REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(FAST TRACK)

CIVIL CASE NO. 186 OF 2011

1. PETER MWARA DANIEL …….……. 1ST PLAINTIFF

2. NANCY NYAMBURA MWARA …….…….. 2ND PLAINTIFF

(TRADING AS CAROL'S ANNEX BAR & RESTAURANT)

- Versus -

1. MARGARET WAMBOI KINOTHIA……. 1ST DEFENDANT

2. ROSELYN GACHIGI KINOTHIA…… 2ND DEFENDANT

3. SHEILA GACHIKU KINOTHIA ……. 3RD DEFENDANT

RULING

The Plaintiffs have filed a Notice of Motion dated 29th June 2011 in which this court is asked to grant an interlocutory injunction to restrain the 2nd and 3rd Defendants from determining the plaintiffs tenancy on Mombasa Block XX/25 (*the suitland*) or taking vacant possession thereof or altering the terms and conditions of the tenancy thereof to the detriment of the plaintiffs otherwise than is provided for under the law. An alternative prayer, which may very have the same effect as the principal prayer, is that this court makes an interlocutory order preserving the tenancy enjoyed by the plaintiffs.

The Defendant's are opposed to the application and have responded to it through a replying affidavit sworn by the 2nd Defendant on 12th August, 2011.

The parties to this litigation have taken rival positions on some facts pertaining to the tenancy which forms the subject matter of this dispute. I am therefore well minded to recall the words of Justice Gicheru in **Civil Apppeal No. 60 of 1993 Rockland Kenya Ltd –Vs- Elliot While Miller** when he said-

"In cases where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is given on affidavit and is therefore incomplete as it has not been tested by oral cross examination. At that stage therefore, it is not the function of the court to attempt to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions

of law which call for detailed argument and mature considerations. Such matters are to be dealt with at the trial."

It is common ground that prior to her death JERUSHA WANJIKU KINUTHIA (the deceased) leased out all that property known and described as Mombasa Block XX/25 to the plaintiffs. Although no lease agreement was entered between the plaintiffs and the deceased both sides acknowledge the existence of a written document dated 1st April 1998 (*hereinafter the common document*). The common document is said to be a letter of offer made by the deceased agents to the plaintiffs to lease the suit premises with the following important highlights-

"Terms: The Landlady/Agent has allowed the Tenant

to convert the said premises from residential to Guest House.

Cost of Renovation: Kshs. 670,000/- (Six hundred seventy

thousand only). The Landlady/Agent hereby

authorizes the Tenant to spend the said amount for General renovations pending processing and payment of the same by the former Tenant, Ministry of Works to the Landlady. The cost of conversion from residential to Guest House to be met by the Tenant. The Tenant shall not construct additionals to the existing premises without the authority of the Landlady/Agent."

Although the Defendants claim that it is not within their knowledge that the plaintiffs have converted the property to commercial use, the court has no difficulty believing that the plaintiffs indeed operate a lodging house with a Restaurant and Bar known as "Carols Annex" on the suitland. The plaintiffs have shown this court a current business permit issued to it by the Municipal Council of Mombasa. Again on the basis of the common document there appears to have been an intention by the parties that the tenants could change the use of the suit property to commercial. So any change effected would be in consonance with that intention. Whether the plaintiffs have obtained a formal change as required by Physical Planning Act is a matter for full trial. For now and on the basis of the permission granted to the plaintiffs by the local authority this court accepts that the user of the suitland is commercial.

The common document also shows that the deceased gave concurrence to the plaintiffs to carry out renovations. The plaintiffs allege that the deceased authorized them to carry out the renovations at a total cost of Kshs. 3,179,421/- and rely on an "*agreement for compensation*" entered between Mwangi Gicheru and them. Mr. Mwangi Gicheru is said to have been the duly appointed agent of the deceased. The authenticity and/or validity of this agreement is disputed by the Defendants just as they dispute memorandum of understanding allegedly entered between the Defendants and the 2nd Defendant on 5th May 2011. In the memorandum the 2nd Defendant acknowledges and accepts that the total cost of renovation by the plaintiffs is Kshs. 3,120,000/-.

Arising from these are the following issues that can only be resolved at a full hearing-

(a) Did the deceased authorize the plaintiff to carry out renovations and improvements to the suit property?

(b) If so, was the authority for Kshs. 670,000/- (as appearing in the common document) or for Kshs. 3,179,421/- as appearing in the documents of 28th November 1997 and 5th May 2011?

Important for now is that there is prima facie evidence that the Deceased authorized the plaintiffs to expend some money on renovations and that amount, whatever it may be, has not been refunded.

Two other issues need to be considered at this stage. The plaintiffs say that the Defendants have expressly admitted their indebtedness to the plaintiffs for developing and enhancing the value of the suit

property. For that reason they claim a legitimate expectation in raising an equity. Mr. Kimani appearing for the plaintiffs spent considerable effort pressing this point. Central to this argument is Clause 3 of the disputed agreement of 28th November 1997. Clause 3 reads as follows-

"That as the Tenant has expended the said sum of Kshs. 3,179,421/- pursuant to the authority conferred upon the tenant by the landlady for purposes of improving the landladys said property, the landlady hereby confirms that the sum of Kshs. 3,179,421/- is held by the landlady as a deposit on the rent account of the tenant and upon termination of the tenancy or upon the landlady forfeits ownership of the said property, the landlady shall fully refund to the Tenant the said sum of Kshs. 3,179,421/-."

