 1st defendant and the 2nd defendant is unlawful and that whatever rights the 2nd defendant may have acquired over the suit property were subject to the plaintiff's rights over the same property.
8. In the supporting affidavit sworn on 10th March 2014, the plaintiff reiterated the contents of the plaint which I have highlighted hereinabove in detail. The plaintiff's manager at its Kisumu Depot, David Obado deposed that; following the assignment to the plaintiff of the lease over that the suit property by Somken, the plaintiff carried out extensive renovation and refurbishment of the suit property at a cost of about kshs.22,000,000.00 before the plaintiff commenced business therein. The renovation and refurbishment aforesaid was necessary because the buildings and structures on the suit property had been damaged during the post-election violence of the years 2007/2008. He deposed further that; the plaintiff and the 1st defendant entered into negotiations for the renewal of the lease but the negotiations broke down due to the 1st defendant's refusal to sign the new lease. He deposed that, the plaintiff remained in occupation of the suit property after the expiry of the

- term of the lease with the knowledge of the 1st defendant enjoying all the rights and privileges of a tenant and discharging the duties and obligations associated with that status.
9. David Obado deposed further that; it came as a surprise to the plaintiff when the plaintiff received a letter from the 1st defendant dated 3rd March, 2014 in which the 1st defendant purported to terminate the plaintiff's tenancy. He reiterated that, the plaintiff is a protected periodic tenant of the 1st defendant and that the purported termination of the plaintiff's tenancy was illegal and was intended to enable the 1st defendant to improperly and unjustly benefit from the massive improvements that the plaintiff has carried out on the suit property. David Obado deposed further that the 2nd defendant was under a duty to verify the nature of the relationship that the plaintiff had with the 1st defendant before it could purport to enter into a lease with the 1st defendant over the suit property. He deposed further that the loss and damage that the plaintiff is likely to suffer if the plaintiff is evicted from the suit property cannot be compensated for in damages and that the defendants have no capacity to compensate the plaintiff for the losses aforesaid even if the same could be compensated. He deposed that the defendants would not suffer any inconvenience or prejudice if the orders sought are granted and that if any loss was to be incurred, the plaintiff has the financial ability to make good such loss.
 10. The plaintiff's application was opposed by the defendants. The 1st defendant filed a notice of preliminary objection dated 17th March, 2014 and a replying affidavit sworn on the same date in opposition to the application. In his preliminary objection, the 1st defendant contended that the plaintiff's suit is misconceived, discloses no cause of action, a non-starter, fictitious, incompetent *ab initio* and an abuse of the process of the court. In his replying affidavit, the 1st defendant deposed that; the 1st defendant is the registered proprietor of the suit property which the 1st defendant leased to Somken for a period of 10 years with effect from 1st January, 2004. The lease between the 1st defendant and Somken expired by effluence of time on 1st January 2014. The benefit of the said lease was assigned by Somken to the plaintiff on 21st August 2008. The lease had an option to renew clause which provided that if the plaintiff wanted to renew the same, the plaintiff was to notify the 1st defendant of such intention in writing three (3) months before the expiry of the lease. The said lease could then be renewed for a further term of ten (10) years with effect from 1st January 2014. Pursuant to the said option to renew clause, the 1st defendant addressed to the plaintiff two (2) letters seeking the plaintiff's commitment to renew the lease over the suit property which was scheduled to expire on 1st January 2014. The 1st defendant received no firm commitment from the plaintiff on the renewal of the lease. Due to lack of commitment on the part of the plaintiff on the renewal of the lease as at the time when the said lease expired on 1st January 2014, the plaintiff entered into a lease with the 2nd defendant over the suit property for a period of 15 years with effect from 1st February, 2014 on terms and conditions that were contained in the said lease pursuant to which the 1st defendant also executed a charge over the suit property in favour of the 2nd defendant.
 11. The lease and the charge over the suit property in favour of the 2nd defendant were registered against the title of the suit property. The 1st defendant thereafter out of courtesy sent to the plaintiff the letter dated 3rd March 2014 to facilitate smooth transition after the plaintiff's lease expired by effluence of time on 1st January 2014. The 1st defendant deposed further that the plaintiff's letter dated 7th February 2014 in which the plaintiff expressed an intention to renew the lease was unilateral and belated. The terms set out in the said letter were not accepted by the 1st defendant due to the fact that the relationship between the plaintiff and the 1st defendant had determined on 1st January 2014. The 1st defendant deposed that there is no landlord and tenant relationship between the plaintiff and the 1st defendant and that the 1st defendant has not invoiced the plaintiff for rent from 1st January 2014. The 1st defendant deposed that the plaintiff's continued occupation of the suit property after 1st January 2014 was an act of trespass since such occupation has no contractual or any other legal basis the suit property having already been leased to the 2nd defendant. The 1st defendant denied that the 1st defendant had expressly or by implication allowed

