



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 88 OF 2013

EDWARD MURIMI t/a EDD ENTERPRISES..... PLAINTIFF
THE KENYA SCOUTS COUNCIL..... DEFENDANT

RULING

1. The application before this Court is the Notice of Motion dated 15th March 2013 brought under Order 40 rule 1, Order 51 rules 1, 2, 3 and section 3 A of the Civil Procedure Act. The applicant seeks to restrain the Respondent from interfering with or otherwise dealing with the applicants/plaintiffs quiet enjoyment of the premises known as L.R. No. 209/4332 Baden Powell House until the hearing and determination of the suit, he also seeks to set aside of the Eviction Notice issued by the respondent and that the O.C.S. Parliament Police Station be ordered to supervise the enforcement of the orders plus costs of the application.
2. The application is premised on the grounds on the face of the application and the supporting affidavit sworn by Edward Murimi dated 15th March 2013; that the applicant has been running a restaurant at the ground floor of Baden Powel house pursuant to a rent agreement executed by both parties for a period of 5 years 1 month with effect from 31st May 2010 which is still subsisting; that the tenancy does not fall within Cap 301 of the Landlords Hotels and Catering Establishments Act and that the said notice is due to expire on 28th February 2013 and should the eviction proceed he stands to suffer serious economic set back and he will be exposed to irreparable damage, loss of income and prejudice.
3. The application was opposed, the respondent filed a replying affidavit sworn on the 4th April 2013 by Ray Charles Musau the Chief Commissioner of the defendant. The respondent admits that the applicant is a tenant in the said premises and there is an existing lease agreement for 5 years 1 month; that the lease agreement stipulated that the applicant would pay rent on the 1st day of each month, the leased premises was to be used for a hotel business only and the applicant was to comply with all the local authority requirements. Other terms were that the tenant would not sublet the said premises to any one; that each party could terminate the said lease agreement by giving a ninety days written notice or pay in lieu of Notice; that in this regard the respondent issued the applicant a notice to terminate pursuant to provision of Section 4(2) of Cap 301 and advanced reasons that the applicant was a habitual rent defaulter, the respondent required extra space to accommodate its staff and the applicant has failed to comply with the safety standards of the City Council of Nairobi even after being given Kshs. 1.2 million to comply; that the applicant did not file a reference to the eviction notice under Sec 6 of the said Cap 301 and this he argues makes the respondent a trespasser in law; that the inclusion of a determination clause in the lease agreement was proper and that the applicant has failed to disclose that he has sublet the premises and has failed to comply with the Council regulation which is contrary to the lease agreement; that the applicant has not satisfied the requirements to be granted an injunction; that the applicant is not a

controlled tenant and the eviction notice given on 14th November 2012 was proper in law.

4. In the submissions filed by the applicant, he states the applicant is not a controlled tenant under the law and therefore the notice served on him is an unlawful notice that the Business Premises Rent Tribunal has no jurisdiction to deal with the matter: that the matters before it must be set out under Landlord Tenant (Hotels & Catering Establishments) Act, Cap 301 and that the said Act does not apply to the applicant as the lease in question is for 5 years 1 month; further that the High Court as Under Article 165 gives the High Court unlimited Original jurisdiction in both Civil and criminal matters. Counsel relied on the case of ***THREWAYS SHIPPING SERVICES LIMITED –VS- KENYA PORTS AUTHORITY (2012) eKLR***, where it was held that; “By article 159(2)(a) of the Constitution , the court , in exercise judicial authority , is required to ensure that justice shall be done irrespective of status., in my opinion , the law today is that the high court has unlimited jurisdiction in all causes, save in matters reserved by the Constitution itself to the Supreme Court or specialized courts’.
5. Counsel for the applicant submitted further that in an application for temporary injunction the Court in exercising its judicial discretion must consider the principles laid out in the case of ***Geilla –vs- Cassman Brown& Co. Ltd [1973] EA 358***, this being;
 - i. whether the applicant has a prima facie case
 - ii. Whether a consideration of the balance of convenience the plaintiff will suffer more if the injunction is not granted
 - iii. Whether damages will be adequate damages.

Counsel relied on the case of ***Julius Uswekha Shitakwa –vs- Saul Masavila Shitakhwa & another [2007] eKLR***, where it was held that; “It was submitted that the application seeks to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated by damages recoverable in the action if the uncertainty were resolved in his favour at trial”. The applicant also relied on the case of, ***Assanad –vs- Petit (1989) KLR 241***, where it was held that; “the object of temporary injunction is to keep things in status quo so that after a hearing the plaintiff obtains a judgment in his favor, the defendant will have been prevented from dealing in the meantime with the property in such a way.’

