



No. 363

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 22 OF 2009

**ENAMBA CONSTRUCTION COMPANY
LTD.....PLAINTIFF**

-VERSUS-

**NYAIGWA FARMERS CO-OPERATIVE SOCIETY
LTD.....DEFENDANT**

RULING

The plaintiff claims to be the lawful tenant of the defendant pursuant to a lease agreement executed between them on 2nd July, 2004. That lease agreement was for a period of 10 years with effect from 1st January, 2003. The agreed monthly rent was Kshs. 10,000/=.

Whilst the alleged lease agreement was still in force, the defendant purported to issue a Notice to terminate the same pursuant to the provisions of section 4(2) of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**. The notice was to take effect from 18th March, 2009. It is the case for the plaintiff that the Business Rent Tribunal which the defendant wants to determine the dispute has no jurisdiction, the lease agreement having been reduced in writing and for a period of 10 years. The tribunal has only jurisdiction to deal with controlled tenancies where the tenancy has not been reduced into writing or which has been reduced into writing but is for a period not exceeding 5 years. It is this notice to terminate the tenancy that prompted and prodded him to file this suit for a declaration that the Business Premises Rent Tribunal had no jurisdiction to handle or deal with the dispute between them, an injunction to restrain the defendant from in any way enforcing the illegal and defective notice dated 18th December, 2008 until the final determination of the suit and costs.

Contemporaneously with the filing of the suit, the plaintiff took out a chamber summons application

pursuant to Order XXXIX rules 2 and 2A(1) of the **Civil Procedure Rules** and sections 3 and 3A of the **Civil Procedure Act**. That application was for an injunction in terms aforesaid. The grounds and the affidavit in support of the application were along the same lines as outlined above.

In response, the defendant averred that it never entered into a lease agreement with the plaintiff. The purported lease agreement was prepared by **G. J Masese Advocate**. The same advocate is the one who is acting for the plaintiff which was irregular in terms of rule 9 of the **Advocates (practice) rules**. Thus the notice given to the plaintiff to terminate the lease was proper. The purported lease if at all was not registered in the lands office, Kisii as required by law. In the premises the Business Premises Rent Tribunal had jurisdiction to deal with the matter as the defendant knew that it had no written lease agreement with the plaintiff.

When the application came up before me for interpartes hearing on 3rd November, 2010, parties agreed to canvass the same by way of written submissions. Subsequently, the written submissions were filed and exchanged. I have carefully read and considered them.

It cannot be gainsaid that in an application for temporary injunction, a successful party must endeavour to establish a prima facie case with probability of success, that if the injunction is not granted, the party may end up suffering irreparable damage that is not compensatable with an award of damages and if the court is in doubt it will decide the application on the balance of convenience. See generally, **Giella –vs- Cassman Brown & Company Limited (1973) E. A 358**. Above all, an injunction is an equitable and discretionary remedy. It will be denied where the party seeking it deliberately misleads the court, swears false affidavits, withholds facts from the court or otherwise comes before court with unclean hands. See **Kitur & Another –vs- Standard Chartered Bank and 2 Others (2002) 1 KLR 640**.

From the pleadings so far, I have no doubt at all that the plaintiff has established a prima facie case with probability of success against the defendants. Its case for now is that its tenancy does not fall within the jurisdiction of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** as it is written and is for an period of 10 years. By virtue of that fact the jurisdiction of the Business Premises Tribunal to adjudicate over the same is ousted. Secondly, the plaintiff has taken the position that even if the lease came within the Provenance of Cap 301, the same was still defective as it purports to take effect on 18th March, 2009 whereas by law it should take effect on the 1st day of the given month as per the provisions of section 4 of the aforesaid **Act**.

The defendant has not denied the existence of the relationship of land/tenant between them. Its position however is that it is a controlled tenancy since there was no written lease agreement between them nor was it registered as required by law. Finally, it contends that counsel for the plaintiff is irregularly on record. All these positions raise serious issues of law which can only be canvassed and tested during the formal hearing of the suit and on evidence. For now they remain alive and are not preposterous. Clearly this is a case with serious questions of law that will have to be addressed during the hearing. Prima facie therefore it is a case with probability of success on the part of the plaintiff.

The premises were rented for business and if the termination of the lease is effected as threatened by the defendant, no doubt the plaintiff will suffer loss. I do not think that such loss can be compensated by an award of damages. It is therefore irreparable loss.

The balance of convenience also tilts in favour of the plaintiff. It is in occupation of the premises and has continued to pay the rent whenever it has become due and payable. There is no loss that the defendant

will suffer since the rent shall continue to be paid by the plaintiff. However, in the event that the application is denied the plaintiff will suffer prejudice for it will be locked out of the premises.

In the result, I grant prayer III of the application dated 11th February, 2009 on condition that within seven (7) days from the date hereof, the plaintiff shall execute an undertaking as to damages to the tune of Kshs. 500,000/=. The plaintiff shall also have the costs of this application.

Ruling dated, signed and delivered at Kisii this 31st day of January, 2011.

ASIKE-MAKHANDIA

JUDGE