the plaintiff to remain on the suit property after 1st January 2014. The 1st defendant denied further that the plaintiff is a protected tenant in the suit property. The 1st defendant denied further that the plaintiff has carried out any repairs or renovation on the suit property since 1st January 2014 and contended that in any event, the 1st defendant is not liable to refund such expenses whether incurred earlier or after 1st January 2014. The 1st defendant urged the court to dismiss the plaintiff's application for injunction reiterating that the plaintiff's continued occupation of the suit property is an act of trespass and forcible detainer.

12. On its part, the 2nd defendant responded to the plaintiff's application through another application dated 17th March 2014 in which the 2nd defendant sought an order discharging the ex parte injunction granted to the plaintiff on 11th March 2014 and, the striking out and dismissal of the plaintiff's suit as against the 2nd defendant. The 2nd defendant also sought a mandatory injunction to compel the plaintiff to deliver up possession of the suit property to the 2nd defendant. The 2nd defendant's application was brought on the grounds set out in the body thereof and on the supporting affidavit sworn by the 2nd defendant's company secretary, Naomi Assumani on 17th March 2014. The parties agreed that this affidavit was to serve two purposes. It was to support the 2nd defendant's said application and was also to be treated as the 2nd defendant's replying affidavit to the plaintiff's application for injunction. The 2nd defendant's application was brought on the grounds that the 2nd defendant has a legally registered interest in the suit property and that the plaintiff's interest in the suit property that was acquired through assignment expired by effluxion of time on 1st January 2014. The 2nd defendant contended that the lease agreement made between the 1st defendant and the 2nd defendant conferred upon the 2nd defendant the right to occupy the suit property. The 2nd defendant contended that the plaintiff's suit is an abuse of the process of the court and that the ex parte orders issued on 11th March 2014 were obtained by the plaintiff through concealment of material facts to the court. The 2nd defendant contended that the ex parte orders aforesaid are being utilized by the plaintiff to unlawfully deny the 2nd defendant access to and use of the suit property thereby subjecting the 2nd defendant to loss.

13. In her affidavit in support of the application, Naomi Assumani deposed that; the 1st defendant offered to lease the suit property to the 2nd defendant sometimes in February 2014. The 2nd defendant carried out the necessary due diligence on the 1st defendant's title and confirmed that it was not subject to any encumbrance. The 2nd defendant thereafter made a formal offer to the 1st defendant to lease the suit on 13th February 2014 which offer was accepted by the 1st defendant. A lease was thereafter drawn between the 1st defendant and the 2nd defendant, executed by both parties and registered on 27th February 2014 together with a charge over the suit property which was to secure the advance rent that the 2nd defendant was to pay to the 1st defendant under the terms of the said lease. Under the lease between the 1st defendant and the 2nd defendant, the 1st defendant leased to the 2nd defendant the suit property together with all the improvements thereon for a term of 15 years with effect from 1st February 2014 on terms and conditions that are set out in the said lease. Before the 2nd defendant took possession of the suit property, the 2nd defendant sent to the plaintiff a courtesy letter dated 5th March, 2014 notifying the plaintiff of the 2nd defendant's interest in the suit property and of the 2nd defendant's intention to take possession thereof. The 2nd defendant received no response from the plaintiff on the said letter. The 2nd defendant contended that the lease between the plaintiff and the 1st defendant expired and was not renewed and as such the plaintiff was obliged to deliver vacant possession to the 1st defendant. The 2nd defendant contended further that the plaintiff is a trespasser on the suit property with no legal, equitable or any other interest known in law over the suit property. The 2nd defendant contended that the plaintiff's continued occupation of the suit property is detrimental to the interest of the 2nd defendant as lessee thereof and that it would only be fair and just if the ex parte injunction granted to the plaintiff herein is discharged, the plaintiff's suit struck out and dismissed with costs and an order is made compelling the plaintiff to deliver up vacant possession of the suit