6. It was further submitted that there would be higher risk of injustice against the applicant should the Court decline to grant the orders sought and pointed out that the respondent is an owner of several properties in the country and the applicant’s premises are of little importance to him whilst the applicant stands to lose considerably in the event he is evicted. Further that the City Council letter dated 23rd July 2012 refers to the respondents’ properties in blanket and does not specifically point to the premises occupied by the applicant and refutes to the respondents claim to have been given 1.2 million to comply with the City Council requirements; that no evidence has been adduced to show that the applicant has defaulted in making its payments nor has the respondent adduced evidence that it has distressed for rent and should have exhausted remedies available to him; that the applicant has established he has a prima facie case with probability of success as he stands to lose his livelihood and the balance of probability tilts in his favor.
7. The respondent in their submissions insists that the lease agreement falls within controlled tenancy and therefore the eviction notice issued was lawful; that section 10 of Cap 301 provides that the landlord shall serve the landlord with the notice and the tenant shall subject to section 6 inform the landlord of their unwillingness to comply. that the tenancy terminated on 28th February 2013 but the applicant only moved the Court on 13th March 2013. Counsel relied on the case ***HCMC App. No. 166 of 2004 Joseph Shadrack Mureithi –vs- Leonard Wachira & Others***, where Justice Khamoni observed that; “where the tenant sat back and did nothing under section 4(5) and 6(1) for more than the notice period suggested that they intended to comply with the tenancy notice and only went to court as an afterthought merely to delay the inevitable.”
8. It was further submitted that the applicant has not met the requirements for grant of a temporary

injunction, nor has he proved that he has a prima facie case with probability of success in that the lease agreement contained a termination clause that provided a termination notice period of 3 months hence it was a controlled tenancy and fell within the confines of the Business Premises Rent tribunal which has primary jurisdiction; that the notice to terminate was issued on 15th October, 2012 and was followed by an eviction notice shortly after; that the applicant took no action until after the lapse of the said notice; that the applicant has not proved how damages will not compensate his losses if any, on this Counsel relied on the case of **Wilfred Oanda Kirochi – vs- David Pius Mugamba (Civil appeal** No. 76 of 1997) where Bosire J. (as he then was) held that; “*if damages can suffice an injunction should not be granted; that the defendants want to house some of their staff hence it will suffer if the tenancy is not terminated.*” The Respondent also relied on the case of **Alex Kadenge Mwendwa v Grace Wangari Ndikimi & 2 others [2006] eKLR**, where the Court held that; “*the tenancy was controlled and the complaint lodged in the Business premises rent tribunal, but the respondent failed to attend the said tribunal and moved the High Court. The jurisdiction of that tribunal is not to be excluded but for good cause.*”

9. In their oral submission in Court on the 12th May 2012, Miss Kaviundi for the applicant submitted that the lease agreement is for 5 years and 1 month and as such the matter did not fall within the jurisdiction of the Business Premises Tribunal and this Court has unlimited jurisdiction to hear the case; that the applicant has established prima facie case and should be granted the temporary injunction orders sought. Mr. Okemwa for the respondent submitted that even if this Court has jurisdiction the same should not act where there are specialized Courts like in the instance case there is the Tribunal established under Cap 301 and the Court can only interfere where they have failed in their duties; that the correct Court to hear the matter is the Business Rent tribunal.

10. I have read and considered the affidavits and submissions made by the parties and the authorities cited. The applicant filed this application seeking an injunction against the respondent from eviction from the leased premises on Baden Powell House where he runs a restaurant business. The lease agreement and period of the lease are not in dispute. The applicant argues that he is not a controlled tenant and as such his case does not fall within the jurisdiction of the Business Premises Tribunal established under Cap 301. The definition section 2 of the said Act defines a Controlled Tenancy as;

“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:”

My findings are that the lease agreement between the parties cannot be termed as a controlled tenancy in that it does not fall within the provisions of section 2(a) of cap 301. The lease agreement is written but is for a period of 5 years 1 month, it exceeds five (5) years. The applicant need not move to the Business Premises Rent Tribunal, as submitted as this Court has jurisdiction to hear and determine this matter. Further, the notice that the respondent gave is a notice under section 4(2) of Cap 301. I find that this notice was an irregular and unlawful notice as the tenancy agreement does not fall under Cap 301. The respondent has an intention to terminate the tenancy between it and the applicant. However in doing so it must give a proper notice as provided in the lease agreement dated 30th May 2010. I therefore find that it is in order to restrain the respondent from interfering with the applicant’s use and quiet enjoyment of property known as **L. R. No 209/4332 Baden Powell House** pending the issuance of a proper notice to terminate the tenancy as provided in the agreement. Since

the eviction order was issued subsequent to unlawful notice, the eviction order is set aside. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 22nd day of September 2014.

R.E. OUGO

JUDGE

In the Presence of:-

..... For the Plaintiff/Applicant

..... For the Defendant/Respondent

.....Court Clerk