Even if it were to be accepted that the agreement is valid, the only expectation created or promised by it is a refund of the sum of Kshs. 3,179,421/- used in improving the property. It would be extravagant to interpret the terms in this clause as creating a proprietory interest in the suitland in the manner of **Inlands –Vs- Baker [1965]1 ALL E.R. 448**. In that suit the Denning M.R said-

"It is quite plain from those authorities that, if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity."

In the absence of more, the court is unwilling to find that the plaintiff has, on a prima facie basis, established a case for an equity in the suitland in addition to a refund of money spent on renovation and/or improvement.

It is not in doubt that at all material times the plaintiff's were tenants of the Defendant. That tenancy was not reduced into writing. Accepting also that the tenants were using the premises for commercial purposes then this tenancy would fall within the category of tenancies protected by provisions of The Landlord & Tenant (Shops, Hotels & Catering Establishments Act (Cap 301) (the "Act"). This suit is, partly, a plea by the plaintiffs for protection from what they allege is an attempt by the Defendants to terminate the tenancy without compliance with the provisions of the Act.

The notice issued by the Defendant's lawyers on 4th May 2011 did not comply with the provisions of Section 4 of the Act. The notice was not in the form prescribed by the law. The notice was for a period of less than two months. Lastly the notice did not specify the ground upon which the Defendants sought termination. The notice was for at least three reasons void and would not be effective. Section 5(5) of the Act is in the following unequivocal terms-

"A tenancy notice <u>shall not be effective for any of the purposes of this Act</u> unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice."(emphasis mine)

On receipt of the notice the plaintiffs chose not to make a reference to the Tribunal. But on the authority of **Munaver Alibhai T/A Diani Boutique –Vs- South Coast Fitness & Sports Centre Ltd Mbsa Civil Appeal No. 203/94** the notice, being void, would have no effect in law on the plaintiffs tenancy and they would be "*under no duty, legal or otherwise to react to it*." The plaintiffs were entitled to seek protection of this court as they have now done.

The dispute before court is between a tenant and a landlord involving in the main, and perhaps wholly, the tenancy. I would have no doubt that any claim by the plaintiffs can be adequately compensated by payment of damages, that may be an appropriate remedy. I nevertheless think that the Defendants blatant disregard of the clear provisions of the Act must not be left unchecked. This is one of situations where an injunction should issue even if damage would be a satisfactory remedy. I would identify with the following words of Ringera J (*as he then was*) in **Waithaka –Vs- Industrial and Commercial Development Corporation [2001]KRL 374** at page 381-

"If the Adversary has been shown to be high handed or oppressive in its dealings with the applicant this may move a court of equity to say: 'money is not everything at all times and in all circumstances and don't you think you can violate another citizens rights only at the pain of damages'."

The Defendants have told court that they have entered into a sale agreement for the sale of the suit property. The sale agreement was shown to court. Clause 6 thereof is relevant and provides-

"The property is sold subject to the existing tenancy and for such purpose the vendors declare and confirm that the current rental income from the property is Kenya Shillings Eight Six Thousand four hundred (Kshs. 86,400/-) per month and which income the purchaser shall only be entitled to upon payment of the full purchase price."

At the hearing I was not told whether this sale had completed. Needless to say and as expressly acknowledged in the above clause the purchaser takes or shall take over the property subject to the plaintiffs tenancy. Any termination thereof can only be achieved in compliance with the Act. In this regard, the purchasers would be well aware of the specific fetter to their right to terminate in certain instances provided in Clause 7(2) of the Act which reads as follows-

"The landlord shall not be entitled to oppose a reference to a Tribunal on the ground specified in subsection (1) (g) of this section if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created within the five-year period preceding the date of the tenancy notice seeking to terminate the tenancy, and at all times since such purchase or creation the premises concerned have been occupied wholly or mainly for the purposes of a shop, hotel or catering establishment."

On the material before it the court forms the view that the plaintiffs tenancy deserves the protection of a temporary injunction. On the other hand, the plaintiffs have not established on a prima facie basis that they have a proprietory right, in law or equity, over the suitland. For this reason the court is reluctant, and indeed unwilling, to make an order in favour of the plaintiffs that is so broad as to curtain or restrict the Defendants from enjoying their proprietory right to the suit land. This includes the right of the Defendants to dispose of the property. For this reason I order that an interlocutory injunction does hereby issue to restrain the second and third Defendants by themselves or through their agents, servants, employees or otherwise or purchasers or successors in title from determining the plaintiffs tenancy on Mbsa Block XX/25 Mbsa Island or otherwise forcibly taking vacant possession of the suit property or altering the terms and conditions of the tenancy to the detriment of the plaintiffs, otherwise than as provided for under the law, pending the hearing and determination of this suit.

Costs of the application to the plaintiffs.

Dated and delivered at Mombasa this 11th day of April, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Migiya for Kimani for plaintiffs

Shimaka for Onguto for defendants

Court clerk – Moriasi

F. TUIYOTT
JUDGE