- property to the 2nd defendant.
14. On 1st April, 2014, the plaintiff filed a supplementary affidavit in response to the 1st defendant's replying affidavit sworn on 17th March 2014. The plaintiff also filed a replying affidavit in response to the 2nd defendant's application dated 17th March 2014. In the supplementary affidavit, the plaintiff reiterated that there were negotiations between the plaintiff and the 1st defendant over the renewal of the lease and that it was the 1st defendant who failed to respond to the plaintiff's offer on rent for the new lease. The plaintiff contended that the 1st defendant is estopped from denying that the plaintiff had requested for the renewal of the lease and that the plaintiff became a protected tenant on 1st January, 2014. In the plaintiff's reply to the 2nd defendant's application, the plaintiff reiterated that the plaintiff spent substantial amount of money in renovating and refurbishing the structures on the suit property as the same were not in a usable condition when the plaintiff took possession of the suit property. The plaintiff contended that the 2nd defendant colluded with the 1st defendant to take over the plaintiff's equipment and products on the suit property. The plaintiff contended that as at 27th February 2014 when the 2nd defendant entered into a lease agreement with the 1st defendant, the plaintiff was already a periodic tenant of the 1st defendant and as such the lease and the charge that were executed by the 1st defendant in favour of the 2nd defendant were subject to the plaintiff's tenancy.
15. The plaintiff reiterated that the 2nd defendant should have contacted the plaintiff to establish the nature of its relationship with the 1st defendant before entering into a lease with the 1st defendant. The plaintiff contended that this suit raises valid questions which ought to be determined by the court at the main trial. On 7th April 2014, the plaintiff filed an amended plaint. In the amended plaint, the plaintiff averred that, by the time the lease between the plaintiff and the 1st defendant expired by effluence of time on 1st January 2014, the plaintiff and the 1st defendant had concluded negotiations for the renewal of the said lease for a further term of 15 years at a monthly rent of kshs. 115,000/- and that the 1st defendant has unreasonably and without any lawful excuse refused and/or neglected to accept the plaintiff's letter of offer so as to facilitate the preparation of a formal lease. The plaintiff sought two (2) additional prayers or reliefs in the amended plaint namely; a declaration that the plaintiff is a protected tenant and that the purported termination of its tenancy is irregular, unlawful, null and void and, in the alternative, a declaration that the plaintiff and the 1st defendant had entered into a lawful agreement for the renewal of the lease for a term of 15 years with effect from 1st January 2014 and an order against the 1st defendant for specific performance of the said agreement.
16. **The submissions and summary of the parties' respective cases;**

On 25th March 2014, I gave the parties liberty to file skeleton submissions. By the time the application came up for hearing on 7th April 2014, only the 1st defendant's advocates had filed skeleton submissions. In the circumstances, the advocates for the parties opted for oral submissions. From the submissions that were made before me, I have summarized the parties' respective cases as follows:-

17. Plaintiff's case;

The Plaintiff has sought as against the 1st defendant orders for specific performance of an agreement to lease which the plaintiff claims to have entered into with the 1st defendant. The plaintiff has contended that the 1st defendant had agreed to renew the plaintiff's lease over the suit property for a further term of 15 years with effect from 1st January, 2014. The plaintiff has submitted that as at the time the lease dated 19th December, 2003 expired on 1st January, 2014, there was already an agreement between the plaintiff and the 1st defendant for the renewal of the said lease and that the letter of offer that was sent by the plaintiff to the 1st defendant on 7th February, 2014 was superfluous. The plaintiff has submitted that as at the time the 1st defendant purported to enter into a lease with the 2nd defendant on 27th February, 2014, the plaintiff's

tenancy had already commenced which tenancy was an overriding interest on the title of the suit property under section 28 of the Land Registration Act, 2012. The plaintiff has submitted that the plaintiff has established a prima facie case against the 1st defendant for specific performance of the said agreement to lease which should entitle the plaintiff to the injunction sought. In support of its case for specific performance of the said agreement to lease, the plaintiff cited the cases of **Taylor Fashions Ltd. vs. Liverpool Victoria Trustee Co. Limited [1981] 1 All ER 897** and **Gathuthi Hotel vs. Fazalilahi (1957) E.A. 17**. In the alternative, the plaintiff has contended that the plaintiff is a periodic tenant in the suit property and as such tenant his tenancy is protected under the provisions of Cap. 301 Laws of Kenya and cannot be terminated save as provided for in the said Act. The plaintiff has contended that the purported termination of the plaintiff's tenancy by the 1st defendant was not in accordance with the provisions of the said Act and as such illegal and of no consequence in law. The plaintiff has contended that 1st defendant had allowed and actively encouraged the plaintiff to remain in occupation of the suit property after expiry of the lease and by virtue of the provisions of section 57(1)(c) of the Land Act, 2012, the plaintiff is deemed to be a periodic tenant. In support of this submission, the plaintiff cited the case of **Gusii Mwalimu Investments Co. Ltd. & Others vs. Mwalimu Hotel Kisii Ltd. [1996] eKLR** and the case of **Jubilee Insurance Co. of Kenya Ltd. vs. Joseph Ndungu Karega T/A leather Tough Foot Care Specialists [2014] eKLR**. The plaintiff has submitted that on the basis of the 1st defendant's representations that the lease would be renewed, the plaintiff spent in excess of Ksh. 22 Million in renovating the suit property. The plaintiff has submitted that the 1st defendant is estopped from denying that he had agreed to renew the plaintiff's lease over the suit property. In support of its estoppel argument, the plaintiff has cited section 120 of the Evidence Act Cap. 80 Laws of Kenya and the cases of **Amalgamated Investments and Properties Co. Ltd. (Liquidation) vs. Texas Commerce International Bank (1981) All E.R Ch.D 923** and **Taylor Fashions Ltd. vs. Liverpool Victoria Trustee Co. Ltd. [1981] 1 All ER 897**. The plaintiff has contended that the plaintiff stands to suffer irreparable loss if the orders sought are not granted which loss the defendants cannot meet in any event. The plaintiff has submitted that even if the application is considered on a balance of convenience the same would tilt in favour of the plaintiff. The plaintiff has contended that possible loss to the defendants is strictly financial and the defendants have counter-claimed for the same. The Plaintiff has contended that the plaintiff has the ability to meet any loss that may be occasioned to the defendants as a result of the injunction sought. On the 2nd defendant's application, the plaintiff has submitted that no good grounds have been put forward in the said application to warrant the granting of the orders sought. The plaintiff has submitted that a mandatory injunction can only be granted in exceptional circumstances.

