



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 534 OF 2010

ELITE BOOK CENTRE LIMITED.....1ST PLAINTIFF

KENAGU ENTERPRISES LIMITED.....2ND PLAINTIFF

WORKSHOP SUPPLIES LIMITED.....3RD PLAINTIFF

GROWERS CAFÉ LIMITED.....4TH PLAINTIFF

BURGERLAND FAST FOODS LIMITED.....5TH PLAINTIFF

AMIRALI H.M. MAPARA AND SHIRIN AMIRALI

HASSAN ALI T/A ORBIT FAST FOODS.....6TH PLAINTIFF

ELIZABETH OYUGI OKELLO T/A LIMODA

FASHIONS AND EXHIBITION CENTRE.....7TH PLAINTIFF

VERSUS

MERU CENTRAL FARMERS (COFFEE)

CO-OPERATIVE UNION LIMITEDDEFENDANT

RULING

The application before the Court is brought by the Plaintiffs/Applicants by way of Chamber Summons dated 9th November 2010, and pursuant to Order XXXIX Rule 1(a) of the revoked Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap 21). The Plaintiffs are seeking orders to restrain the Defendant/Respondent from demolishing Imenti House Building which is situated on LR No. 209/2437 in Nairobi (hereinafter referred to as the suit premises), and from evicting the Plaintiffs or in any manner whatsoever interfering with the Plaintiffs' quiet enjoyment of their respective tenancy premises within the suit premises, pending the hearing and determination of the suit filed herein. The main ground for the application is that the Defendant has served each of the Plaintiffs with a notice to vacate their respective tenancy premises within the suit premises, which premises they were to vacate by 30th November 2010.

The Plaintiffs have expounded on the ground for the application in a Supporting Affidavit sworn on their behalf on 9th November 2010 by Harish B. Kanabar, a Director of the 1st Plaintiff. The Plaintiffs state that each of their lease agreements contains a clause that allows the Defendant to terminate the lease

agreement for reasons other than their breach of the terms and conditions of the lease. Further that because of the existence of the said termination clause, each of the Plaintiffs therefore enjoys a controlled tenancy in terms of section 2(1)(b)(ii) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act (Cap 301). The Plaintiffs aver that as a result their tenancies cannot be lawfully terminated or the terms altered to their detriment except in accordance with the provisions of the said Act. The Plaintiffs have annexed as evidence their lease agreements with the Defendant, and the letters sent to them by the Defendant dated 11th August 2010 asking them to vacate the suit premises by 30th November 2010.

The Defendant in a Replying Affidavit sworn by its General Manager Fredrick Mburugu on 23rd November 2010 confirms that the Plaintiffs are its tenants, and that the suit premises were leased to each of the Plaintiffs for a period of 5 years and 3 months. The Defendant further states that the provisions of the lease agreements entered into with each of the Plaintiffs do not create a controlled tenancy, and that Landlord and Tenants (Shops, Hotels and Catering Establishments) Act does not apply to the suit premises. The Defendant also argues that if the Plaintiffs' contentions are that each enjoys a controlled tenancy, then they should have filed these proceedings in the first instance before the Business Premises Rent Tribunal. Finally, the Defendant states as a result of the suit premises being in a poor structural state, it had sought and obtained approval from the City Council of Nairobi to redevelop the property and has arranged and obtained financing for the project. The Defendant has annexed as evidence a copy of an Enforcement Notice issued by the Nairobi City Council dated 11th November 2011, and an offer for a mortgage facility from Cooperative Bank of Kenya dated 16th July 2010.

The Plaintiffs filed written submission on 20th April 2011 of the same date. At the hearing of the application on 21st November 2011, the Defendant's Counsel, Mr. Mwarania, sought to withdraw the written submissions dated 26th May 2011 and filed on 27th May 2011, and to rely on the written submissions dated 31st May 2011 which were filed on 2nd June 2011. Orders were given by this Court accordingly. In addition, Mr Mwarania and Mr. Kangatta the Counsel for the Plaintiffs, made oral submissions at the said hearing.

I have considered the application, the affidavits filed by the parties, and the submissions made by Counsel. The first issue that has been raised is whether this Court has the jurisdiction to hear and determine this application, or whether the Plaintiffs ought to have filed their application in the Business Premises Tribunal. The Plaintiff's argument is that since the tenancies herein are controlled tenancies, the Defendant has not, in purporting to issue a termination notice, complied with the issuance of a tenancy notice under section 4 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act. The Plaintiff has relied on the Court of Appeal decision in **Caledonia Supermarket Ltd v Kenya National Examination Council, (2002) 2 EALR 357** where it was held that the Respondent in the case had properly sought redress in the High Court when faced with an illegal eviction, and having been served with an invalid notice which deprived the Business Premises Tribunal of jurisdiction.

