



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**Civil Case 426 & 427 of 2010**

**DOUGLAS KUBAI M'MTURI.....PLAINTIFF**

**-VERSUS-**

**TATU FADHILI .....DEFENDANT**

*Consolidated with*

**CIVIL CASE NO. 426 OF 2010**

**JOHN KAMANJA.....PLAINTIFF**

**-VERSUS-**

**MRS. TATU FADHILI.....DEFENDANT**

**RULING**

The plaintiffs in the consolidated suit, moved the Court by Notice of Motion dated **20<sup>th</sup> April, 2011** and brought under Order 40, Rules 1 and 2 of the Civil Procedure Rules. The plaintiffs sought two separate Orders of an injunctive nature – one being for interim injunction, and the other for a mandatory injunction. The first of these is for –

(i) *“an interim injunction...to preserve the plaintiff’s protected tenancy issued to restrain the defendant by herself or through her children, agents, servants or employees or otherwise howsoever from unlawfully terminating the tenancy and evicting the plaintiff or interfering with the plaintiff’s quiet enjoyment of the tenancy; or otherwise altering to the detriment of the plaintiff, the terms and conditions of the tenancy of one shop on a development on part of Plot No.129/Block XI/MI (Sub-plot No.21), on the ground that the tenant is protected under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and any action done in contravention of the said law and to the detriment of the said tenant is illegal.”;*

(ii) *“a mandatory injunction...compelling the defendant to immediately restore at her expense electric power supply to the suit shop, failing which the ‘house without land’ housing the tenancy be attached*

*until she complies with the Order of the Court: on the ground that she [the defendant] has caused power to be disconnected as she desires to sell the property to a third party [with] vacant possession, and she cannot do so while the plaintiff is still in possession of the shop as a going concern.”*

The plaintiff swore a supporting affidavit on **20<sup>th</sup> April, 2011** making averments as follows: he is a tenant of one shop of Plot No. 129/Block XI/MI, where he pays Shs.5000/= per month in rent, in arrears; he is paid up for the period covering he month of **March, 2011**; the landlady has made attempts to terminate the said tenancy, without following the applicable tenancy law; in **November, 2010** while suit was pending, the landlady attempted to remove the roof and rear door of the suit premises, and the matter was reported to the Police; in **February, 2011** the landlady brought along persons who removed the electrical power metre; as from **April, 2011** the landlady has been carting building materials into the surroundings of the suit property, scattering the same generally and creating obstructions; the landlady has sold or is endeavouring to sell the suit premises to one **Mr. Hassan**; the deponent’s tenancy is a protected one under the Tenants (Shops, Hotels and Catering Establishments) Act (Cap.301); the landlady has been serving termination notices upon the tenant which do not comply with the tenant’s status under the said Act; the deponent apprehends that the defendant’s action is intended to frustrate him out of the suit tenement.

The defendant swore a replying affidavit on **9<sup>th</sup> May, 2011** deponing, *inter alia*, that the suit property required repairs, and so she obtained consent from the Municipal Council of Mombasa to effect these; that, to enable the deponent to effect repairs, she in **October, 2010** gave notice to all her tenants, by virtue of s.4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, that she would carry out repairs; that all tenants vacated, pursuant to the said notice, apart from the plaintiffs who filed suit against her; that the plaintiffs also filed a reference before the Business Premises Rent Tribunal, and duly served notice upon her; that she has “*not in any way attempted to unlawfully evict the plaintiffs from the suit premises*”; that the deponent has not interfered with electrical connections to the plaintiffs’ shops; that the dispute is pending before the Business Premises Rent Tribunal.

Learned counsel, **Mr. Kimani** for the plaintiff/applicant, submitted from the affidavit evidence that the plaintiffs, run two separate shops in a semi-permanent structure on L.R. No. Mombasa/Block XI/129, sub-plot No.21 on Mombasa Island; the defendant is the owner of the structure, a “house without land”, on just part of the said parcel of land, Mombasa/Block XI/129 (sub-plot No. 21). While the land on which the defendant’s “house without land” stands is owned by one set of individuals, the houses on the plot are owned by different persons – including the defendant. The plaintiffs pay rent to the defendant, in the sum of Kshs.5000/= per month, for their respective shops. The tenancies are “controlled”, within the meaning of s.2 as read with s.4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap.301).

In the course of **2010**, the defendant introduced to the plaintiffs one **Mr. Hassan**, as a person to whom she had decided to sell off her property. Even though such intended sale of the property was the sole issue between the plaintiffs and the defendant, she moved to issue notices to terminate the tenancies, on the ground that she intended to effect repairs – and that she had to recover possession. The plaintiffs did not comply with the said notices, and filed a reference before the Business Premises Rent Tribunal, contesting the propriety of the said termination notices; and these references are now pending before the said Tribunal. Yet the defendant had immediately engaged in “*unorthodox attempts to evict the tenants from the suit premises.*” The defendant gave no notice to the tenants when she requested the Municipal Council’s permission to undertake certain works on the roof of the demised premises; and she did not, at the time, make the disclosure that she had tenants in occupation of the demised premises; the Municipal Council granted permission without hearing the tenants.