18.1st defendant's case;

The 1st defendant has submitted that the plaintiff's decision to renew the lease dated 19th December, 2003 was made on 7th February 2014 after the expiry of the lease. The 1st defendant has submitted that the plaintiff did not invoke the option to renew clause in the said lease and the 1st defendant did not consent to the plaintiff's continued occupation of the suit property after the expiry of the said lease. The 1st defendant has submitted that the minutes relied upon by the plaintiff as evidence of the 1st defendant's consent to the plaintiff's continued occupation of the suit property and the 1st defendant's agreement to renew the lease are the plaintiff's internal communication which do not bind the 1st defendant. The 1st defendant has submitted that since the negotiations to renew the lease did not yield any fruit, the 1st defendant was entitled to look for another tenant. The 1st defendant has submitted that the plaintiff is neither a periodic nor a protected tenant. The 1st defendant has submitted that the plaintiff's status in the suit property falls under the provisions of section 60 (1) and (2) of Land Act, 2012 which provides for the legal position of a tenant who remains in possession of demised premises after the expiry of the term of the lease without the consent of the lessor. The 1st defendant has submitted that the lease between the plaintiff and the 1st defendant having expired and there being no agreement to renew the same,

the plaintiff is a trespasser in the suit property and the court cannot be called upon to create a new lease agreement for the parties. The 1st defendant has cited the case of **Devon Wholesalers Limited & 3 Others vs. James Githinji Kibugi & Another [2009] eKLR** for the proposition that a party cannot be allowed to create a state of affairs and then rush to court to preserve the same.

19.2nd defendant's case;