It is indeed the law under section 6 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, that any dispute as to a tenancy notice is required to be referred to the Business Premises Tribunal established under the said Act. I however find that the dispute between the parties is not as regards a tenancy notice validly issued under section 4 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act. My finding is that the dispute before this Court is on the nature of the tenancies herein, and specifically if they are controlled tenancies that therefore require compliance with section 4 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act. In addition this court has jurisdiction to give an interlocutory injunction under section 63 (e) of the Civil Procedure Act, and Order 40 Rule 2 of the Civil Procedure Rules in relation to a dispute of this nature.

The second issue arising is whether the Plaintiffs have established the necessary conditions for the injunctions sought to issue. The principles for the grant of an interlocutory injunction are settled and were set out in the case of **Giella – v – Cassman Brown & Co. Ltd. [1973] EA 358.** They are that first, the applicant must show a *prima facie* case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer an

irreparable injury which could not adequately be compensated in damages; and thirdly that if the court is in doubt it should decide the application on a balance of convenience. What I need to decide at this stage is whether the Plaintiffs have brought any evidence to show that the tenancy is a controlled tenancy within the meaning of section 2(b)(ii) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, so as to bring into effect the provisions of the said Act as to termination of tenancies. Section 2 of the said Act defines a controlled tenancy as follows:

“controlled tenancy” means 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:

The Plaintiffs in their oral and written submissions contend that they have shown a *prima facie* case. The Plaintiffs’ Counsel submitted that it is not in dispute that each of the Lease Agreement’s contains a Clause that reads as follows:-

“Should the Principal lessor, the City Council of Nairobi, in writing require, demand and/ or approve the demolition, improvement, and/or reconstruction of the Imenti House by the Lessor herein, the Lessor shall intimate the same in writing to the lessee herein, giving him notice of not less than three (3) months to terminate the term hereby created , PROVIDED THAT after such improvements and/or reconstruction, the lessee shall be given the first priority to take on lease a proportionate section of the premises as improved or reconstructed and in as similar location as possible to the current premises”.

The Plaintiff’s contention is that the above quoted clause, which is Clause 3(c) in the lease agreements, creates a controlled tenancy within the meaning of Section 2(1) (b) (ii) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act.

The Defendant’s Counsel Mr. Mwarania submitted that the said Clause 3(c) of the lease agreement is not a termination clause, but is a suspension clause implied under the Schedule to Act, in the event the premises are in need of renovation. It is my view that the Schedule to the Act must be read together with section 3 of the Act pursuant to which it is enacted. Section 3 implies the terms and conditions in the Schedule to controlled tenancies not reduced to writing, or which are reduced to writing in the prescribed form. The parties in this suit have mutually agreed to adopt a different form in writing in terms of the lease agreements entered into, and the Schedule is inapplicable. Even if the terms and conditions in the Schedule were to apply, I agree with the Plaintiff’s counsel’s submissions that the only reference to suspension in the said Schedule is suspension of payment of rent, in the event of premises being destroyed by fire, civil commotion or accident through no negligence on the part of the lessee.

I also find that there is an option in the lease agreements entered into by the parties for termination otherwise than for breach of the lease. Clause 3(i) of the said lease agreements provides as follows:

“The term hereby created may be determined under Clause 3(c) hereof, or by either party giving three (3) months written notice to the other if the other party fails to comply with any of its obligations under this agreement.”

The termination in Clause 3(c) of the lease agreements as quoted in the foregoing does not arise from a breach by either party of the terms of the agreement, but from a decision made a third party, the Nairobi City Council. The term of the lease is indicated in the introductory recitals to the lease agreements as

being 5 years and 3 months, and there is therefore the possibility of a lease being terminated within a period of five years of commencement.

It is also not in dispute that the Defendant has relied on clause 3(c) of the lease agreement in its letter to the Plaintiffs dated 11th August 2010, requiring them to vacate the suit premises by 30th November 2010. The Defendant's Counsel made detailed submissions as to the interpretation of clause 3(c) in the context of the entire lease agreement. This court cannot at this stage embark on such an examination or make any definitive findings on the same, and can only do so at the trial of the suit filed herein.

I therefore find that the Plaintiffs have established a *prima facie* case. The only outstanding question is whether damages would be an adequate remedy to the Plaintiffs. The Plaintiffs have submitted that eviction would result in loss and damages to their businesses which would be difficult to quantify. The Defendant in reply has submitted that the Plaintiffs' being business persons either make profits or losses from their businesses, and they can easily compute their losses if any, and be compensated in damages. I am however of the view that whether or not damages are quantifiable or adequate is immaterial when it comes to the legal protection accorded to controlled tenancies. The provisions of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act are meant to protect the tenants from exploitation and arbitrary evictions, and this Court cannot allow compensation to be used as justification for non-compliance with the provisions of the Act.

For the reasons given in the foregoing, the Plaintiffs application dated 9th November 2010 is allowed. A temporary injunction is hereby granted restraining the Defendant from demolishing Imenti House Building which is situated on LR No. 209/2437 in Nairobi, and from evicting the Plaintiffs or in any manner whatsoever interfering with the Plaintiffs' quiet enjoyment of their respective tenancy premises within the said Imenti House Building, pending the hearing and determination of the suit filed herein.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____8th____ day of ____February____, 2012.

P. NYAMWEYA

JUDGE