**Mr. Kimani** submitted that there were two issues for determination, at this interlocutory stage:

*(i) whether the plaintiffs have established wrongs by the defendant against their tenancies, that warrant grant of injunctions, to preserve the controlled tenancies, pending the hearing and determination of the contested issues;*

*(ii) is the filing of a reference before the Business Premises Tribunal an inhibition to the High Court’s*

*exercise of jurisdiction where, as in this case, the tenants are threatened with imminent eviction before the said Tribunal gets down to business?*

Learned counsel urged that the plaintiffs have demonstrated they enjoy controlled and protected tenancies on the defendant's premises, where they carry on business as shopkeepers. The defendant also acknowledges that she wants to recover possession for the purpose of affecting repairs. The defendant did not deny she has made irregular attempts to evict the plaintiffs. The defendant has not denied the averment that she is selling the suit premises to one **Mr. Hassan**, and that she wants to hand over vacant possession to the purchaser.

Counsel submitted that the defendant knows that the plaintiffs have raised a dispute before the Business Premises Rent Tribunal, but she wants to render the likely outcome of the matter nugatory.

On the question of jurisdiction, counsel submitted that the Business Premises Rent Tribunal has no jurisdiction to grant an injunction – and this jurisdiction falls to the High Court. In **Narshidas & Co. Ltd. v. Nyali Air-conditioning & Refrigeration Services Limited**, Civ. Appeal No. 205 of 1995, the Court of Appeal thus resolved the jurisdictional question:

***“What does a controlled tenant confronted with an illegal threat of forcible eviction do? He cannot go to the Business Premises Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord.”***

Counsel urged that *“the High Court is the proper court to preserve the status quo ante in the circumstances of these cases”*; and that, *“as the plaintiffs have also made other claims for damages in these suits, the injunctions ought to remain in place until hearing and determination of these suits so that they are not rendered nugatory as well.”*

For the defendant, learned counsel, **Mr. Mwawasi** submitted that the plaintiffs are not entitled to the Orders sought: for the facts they rely on are *“mere allegations and the plaintiffs have not proved them.”* Counsel contended that the sole reason the defendant sought vacant possession, was that of need to effect repairs; that the defendant did not disconnect the plaintiffs' electric power supply; that the only tenable gravamen as between the parties, is properly lodged before the Business Premises Rent Tribunal; that the defendant has already terminated the suit tenancies, by *“a valid Notice under the Landlord and Tenant (Shops, Hotels and Catering Establishments) [Act].”*

It emerges as common cause that the plaintiffs have, for some time, been the tenants of the defendant; that they remain in occupation of the demised premises; that the tenancies in question are controlled tenancies under the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act (Cap.301, Laws of Kenya); that certain of the disputes between the plaintiffs and the defendant are now properly lodged before the Business Premises Rent Tribunal established under the said Act; that there are elements in the plaintiffs' pleadings that relate to *damages*, and that properly belong only to the High Court for determination; that the defendant has done, and is in the course of doing, certain things which raise apprehension among the plaintiffs as to the durability of their tenancy interests.

If the plaintiffs were to be evicted at this stage from the suit premises, any dispute-resolution such as may later issue forth from the Business Premises Rent Tribunal, would have been rendered purely academic, as it could confer no benefits upon the plaintiffs. And again, if the plaintiffs were to cease to enjoy their tenancy interests at this stage, then even their pending suits before the High Court would have been rendered nugatory.

The Court has no basis for doubting that the pending issues in the suit are meritorious, and touch on *duties, rights and interests* of parties. By Article 159(2)(a) of **the Constitution of Kenya, 2010** this Court is shouldered with the obligation to ensure that *“justice shall be done to all, irrespective of status”*; and this imperative requires me, once I form the opinion that the plaintiffs have a cogent case, to *sustain the process leading to a just determination of the question.*

Secondly, in terms of the integrity of the Courts and the judicial system, I am to ensure that if and when this Court will hear the cause lodged before it, and pronounce a just outcome, this outcome shall not be rendered *nugatory*. On this account, the Court cannot allow the complainants to be dislodged from their tenancy claims and then pronounce on their rights on a future date.

*Accordingly, I hereby allow the prayers in the plaintiffs' Notice of Motion of 20<sup>th</sup> April, 2011. Costs shall be in the cause.*

**SIGNED** at **NAIROBI** .....

**J.B. OJWANG**  
**JUDGE**

**DATED** and **DELIVERED** at **MOMBASA** this 20<sup>th</sup> day of February, 2012.

**MAUREEN ODERO**  
**JUDGE**