The 2nd defendant has submitted that under paragraph 3 (viii) of the lease dated 19th December, 2003, it was for the plaintiff to request for renewal of the said lease. The 2nd defendant has submitted that it was a term of the said lease that when it expires, it was either renewed or the plaintiff renders vacant possession. The 2nd defendant has submitted that although the lease between the plaintiff and the 1st defendant was acquired through assignment, the deed of assignment was not registered against the title of the suit property and was not detected by the 2nd defendant when they conducted due diligence on the title of the said property. The 2nd defendant has submitted that in the circumstances, there was no notice to third parties of the existence of the said lease. The 2nd defendant has submitted that the plaintiff has no case against the 2nd defendant who has a valid lease and charge over the suit property. The 2nd defendant has submitted that the 2nd defendant has no contractual relationship with the plaintiff which can form a basis of any claim. The 2nd defendant has submitted that the plaintiff having admitted that the lease that it had with the 1st defendant had expired, the only option that was left for the plaintiff was to handover vacant possession of the suit property to the 1st defendant. The 2nd defendant has submitted that the plaintiff's offer to the 1st defendant for the renewal of the lease was not accepted by the 1st defendant and as such no lease was created between them. The 2nd defendant has submitted that in the circumstances, the plaintiff's claim that there is an agreement between the plaintiff and the 1st defendant for the renewal of the lease over the suit property has no basis. The 2nd defendant has submitted further that the plaintiff is not a protected tenant. The 2nd defendant has submitted that since the 2nd defendant has a registered lease over the suit property, the court cannot infer a concurrent lease in favour of the plaintiff. The 2nd defendant has submitted that the issue of unjust enrichment does not arise because the plaintiff has a right under the expired lease to remove its tanks, pumps and other equipment from the suit property with the 1st defendant having the first option to purchase the same. The 2nd defendant has submitted that it has a duly executed and registered lease over the suit property and as such it is entitled to possession. On its application, the 2nd defendant has submitted that the only encumbrance registered against the title of the suit property is the lease and charge by the 1st defendant in favour of the 2nd defendant. The 2nd defendant has submitted that this lease gives the 2nd defendant a right to possession of the suit property. The 2nd defendant has submitted that it is entitled to a mandatory injunction. The 2nd defendant cited the cases of **Velji Shamji Constructions Limited vs. Westmall Supermarket Ltd. [2007] eKLR** and **R & K Investment vs. Evanson Gitau [1998] eKLR** in support of its submission that a tenant whose lease has expired has only one alternative which is to render vacant possession. In support of its submission that it is entitled to a mandatory injunction, the 2nd defendant cited the case of **Jubilee Insurance Co. of Kenya Ltd. vs. Joseph Ndungu Karega T/A leather Tough Foot Care Specialists [2014] eKLR**. The 2nd defendant has submitted that it was not enough for the plaintiff just to allege that it is a protected tenant. The onus was upon the plaintiff to prove the existence of such tenancy. In support of this submission, the 2nd defendant cited the cases of **Sammy Karanja vs. Provident Rock Investment Co. Ltd. [2005] eKLR** and **Zakayo Michubu Kibuange vs. Lydia Kaguna Japheth & 2 Others [2014] eKLR**. The 2nd defendant has submitted that the plaintiff has failed to establish a prima facie case against the defendants. The 2nd defendant has denied that the plaintiff's alleged tenancy over the suit property is an overriding interest over the title of the suit property. The 2nd defendant has submitted that an overriding interest only affect the rights of registered owners of land and not third parties. The 2nd defendant has submitted that the plaintiff's alleged interest in the suit property cannot override the

2nd defendant's registered interest in the property.

20. Consideration of the parties' respective cases and determination of the issues arising;

I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the affidavits and the notice of preliminary objection filed in opposition to the said application. I have also considered the 2nd defendant's application together with the affidavit filed in support and in opposition thereto. Finally, I have considered the respective submissions and authorities cited by the advocates for the parties. I have before me two applications. The first application which has been brought by the plaintiff is seeking an order of interlocutory injunction pending the hearing and determination of this suit while the second application which has been brought by the 2nd defendant is seeking the striking out and dismissal of the plaintiff's suit and a mandatory injunction to compel the plaintiff to deliver up to the 2nd defendant vacant possession of the suit property. The principles of law applicable to the two applications are not the same. For a temporary injunction, the applicant must demonstrate that it has a prima facie case against the respondents with a probability of success and that unless the injunction is granted, it will suffer irreparable harm. If the court is in doubt, the court will determine the application on a balance of convenience. These principles were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A. 358**. With regard to the application to strike out the suit, the rule of thumb is that the power to strike out a pleading should be exercised with great caution and only in clearest of cases. In the case of **D. T Dobie & Co. (K) Ltd –vs- Joseph Mbaria Muchira & Another, Civil Appeal No. 37 of 1978** (unreported) Madan J. A. stated as follows regarding the exercise of this power;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”

In the case of **Murri –vs- Murri & Another [1991] E. A 209 (CAK)**, the Court of Appeal held that **“summary remedy of striking out pleadings is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the court process or is unarguable**. For a mandatory injunction, the law is that the same can only be granted in clear and unusually strong cases and only in exceptional circumstances. In the case of **Shepherd Homes Ltd –vs- Sandham [1971] 1 Ch. 304**, Meggery J. stated as follows regarding mandatory injunction;

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation.”

In the case of **Redlands Bricks Ltd –vs- Morris [1970] AC 652**, it was stated that jurisdiction to issue a mandatory injunction **“is a jurisdiction to be exercised sparingly and with caution but in a proper case unhesitatingly.”** The purpose of a mandatory injunction at interlocutory stage was explained in the Court of Appeal Case of **Jaj Super Power Cash and Carry Ltd. –vs- Nairobi City Council & 2 Others, Nairobi Civil Appeal No. 11 of 2002 (unreported)** where the court stated that at an interlocutory stage, a mandatory injunction **“merely serves to redress the status quo ante in deserving cases until the main dispute is determined.”**

