**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MILIMANI LAW COURTS**

**HCCC CASE NO. 125 OF 2012**

**MEENA SALON & BARBERSHOP LIMITED.... PLAINTIFF**

**Versus**

**SOROYA INVESTMENT LIMITED ..... DEFENDANT**

**RULING**

**Temporary injunction**

[1] This is an application for injunction. It is dated 28th February, 2012. A temporary injunction was granted by Havelock J on 29th February 2012 on condition that the admitted arrears of rent in the sum of Kshs. 207,000 be paid forthwith by the Applicant. The record for 22nd March 2102 shows the learned judge recorded *''I gather that the rent which is not in dispute in the amount of shs. 207,000 has been paid as per my order of 29 February 2012''*. In the affidavit by the NAVEED SOROYA on 23rd May, 2014, it is stated that the Applicant did not comply with the order of 29th February 2012. It is not clear whether actual payment was done as no receipt to that effect has been annexed by the Applicant. Parties then engaged in a fruitless negotiation which the Respondent says was deliberately delayed and stalled by the Applicant and its counsels.

[2] The Applicant submitted that it has established a prima facie case that the Respondents are just out to harass and eventually evict the Applicant from the demised premises on which it carries out business, has invested over Kshs. 4,000,000 and has built enormous goodwill with its customers. It claimed that it has faithfully paid the rents due to the Respondents except the issue in controversy is that the Respondent is asking for rent over walkways, stairways and balcony which the Applicant considers to be public walkways on which no rent is chargeable on the Applicant. By including these public walkways, the Respondent has doubled the occupied space contrary to the lease they have with the Respondent. The Applicant, therefore, seeks for valuation of the space occupied against the rent charged. They believe they have overpaid the Respondent and they posit the Respondent in seeking to levy distress while this case is pending is intended to pre-empt the case, evict the Applicant and avoid refund of the over-payment. All these added together satisfies the test in the case of **Giella vs. Cassman** Brown and an injunction should be granted.

[3] The Respondent submitted that despite repeated efforts to have the issue of rent arrears

settled amicably, the Applicant has simply frustrated all negotiations. The urged that the Applicant is in arrears of rent before the rearrangement of lease herein in 2013. The Respondent says that the claim by the Applicant that they issued some payment cheques is baseless as they did not even annex a receipt to that effect. The statements of accounts shows a total of rent due from the Applicant between August 2009 and July 2013 was Kshs. 10,248,091 and only Kshs. 5,294,108 has been received leaving a balance of Kshs. 4,953,983 for which distress has been levied. They also disputed that they refused to issue a new lease. They stated that it is the Applicant who has refused to pay legal fee and disbursements set out in the letter of offer for preparation of a new lease. To them, the Applicant is just but a difficult tenant to deal with. According to the Respondent, the Applicant is using these proceedings and the injunction to refuse to pay just rent owing herein and should be refused the injunction. In any case, the argued, the Applicant has not shown its rights will be injured here. The test in Giella case has not been met.

**DETERMINATION**

[4] I have considered all the affidavits, pleadings and submissions filed in court. I have also considered the judicial authorities submitted by the parties. I note, there are counter accusations by one party on the other. The Applicant says the Respondent is charging for public walkways, thus, measuring and valuation of the space occupied is needed. The Respondent on the other hand says that the Applicant is introducing valuation of the demised space through submissions as it was never in the original application. I agree with the Respondent that the issue of valuation is not in the original application as well as the plaint filed. Such would be a backdoor amendment to pleadings. And as parties are bound by their pleadings I will not determine the issue of valuation or consider it here.

[5] That is not all; the Applicant accuses the Respondent of harassment and intent at evicting them despite huge investments they have made in the premises. The Respondent on the other hand accuses the Applicant of failing to pay its rents and is only reviving these proceedings to continue with the default to pay rent arrears. Until the court reaches a point where it thinks this is a case of *in pari delicto* whereat the court will not ordinarily involve itself in resolving one side's claim over the other; and will be guided by the practice of law to leave them where it finds them, in accordance with the maxim, *in pari delicto potior est conditio defendentis et possidendis.* Or, simply take the view that whoever possesses whatever is in dispute may continue to do so in the absence of a superior claim. Judicial decisions on this subject of *in pari delicto* are legion and I do not wish to multiply them except I am content to adopt a work of this court in **Nbi Hccc No 516 2013 C-Hear Kenya Limited vs. Liquid Telecommunication Kenya Limited [2014] eKLR**.
But there are some elements of this case which persuade the court to offer just a temporary measure of relief. First, despite the fact that there has been inordinate delay on the part of the Applicant to prosecute its case, I observe the Respondent has not filed appearance or defence. And, the suit may as well be determined on formal proof. But nonetheless, the Respondent has participated in the proceedings and filed responses to the application. Second, there subsists a landlord-tenant relationship which has not been shown to have been terminated in accordance with the law despite a notice of termination of tenancy which seems to have been issued herein. The court has not been told whether the relation was actually terminated. In that relationship arose this dispute where the Respondent claims there are huge rent arrears due from the Applicant while the Applicant claims it has overpaid the rent.

I should think the simple issue which should resolve the entire dispute is taking of accounts between the parties and I am glad the parties had attempted some negotiations towards that end although they were fruitless. I do not want to declare who was responsible for the breakdown of those negotiations but that is the desired path serious litigants should always take. These things when put together convinces the court they will need to be determined conclusively. And to achieve that I should adopt the test formulated by ***Hoffman J*** in the English case of **Films Rover International vs. Cannon Films Sales Ltd (1986) 3 All ER 772 at page 780-781** that**:-**

***"A fundamental principle is therefore that the court should take whichever***

***course appears to carry the lower risk of injustice if it should turn out to have been "wrong"…."***

[6] Applying the said test, I will extend the injunction for only 30 days from today and if the Applicant will not have set down this suit for hearing, the injunction will automatically be discharged without the necessity for any party to apply in that behalf. Other than distress for rent, this order of injunction does not affect any duty on the Applicant to pay current rent as per existing tenancy (lease or holding over), or other right or remedy due to any party in respect of renewal or termination of tenancy etc. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 21st day of November 2014**

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**F. GIKONYO**

**JUDGE**