

**FEISAL SHARIF MOHAMMED T/A GENERAL OFFICE TECHNOLOGIES
SOLUTIONS.....PLAINTIFF**

-VERSUS-

KIRIMA BUS SERVICE LTD.....DEFENDANT

RULING

The Plaintiffs filed an application by way of Notice of Motion dated 21st November 2011, seeking three substantive orders, namely:

1. A temporary mandatory injunction compelling the Defendant to return the Plaintiff to possession of the premises of the ground floor of the building commonly known as Jinja House erected on L.R No. 209/3542 situated along Lagos Road, Nairobi (hereinafter referred to as the suit premises)
2. An injunction restraining the defendant from evicting, threatening to evict, directly collecting rent from the Plaintiff's licensees or howsoever interfering with the Plaintiff's quiet occupation and possession of the suit premises
3. An order that the defendant accounts for all rental income generated from the suit premises from 1st August 2011 to date

The main grounds for the application are that the Defendant demised the suit premises to the Plaintiff for a term of five years and 3 months by virtue of a written lease dated 1st February 2009, whereupon the Plaintiff partitioned the premises and let them to several licensees. The Defendant then evicted the Plaintiff without notice from the suit premises and is alleged to have entered into agreements directly with the said licensees. The grounds are detailed out in the Plaintiff's supporting affidavit sworn on 21st November 2011 and to which is annexed the lease entered into with the Defendant, the various leases he entered into with his licensees and receipts evidencing payment of rent.

The Plaintiff alleged in a further affidavit he swore on 9th December 2011 that on 10th July 2011 he sent an assistant to the Defendant's appointed agents namely Nduati Wamae & Associates to pay rent, but they refused to receive the same. Further, that he inquired from the said agents the reasons for the said refusal in a letter dated 10th July 2011, and received a reply dated 23rd July 2011 informing him that the said agents had instructions not to receive rent from him.

The Plaintiff submitted in written submissions dated 16th December 2011 that there existed a valid lease between the parties for a term of five years and three months over the suit premises, which could only terminate by effluxion of time. The Plaintiff relied on the decision of **Shell & BP (Malindi) Kenya Ltd. Vs Kings Motors Ltd H.C.C.C. No 265 of 2004** that if a lease agreement did not provide for the termination of a lease, then a landlord is at liberty to invoke the provisions of Registered Land Act on termination of leases. The Plaintiff further submitted that a rent dispute is not a valid reason for evicting a tenant as the said eviction will not be pursuant to a court order and effected according to law. In the circumstances the Plaintiff argued that this court has the powers to grant a mandatory injunction.

The Defendant's response is in a replying affidavit sworn on 5th December 2011 by its Chairman, Lucy Waithera, and in written submissions dated 8th February 2012. The Defendant states that the Plaintiff was evicted from the suit premises at the end of July 2011 for non-payment of rent, which rent was supposed to be paid to the appointed agents of the Defendant and who was to issue the receipts. Further, that the lease agreement between the parties allowed the Defendant to re-enter the demised premises without notice upon breach of the covenants by the Plaintiff and the term granted to the Plaintiff was to determine absolutely.

The Defendant submitted that the application fails to meet the statutory threshold set in Order 40 Rules 1,2 and 4 as the suit premises have been alienated to are in the possession of third parties, and as between the parties there is no property in danger of being wasted, damaged or alienated for an injunction to issue. Further, that the lease entered into on 1st February 2009 is inadmissible in evidence as it is not stamped as required by section 19 of the Stamp Duty Act (Cap 480), and the Defendant relied on the decision in **Fidelity Commercial Bank vs Agritools Ltd & 3 Others H.C.C.C. No 1677 of 2000.**

It was also submitted that as the said lease is not registered it was ineffectual to pass any interest in the land under section 106 of the Transfer of Property Act as read together with section 32 of the Registration of Titles Act, and as held in **New Stanley Hotel Ltd. vs Arcade Tobacconists Ltd (No2) (1986) KLR 760.** Further, that in the premises the lease could only operate as a contract *inter partes*. The Defendant in his submissions undertook a construction of the various provisions of the lease to show that it could be determined otherwise than by effluxion of time. The Defendant in addition contended that the Plaintiff had admitted being in rent arrears in a letter dated 12th August 2011 attached to his supporting affidavit, and therefore no right of his had been infringed in line with the decision in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125.** The Plaintiff had therefore not established a *prima facie* case to entitle him to the injunctions sought.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. At this stage what I need to decide is whether the mandatory and temporary injunctions sought can be granted. For both injunctions to issue the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358** must be met. The main issue therefore is whether the Plaintiff has shown a *prima facie* case to entitle him to the injunctions sought. The evidence produced by the Plaintiff is the lease entered into by the parties dated 2nd February 2009 with respect to the suit premises for a term of five years and 3 months, and which he claims could only terminate by effluxion of time. The validity of the said lease has been disputed by the Defendant on the ground that it is not stamped nor registered, and is therefore incapable of passing any interests in the suit premises to the Plaintiff.

The law on the issue of the validity of the said lease is as provided in sections 32 and 40 of the Registration of Titles Act (Cap 281), which is the regime of law under which the said lease between the parties is stated to be issued. These sections provide that leases for a period of over twelve months must be registered. The effect of non- registration of leases entered into under the Registration of Titles Act has been decided on in **New Stanley Hotel Ltd. vs Arcade Tobacconists Ltd (No2) (1986) KLR 760** with regard to the issue of non-creation of any interests *in rem* in the tenant by such an unregistered lease; and in **Clarke v Sondhi (1963) E.A. 107** in terms of its operation as a contract *inter partes*. The issue whether the said lease as a contract *inter partes* provided for termination otherwise than by effluxion of time is however one which cannot be determined at this stage, without the benefit of further arguments from the parties.

The Plaintiff also disputed the Defendants averments that he was in rent arrears, and that the Defendant was therefore entitled to the remedy of forfeiture. The Plaintiff has produced in evidence various receipts showing payment of the rent as annexure FSM 2". There are three receipts, the first dated 8/3/2011 showing receipt of Kshs 50,000/= as rent for January and February 2011. The second is dated 4/4/11 showing another payment of Kshs 50,000/= being rent for March and April. These two receipts are issued by a Dr. Wahome. The third receipt which is the only one issued by Nduati Wamae Associates, the Defendants appointed agents, is dated 17/12/2008 and is for payment of Kshs 100,000/=. There is also a copy of a cheque made out to the said appointed agents dated 10th March 2010 for Kshs 100,000/=.

According to clause 2.1.1.1 of the lease produced in evidence by the Plaintiff, the monthly rent for the period in dispute was Kshs 50,000/=. It is therefore the case that the rent payable by the Plaintiff for the period February 2009 to July 2011 when the Defendant purported to terminate the lease ought to have been Kshs 1,500,000/=, yet a calculation of the rent paid from the receipts and evidence he has produced is Kshs 300,000/=.

It is the finding of this court that from the foregoing exposition, the Plaintiff has not established a *prima facie* case, and there are issues arising that will need to be determined with finality at the full trial. This is

therefore not a clear case to warrant the grant of a mandatory injunction as decided in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, wherein the Court of Appeal held that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. This court cannot therefore also grant the temporary injunction sought, which was consequent to the mandatory injunction being granted.

The Plaintiff's application dated 21st November 2011 is therefore dismissed, and the costs shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 20th day of July, 2012.

P. NYAMWEYA

JUDGE