21. It is on the foregoing principles that the plaintiff's and the 2nd defendant's applications would be considered and determined. I would start with the plaintiff's application because the determination thereof would have some impact on the 1st defendant's application. The onus was

upon the plaintiff to satisfy the conditions set out above for granting an interlocutory injunction. The plaintiff was under a duty to demonstrate that it has a prima facie case against the defendants with a probability of success and that it stands to suffer irreparable harm unless the orders sought are granted. In the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd (2003) KLR 125** it was held that:

“A prima facie case in a civil application includes but is not confined to “a genuine and arguable case”. It is a case which on the material presented to court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The issue that I need to determine therefore is whether on the material before me the plaintiff has demonstrated that the defendants have in some way or the other infringed on any of its rights. As I have stated hereinabove, the plaintiff has in his amended plaint sought; a permanent injunction to restrain the defendants from evicting or interfering with the plaintiff’s tenancy, use and possession of the suit property, a declaration that the plaintiff is a protected tenant and that the purported termination of the plaintiff’s tenancy is irregular, null and void and, in the alternative, specific performance of an agreement for the renewal of the lease that the plaintiff had entered into with the 1st defendant for a term of 15 years with effect from 1st January, 2014.

22. It is not in dispute that there was a fixed term lease between the plaintiff and the 1st defendant over the suit property. It is also not in dispute that the term of the said lease expired by effluxion of time on 1st January 2014. What is in dispute is the status of the plaintiff in the suit property after the expiry of the term of the said lease. The plaintiff has contended that upon the expiry of the said lease, the plaintiff remained in the suit property with the consent and permission of the 1st defendant and on that account, the plaintiff became a periodic tenant of the 1st defendant in the suit property. The plaintiff has contended further that as a periodic tenant, the plaintiff became a protected tenant in the suit property under the provisions of Cap. 301 Laws of Kenya. The plaintiff has contended further that as a protected tenant the plaintiff’s tenancy could only be terminated in accordance with the procedure set out in Cap 301 Laws of Kenya. The plaintiff has contended therefore that the letter dated 3rd March 2014 that was sent to the plaintiff by the 1st defendant through which the plaintiff was asked to vacate the suit property within seven (7) days was illegal to the extent that it was not in compliance with the provisions of Cap.301 Laws of Kenya. The plaintiff having claimed protection under Cap 301, Laws of Kenya it was the duty of the plaintiff to put material before the court that could bring the plaintiff under the provisions of Cap.301 Laws of Kenya. Protection under Cap. 301 Laws of Kenya has been claimed by the plaintiff on account of a periodic tenancy which the plaintiff claims to have acquired under section 57 (1) (c) (i) of the Land Act, 2012. That section provides that if the lessee remains in possession of land with the consent of the lessor after the term of the lease has expired then unless the lessor and the lessee have agreed expressly or by implication that the continuing period shall be for some other period, the lease shall be deemed to be a periodic one. To be able to establish a periodic tenancy, the plaintiff had to prove that upon the expiry of the lease that they had with the 1st defendant on 1st January, 2014, the plaintiff remained in occupation of the suit property with the consent of the 1st defendant. Consent can be express or implied. The plaintiff has not placed any material before this court in proof of the fact that the plaintiff remained in occupation of the suit property after 1st January 2014 with the consent of the 1st defendant. The correspondence that were exchanged between the plaintiff and the 1st defendant prior to the expiry of the lease that have been exhibited by both parties were all concerned with the negotiations of the terms for the renewal of the lease. The negotiations ended before 1st January, 2014 and as at that date, the parties had not agreed on the terms of the new lease as I will show hereunder.
23. No evidence has been placed before me of any communication between the 1st defendant and the plaintiff after 1st January 2014 from which it can be inferred that the plaintiff’s continued occupation of the suit property after 1st January 2014 was with the consent of the 1st defendant.

The 1st defendant did not demand any rent from the plaintiff and none was paid. I am unable therefore to agree with the plaintiff that the plaintiff remained in possession of the suit property after 1st January 2014 with the consent of the 1st defendant. That contention has no basis. I am not satisfied therefore that the plaintiff is a periodic tenant of the 1st defendant in the suit property to be entitled to protection under Cap 301 Laws of Kenya. The plaintiff's tenancy in the suit property had expired and the parties had not agreed on the renewal of the same. The 1st defendant's letter dated 3rd March, 2014 through which the 1st defendant had requested the plaintiff to vacate the suit property so that the 1st defendant could hand over the same to the 2nd defendant with whom he had entered into a new lease after the expiry of his lease with the plaintiff cannot therefore be termed as illegal, null and void.

24. As I have stated above, the plaintiff has contended in the alternative that the plaintiff had entered into an agreement with the 1st defendant for the renewal of the lease over the suit property for a further term of 15 years with effect from 1st January 2014 in respect of which agreement the plaintiff has sought specific performance. Again, the onus was upon the plaintiff to prove the existence of this agreement. What has the plaintiff placed before this court in proof of this agreement? The plaintiff has exhibited the 1st defendant's letters dated 29th November 2011 and 6th June 2013 through which the 1st defendant had made certain proposals for the renewal of the lease between the 1st defendant and the plaintiff which was expiring on 1st January 2014. The plaintiff has also exhibited minutes prepared by the plaintiff of the discussions that were held between the 1st defendant and the plaintiff's team that was tasked to negotiate the terms of the new lease with the 1st defendant. The minutes cover the discussions held between March, 2012 and September, 2013. A perusal of the said minutes shows that the same were prepared for the plaintiff's internal consumption. The minutes were prepared by the plaintiff's negotiation team for consideration by the plaintiff's tender committee. It was for the tender committee to accept or reject the negotiation team's proposals from the said discussions. The proposals by the negotiation team were not binding on the tender committee. In fact, from my perusal of the said minutes, I have noted that the plaintiff's tender committee had rejected the negotiation team's proposals made on 17th April 2012 and 3rd September 2013. These minutes cannot by any imagination constitute an agreement to lease between the plaintiff and the 1st defendant. This is because first, the contents of the minutes which are contested by the 1st defendant cannot be verified the same having been signed solely by the plaintiff's employees. Secondly, it is clear on the face of these minutes that what the 1st defendant and the plaintiff's negotiation team had were mere discussions which were not intended to bind either party. This explains why the plaintiff's tender committee had rejected the proposals which had been put forward by the plaintiff's negotiation team after the negotiations that were conducted earlier. I am of the opinion that the correspondence and minutes which have been placed before me by the plaintiff fall short of the requirements of section 38 of the Land Act, 2012 and section 3(3) of the Law of Contract Act, Cap. 23 Laws of Kenya. Those sections provide that an agreement for the disposition of any interest in land must be in writing and must be signed by the party against whom enforcement is sought. For the above reasons, I am not persuaded by the plaintiff that there was an agreement between the 1st defendant and the plaintiff for the renewal of the lease over the suit property for a further term of 15 years with effect from 1st January 2014 which can be enforced by an order of specific performance.

25. In my view, the only agreement which the plaintiff and the 1st defendant had for the renewal of the lease dated 19th December, 2003 which expired on 1st January, 2014 which could be enforced by the plaintiff was contained in paragraph 3 (viii) of the said lease. That paragraph of the lease contained an option to renew clause which could be exercised by the plaintiff. It provided that the said lease was renewable for a further term of ten (10) years with effect from 1st January 2014 at a rent to be agreed. The lease had an arbitration clause in paragraph 3 (v) through which a dispute over the rent payable could be resolved. If the plaintiff had exercised this option in the manner set out in the said clause, the 1st defendant could be compelled by an order of specific performance to renew the lease. See the case of **Sands vs. Mutual Benefits Ltd. [1971] E.A 156**. From the material before me, it seems as if the plaintiff was not keen on exercising this option. The plaintiff set out to negotiate a completely new lease without any regard to this clause. In its amended plaint,

the plaintiff has sought to enforce not the agreement to renew the lease under the option to renew clause aforesaid but the terms of a completely new lease that it attempted to negotiate with the 1st defendant. In any event, there is no evidence that the plaintiff made a request to the 1st defendant in writing before the expiry of the lease for the renewal of the same. There is also no evidence that when a stalemate ensued between the plaintiff and the 1st defendant over the terms of the new lease the plaintiff made any attempt to refer the dispute to arbitration in accordance with the terms of the expired lease. These factors support my view that the plaintiff was negotiating a completely new lease with the 1st defendant. I think that I have said enough to show that the plaintiff has not demonstrated that it has an agreement to lease with the 1st defendant which can be enforced through a suit for specific performance. The plaintiff having failed to prove that it is a periodic tenant or that it has an agreement to lease with the 1st defendant which can be enforced by an order for specific performance, I am not satisfied that the plaintiff has established a prima facie case against the defendants. I am of the opinion that the plaintiff having failed to exercise the option to renew the lease and the lease having expired before the plaintiff and the 1st defendant had agreed on the terms of the new lease, the 1st defendant was entitled to enter into another lease with the 2nd defendant. The 2nd defendant's lease over the suit property cannot be said to be subject to the plaintiff's rights over the suit property. The plaintiff's lease with the 1st defendant having expired by effluxion of time, the plaintiff who remained in occupation of the suit property without the 1st defendant's consent had no known right in law over the suit property which the 2nd defendant's lease with the 1st defendant could be subject. I am in agreement with the plaintiff's overriding interest argument save that I don't think that such interest can accrue to the plaintiff who seems to have no known legal or equitable interest in the suit property. Having come to the conclusion that the plaintiff has not established a prima facie case against the defendants, I am not obliged to consider whether or not the plaintiff stands to suffer irreparable loss unless the orders sought are granted. I would like to say however that if I was to decide on this issue, I would have held against the plaintiff. What the plaintiff is undertaking on the suit property is a business. The loss if any which the plaintiff may incur is monetary and can be computed and compensated by way of damages. I have no evidence before me that the defendants would not be able to pay such damages to the plaintiff. The plaintiff having failed to meet the conditions for granting interlocutory injunction, the plaintiff's application dated 10th March 2014 must fail. I have found the cases that were cited by the plaintiff not to be supportive if the plaintiff's case as pleaded and presented before me.

26. The disposal of the plaintiff's application takes me to the 2nd defendant's application. In its application, the 2nd defendant has sought the discharging of the ex parte injunction that was granted herein on 11th March, 2014, the striking out and dismissal of the plaintiff's suit as against the 2nd defendant and a mandatory injunction to compel the plaintiff to deliver up vacant possession of the suit property to the 2nd defendant. The first order sought by the 2nd defendant has been overtaken by events. I have already ruled above that the plaintiff is not entitled to an order of temporary injunction. The ex parte injunction issued herein on 11th March, 2014 would be discharged automatically on the dismissal of the plaintiff's application for injunction. The second order sought by the 2nd defendant is premised on order 2 rule 15 (i) (d) of the Civil Procedure Rules which empowers the court to strike out and dismiss a suit on the ground that the same is otherwise an abuse of the process of the court. I do not think that the plaintiff's suit herein can be said to be an abuse of the process of the court. In the book, **Pleadings: Principles and Practice by Sir Jack Jacob and Iain S. Goldrein**, an action which is an abuse of the process of the court is defined as one which is absolutely groundless. I am unable to say on the material before me that the plaintiff's claim against the defendants is groundless. I am of the view that the plaintiff has a genuine grievance against the defendants. I do not think that the mere fact that the plaintiff's case is weak makes it an abuse of the process of the court. Although the plaintiff has failed to meet the threshold for an interlocutory injunction to issue, this does not mean that the plaintiff's case must fail ultimately. In the book, **Bullen & Leak's Precedents of Pleadings, 10th Edition**, the authors have stated as follows at page 48, "**The mere fact that the plaintiff is not likely to succeed in his action is no ground for striking out his statement of claim....**". I agree

entirely with that statement. The findings that I have arrived at herein above while considering the plaintiff's application for injunction are only preliminary in nature and as such cannot be a basis for declaring the plaintiff's suit an abuse of the process of the court.

27. The last order sought by the 2nd defendant seeks possession of the suit properly through a mandatory injunction. I am of the view that vacant possession is a substantive relief which must be pleaded and claimed before the court can grant the same. I do not think that the court can grant vacant possession when it has not been pleaded and prayed for either in the plaint or by way of a counter-claim under sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. I am of the opinion that the 2nd defendant should have brought a counter-claim against the plaintiff for vacant possession which would have formed a basis for its prayer for the mandatory injunction sought herein. I am of the view that in the absence of a counter-claim for vacant possession or for a mandatory injunction, the interlocutory mandatory injunction sought in the 2nd defendant's application is sought in vacuum. I am aware that a temporary prohibitory injunction can issue at the instance of a defendant even without a counter-claim. I think that the same cannot apply to a mandatory injunction more particularly where what is sought through such injunction is a major relief such as vacant possession. That will go against rules of pleadings which provides that parties are bound by their pleadings and a court can only grant a relief which has been sought. As I have stated at the beginning of this ruling, a mandatory injunction is issued only in clear and obvious cases and only in exceptional circumstances. Since the 2nd defendant has not lodged any claim against the plaintiff, I have no basis on which I can conclude that the 2nd defendant has a clear case against the plaintiff so as to justify the issuance of a mandatory injunction. For the foregoing reasons, I am of the opinion that the 2nd defendant's application dated 17th March 2014 has no basis.

28. In conclusion, I find no merit in the two applications before me. The plaintiff's application dated 10th March, 2014 and the 2nd defendant's application dated 17th March 2014 are hereby dismissed. The 1st defendant shall have the cost of the plaintiff's application. As between the plaintiff and the 2nd defendant, each party shall bear its own costs of the two (2) applications.

Delivered, signed and dated at KISII this 18th day of July, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Miss Nekesa h/b for Mr. Otieno for the plaintiff

Mr. Mose Nyambega for the 1st defendant

Mr. Ondati for the 2nd defendant

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE