



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL CASE NO. 263 OF 2006

**SIFA INTERNATIONAL LIMITEDPLAINTIFF/
RESPONDENT**

VERSUS

**NATIONAL SOCIAL SECURITY FUND BOARD OF
TRUSTEES.....DEFENDANT/APPLICANT**

RULING

The Defendant moved the Court by Notice of Motion dated **28th May, 2009** and brought under the Civil Procedure Rules, Order **XXXIX**, Rule 4 and Order L, Rule 1. The application had one substantive prayer:

“THAT this Honourable Court be pleased to discharge and/or set aside the interim injunction orders issued on 27th February, 2009”.

The supporting grounds, in summary, are as follows:

- (i) the plaintiff’s lease of the suit premises expired by effluxion of time on 28th February, 2009;***

- (ii) the expired lease was not renewed;***

- (iii) by reason of the expiry of lease, the plaintiff’s interest and/or right in respect of the suit premises was legally extinguished;***

- (iv) consequently, the interim injunction orders issued in favour of the plaintiff, cannot lie;***

(v) in the premises, the said injunction orders must be discharged and/or set aside in the interests of justice.

Hope Mwashumbe, the defendant's Deputy Corporation Secretary, swore a supporting affidavit on **28th May, 2009** deponing (in summary) as follows:

(i) by a Ruling of 27th February, 2009 the Court issued injunction orders against the defendant, pursuant to the plaintiff's application of 20th November, 2006;

(ii) the lease which had been the basis of the plaintiff's application and suit, expired by effluxion of time, on 28th February, 2009;

(iii) although the said lease contained a provision for an option to renew, the defendant declined to renew, as it intends to dispose of the suit premises;

(iv) although the defendant offered the plaintiff the option to purchase, the plaintiff did not take up the offer and has not done so to-date

Lennah Catherine Koinange, the plaintiff's Managing Director, swore a replying affidavit on **13th July, 2009**. She avers that, truly, the lease in question

“was destined to expire on or about **28th February, 2009**”; but that upon the arrival of that date “the plaintiff invoked the provisions of Clause 3 (c) of the lease and notified the [defendant] of its desire to renew the same as required under the lease”.

The said notification (“LCK1”) is dated **22nd October, 2008** and bears the heading: “**RE: RENEWAL OF OUR LEASE CONTRACT – LAND REFERENCE NO. 982/2535/2537/2538/2539/2540 ALONG BAMBURI BEACH, MOMBASA**”. The relevant paragraph of the notification thus reads:

“As per the provision under clause 3 (c) page 10 of our lease contract, terms and condition. We hereby write to submit our Notice for renewal of our lease contract, for a further term of six years at the prevailing market price and in consideration to the massive investment we have made. All other considerations made within the initial lease agreement may remain unchanged.”

It is the deponent's understanding that “*upon exercise of that option the respondent was automatically entitled to a renewal of the lease for a further term of six years and the applicant had no right to decline the same if the suit properties had not been sold*”; and she avers that the applicant “*had not deponed that the suit properties or any of them has been sold nor provided any evidence of sale*”.

The deponent avers that the applicant, by letter of **4th February, 2009** purported to reject the respondent's notification, and then wrongly served notice to the respondent to hand over vacant possession by **28th February, 2009**.

It is deponed that **Sergon, J** in his Ruling of **27th February, 2009** had acknowledged that the respondent had invested heavily in the suit premises, and on that basis, had granted an injunction pending the hearing and determination of the suit. Since then, the respondent has continued to pay rent to the applicant, and the same has been consistently accepted; and the deponent believes the applicant is “*estopped from alleging that thetenancy relationship between the applicant and the respondent expired by effluxion of*

time". The deponent believes that *"the respondent's right in the suit properties has not been extinguished but has been renewed expressly and/or by conduct and the respondent's continued occupation of the suit premises is and has been lawful, [consensual] and open"*.

The deponent avers that during the pendency of the suit, the applicant had given the respondent an option to purchase the suit premises; the respondent took up the offer, and secured a financial facility for the purpose of purchasing the same. The deponent deposes that, just before the sale transaction was consummated, the applicant made threats of eviction, leading to the respondent filing contempt proceedings against the officers and agents of the applicant who, subsequently, were convicted and fined Kshs. 300,000/= each, on **19th May, 2008**.

The deponent deposes that the applicant engaged in acts that frustrated the respondent's plans of purchase of the suit premises, including harm to the respondent's property occasioning substantial loss and damage; but that *"the respondent is still intent [on] acquiring the suit premises by way of purchase following the massive investment it has made therein"*.

The deponent believes that since the respondent has legitimate interest in the suit premises, the interim orders of injunction being contested *"are neither wrongfully nor illegally in force"*; and she prays that the said orders *"should continue in force....bearing in mind the peculiar circumstances of this case"*.

Learned counsel for the defendant/applicant urged it to be significant that *"one day after delivery of the Ruling [granting the plaintiff/respondent temporary injunctive orders], the lease entitling the plaintiff [to] occupation of the suit premises expired by effluxion of time."*

In those circumstances, it was urged, the only basis for a subsequent relationship between plaintiff and defendant, was clause 3 (c) of the lease agreement [of **1st February, 2004**] which had given an option for renewal, as follows:

"That in the event that the lessor is to sell the property the lessee shall have the first option to purchase the same.

"AND IT IS FURTHER AGREED THAT in the event the lessor does not sell the premises within the term herein created, the lease shall be renewable at the prevailing market rent for a further term of six years subject to a written notice of desire to renew the lease to the lessor three months prior to the expiry of the term."

Counsel submitted that, by a letter dated **22nd October, 2008** the plaintiff informed the defendant of the intention to renew the lease; but the defendant, by a letter of **4th February, 2009** declined to renew the lease, and demanded vacant possession of the suit premises upon expiry of the lease on **28th February, 2009**.

Counsel submitted, on the basis of the evidence, that sometime in **December, 2006** (much before the request for renewal by letter of **22nd October, 2008**), the defendant had offered to sell the suit premises to the plaintiff/respondent; but the plaintiff did not take up the offer and was *"presumably not interested in acquiring the suit premises"*.

That is the foundation upon which the defendant/applicant proceeded to take the decision which has precipitated this litigation. In the words of learned counsel: *"The defendant contends that on expiry of the lease entered into between the plaintiff and the defendant.....the plaintiff's rights and/or interests vis-à-vis the suit premises were effectively extinguished, more so as the defendant also refused to renew the lease."*

The defendant further contends that the plaintiff has no right to injunctive orders: because the applicant

does not have an existing right or interest to protect or preserve. Counsel for the defendant takes the liberty to assign his own judgment, on this question: “*Indeed, purporting to issue an injunction where no rights exist is tantamount to granting an equitable relief in vain, contrary to the established principles of equity.*”

Counsel further urges: “*Consequently the plaintiff herein having no rights or interests vis-à-vis the suit property as at 28th February, 2009 is not entitled to continue enjoying the injunctive orders issued herein on 27th February, 2009 and the said orders must be deemed to have ceased to be of any effect*”.

Counsel submitted that the plaintiff who had declined to purchase the suit property when the defendant offered it for sale in **December, 2006** could not now purport to avail itself of the lease-renewal clause 3(c) of the agreement; counsel urged: “*clearly... , the plaintiff seeks to continue basking in the equitable remedy of interlocutory injunction whilst it came to Court with tainted and unclean hands and without bona fides*”.

Counsel submitted that, owing to the ill-conduct of the plaintiff, “*the defendant who has been desirous of selling the suit premises has been rendered incapable of so doing*”. Counsel submitted that the defendant was not benefiting from rentals for the suit property, since it had furnished the plaintiff with a quit-notice; and in these circumstances, “*the defendant has suffered and [will continue to suffer] substantial injury should the interlocutory injunction...not be discharged*”.

Counsel invoked in aid the rather similar situation in **Hornbill Pub Ltd. v. Ambassadeur Investment Kenya Ltd**, Nairobi MCCCC. No. 215 of 2006 [2006]eKLR, in which **Azangalala, J** thus held:

“Having found that the lease over the suit premises was determined by effluxion of time, it is obvious that the plaintiff has not established a prima facie case with a probability of success at the trial. I need therefore not consider the second and third criteria for the grant of an interlocutory injunction. However, if it would have been necessary to consider the second criteria, I would have had no difficulty in holding that the injury to be suffered by the plaintiff is quite capable of being quantified and damages would be an adequate compensation.”

Learned counsel urged that the defendant had, following the expiry of the lease, every right to furnish the plaintiff with a quit-notice and to demand delivery-up of vacant possession. As to the plaintiff’s investments, counsel submitted that “*the extent of the plaintiff’s investment in the suit premises is not the yardstick as to whether or not an injunction should issue in favour of the party so alleging*”; and moreover, counsel urged, such a claim can only be a matter the redress for which lay in **damages** – and hence was not relevant for the purpose of issuing or maintaining orders of **injunction** (**Giella v. Cassman Brown & Co. Ltd.** [1973] E.A. 358). Counsel submitted that the plaintiff’s investment was capable of quantification and, in a proper case, being compensated in damages – and “*the defendant is financially capable of.....compensating the plaintiff*”.

Counsel submitted that any rent-payments which the defendant has received from the plaintiff, did not constitute a compromise to the defendant’s position in law, which would attract the defence of **estoppel**; for such rents were accepted only “*on account of past arrears...(prior to furnishing of notice....) – and notice was, moreover, not necessary as the lease simply expired; and, as the defendant had filed HCCC No. 102 of 2009 against the plaintiff for wrongful occupation, the plaintiff could not claim to be in possession on the basis of consent.*”

Counsel for the plaintiff/respondent submitted that his client had filed suit on **21st November, 2006** together with a Chamber Summons application by which an interim injunction was sought: and injunction was granted by **Sergon, J** on **21st November, 2006** and has since been extended. Breaches to the said injunctive order resulted in two further applications by the plaintiff (Chamber Summons of **21st February, 2007** and Chamber Summons of **29th February, 2008**) – and these were consolidated, heard and a Ruling delivered on **19th May, 2008**: the defendants’ officers and agent were found guilty of contempt and were duly penalized therefor.

From this background, counsel submitted that the defendant had consistently endeavoured to terminate the plaintiff's tenancy, notwithstanding the terms of the lease dated **1st February, 2004**; and notwithstanding that the plaintiff had been encouraged by the defendant to invest substantially in the suit property; and these circumstances led to the **interim injunction** issued by the Court, in favour of the plaintiff, on **27th February, 2009** (following *inter partes* hearing). It is these Court Orders of **27th February, 2009**, that the defendant now seeks to have set aside or discharged.

The Court, in its Ruling of **27th February, 2009** thus stated, of the merits of the interlocutory case for each party:

“Since I am not in doubt I will not bother to consider the principle of convenience. It only suffices to state in passing that the facts obtaining in this case [appear] to show that the plaintiff will most probably be the most inconvenienced party if the Order is denied”.

Learned counsel submitted that the defendant/applicant had not provided a basis for the discharge of the injunctive order of **27th February, 2009**: the defendant showed no material change of circumstances, since the Orders were granted; the defendant did not show that the Orders were founded upon an erroneous view of the law; the defendant failed to reckon with the fact that the Orders were made on the basis of an *inter partes* hearing, and so any gravamen should only be lodged by way of **appeal**.

Counsel urged that it was not open to the defendant to refuse the plaintiff's request for a renewal of the lease, by virtue of clause 3 (c) of the lease agreement of **1st February, 2004**; the plaintiff had properly exercised its right of renewal by its letter to the defendant of **22nd October, 2008**; and the defendant purported to decline the plaintiff's offer to renew, by letter of **4th February, 2009** which also demanded vacant possession by **28th February, 2009**.

Counsel contested the contractual validity of the said notice to vacate, and urged: *“It is our..... submission that the lease was renewable at the option of the tenant (plaintiff)”*.

There are contending standpoints on the representation by the defendant that the said lease ended automatically by effluxion of time; the respondent denies this, relying on case law. In **Popatlal Hirji v. I.H. Lakhani & Co. (E.A.) Ltd** [1960] E.A. 437 the plaintiff was claiming from the defendant possession of the suit premises, as well as *mesne* profits as from the date of the termination of tenancy until possession is given.

The defendant denied that the two letters of notice-to-quit, from the plaintiff, constituted valid termination notices. The material clause in the tenancy agreement thus provided:

“The tenancy to be for a period of one year from the 1st day of April, 1954, and shall be renewable annually at the Tenant's option....”

To the plaintiff's contention that the agreement *“does not entitle the tenant to a perpetual right of renewal and that the term came to an end....”* [p.441], the Court (**Bennett, J.**) held (p.441):

“The Courts are loath to construe a covenant in a lease as conferring a right of perpetual renewal, but will not place a forced construction on the words used so as to negative an intention to grant such a right.....”

“In the instant case the words of cl.8 appear to me to be plain and unambiguous. It is true that the

clause does not specify within what period of time the option is exercisable, but this is not fatal to the creation of such an option.”

A further authority cited was *Kanjee Naranjee Ltd v. Tulsidas Dharamshi Ghadialy* [1965] E.A. 171, in which the Court of Appeal held that the binding terms of a tenancy contract will appear starkly intimated (*Crabbe, J.A.* at p.173):

“But a plaintiff in a landlord and tenant suit does not necessarily fail because he cannot prove an express agreement creating the relationship of landlord and tenant. It is sufficient if he proves circumstances from which that relationship can be inferred.....”

On the basis of the foregoing authorities, counsel urged that the facts of the instant matter indicate that there is a subsisting **tenancy by occupation**, under **implied demise**; for the lease had given the plaintiff the option to renew the lease for a further six years, and the plaintiff exercised this option, and has remained in occupation; hence there is an implied lease for a further term of six years, as from **1st March, 2008** when the plaintiff exercised the option to renew.

Counsel urged, in the alternative, that there was a tenancy by estoppel: *Century Automobiles Ltd. v. Hutchings Biemer Ltd.* [1965] E.A. 304. The plaintiff, counsel urged, had applied to lease the suit premises with the clear intention to have a first option to purchase, in the event the defendant was minded to sell, or an option to renew the lease, in the event a sale did not take place (clause 3 (c) of the agreement). The plaintiff, **relying on the security of the two sets of options**, made major investments, as is recorded in *Mr. Justice Sergon’s* Ruling of **27th February, 2009**. Counsel submitted that **“the defendant made the plaintiff believe...the option to renew the lease was valid.....”**

Counsel cited in this respect the relevant authority from the Supreme Court of England, *Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd* [1981] 1All E.R. 897, on **inferred validity of tenancy** by operation of **estoppel**; the relevant paragraphs read as follows [p.898]:

(i) “The doctrine of estoppel by acquiescence was not restricted to cases where the representor was aware both of what his strict rights were and that the representee was acting in the belief that those rights would not be enforced against him. Instead, the court was required to ascertain whether in the particular circumstances it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he had allowed or encouraged another to assume to his detriment. Accordingly, the principle could apply where, at the time when the expectation was encouraged, both parties (and not just the representee) were acting under a mistake of law as to their rights. Whether the representor knew of the true position was merely one of the factors relevant to determining whether it would be unconscionable for him to be allowed to take advantage of the mistake”.

(ii) “The defendants were....estopped from asserting the invalidity of the option against the second plaintiffs because the defendants were to be taken as having represented both in 1948 and in 1963 in the leases offered to the second plaintiffs that the option granted to the first plaintiffs, and on which the second plaintiffs’ prospects for renewal depended, was a valid option, and, further, the defendants had in 1963 encouraged the second plaintiffs to incur expenditure and alter their position irrevocably by taking additional premises on the faith of the supposition that the option was valid. In those circumstances it would be inequitable and unconscionable for the defendants to frustrate the second plaintiffs’ expectation which the defendants had themselves created. The second plaintiffs were accordingly entitled to specific performance.....”

Drawing analogy with the foregoing principles, counsel urged that, in the instant matter, the plaintiff/respondent got encouragement from the lease agreement of **1st February, 2004** itself: by clause 1 (k) of this agreement, **“the plaintiff was encouraged to construct buildings and structures both permanent [and] temporary”.**

Counsel submitted that the defendant, even after rejecting the plaintiff's request for a lease-renewal, "*has continued to accept ...rent albeit on a without-prejudice basis*".

Learned counsel urged that the defendant was disentitled to relief for another reason: the defendant had filed a Notice of Appeal on **12th March, 2009**; and so he is not allowed to seek the discharge of an injunction in respect of the same subject-matter.

From the foregoing account on matters of fact and law, the beacons emerge to guide the resolution of the contested points herein. The relationship between the parties has, throughout, been marked by discord, since the lease contract was entered into on **1st February, 2004** – and it may be assumed there are extra-legal dynamics, in that regard, purveyed by interests antagonistic to the accommodation embodied in that agreement. As early in the currency of the agreement as **December, 2006** the defendant offered to sell the suit premises to the plaintiff; but thereafter, when the plaintiff did not commit itself, bad relations followed, and it became apparent that the defendant had lost interest in the tenancy arrangement. On **21st November, 2006** the plaintiff had sought and obtained injunctive orders against the defendant; but these orders were disobeyed, with the consequence that the Court upheld contempt-of-Court applications, and imposed penalties against the defendant and its agents. Continuing tension between the parties led to the plaintiff (who, relying on the terms of the said lease agreement, had effected major developments on the suit property) obtaining the injunctive orders of **27th February, 2009** which are the subject of the instant application.

It is common cause that the injunctive Orders of **27th February, 2009** were made following a normal hearing *inter partes*. This fact alone stands against the instant application which seeks the discharge of those very orders. Have the underlying facts leading to those Orders, so radically changed, that the *prima facie* considerations guiding the Court are no longer valid? Learned counsel for the defendant did not, with respect, devote his submissions to this relevant question.

The basis of the applicant's case at this stage, is that the lease agreement of **1st February, 2004** had automatically terminated, by virtue of effluxion of time. That contention is contested, especially because the plaintiff had attempted to exercise its option under clause 3 (c) of the agreement, to have a renewal of the lease; and the plaintiff urges that the purported rejection of the exercise of the option to renew, was contrary to the contract, and was illegal.

The situation on the ground is that the plaintiff is *in possession* of the suit premises; it has effected *major developments* on that property; it is *still paying the rents* originally agreed upon, even though the same are received under protest; the defendant is anxious to have vacant possession of the suit premises.

The plaintiff has raised several points of law, as making it the lawful occupant, whose tenancy interests are to be protected.

Firstly, the plaintiff urges that the lease agreement, on the face of it, allows it to exercise the *option to renew* the lease, and it has indeed exercised that option; and so it is wrongful for the applicant to refuse its tenancy and to demand vacant possession of the premises.

Secondly it is urged that the rights flowing from this exercise of the option to renew the lease, are for sustaining, on the basis of *estoppel*: that the defendant is estopped from denying that there exists a *tenancy in fact*, the plaintiff being in occupation of the premises, upon which it has invested substantially. The principle of estoppel is, besides, affirmed by the fact that, to-date, the defendant is *receiving rent-payment* from the plaintiff. Such a situation, it is urged for the plaintiff, amounts to an *implied demise*; by conduct, the defendant has put in place a lawful tenancy, the plaintiff being the tenant and, therefore, entitled to continue exercising the rights appurtenant to tenancy.

While it is true that the parties have conflicting interpretations of clause 3 (c) of the lease agreement of **1st February, 2004**, the scenario emerging is clear enough, at this interlocutory stage. It was open to the plaintiff to exercise the *option* to renew the lease; representations from the defendant, in various forms,

led the plaintiff to make **major investments** on the suit premises; the plaintiff, thus, had certain **legitimate expectations**, and, on that basis, the plaintiff did exercise the option to seek a renewal of the lease; however, for reasons possibly lodged in extra-contractual misgivings, the defendant refused to allow renewal; but in the meantime, the plaintiff **continued** with the earlier-agreed operations. This Court will regard such continuing operations as **resting upon legal foundations**, and they **continue to create and sustain a lawful tenancy relationship**.

The foregoing principle connects to the principle of **legitimate expectations**, as a basis for the grant of orders in equity.

In the broader context of fact, and of the principles of law that have emerged, this Court draws the inference that a **representation** has been made to the plaintiff, that the plaintiff may invest in the suit property, and continue pursuing its business interests thereon, for the time being. It would, therefore, be **unconscionable** to allow the defendant to peremptorily terminate the lease, and to obtain vacant possession of the suit premises.

There is no basis upon which the defendant's application by Notice of Motion of **28th May, 2009** can be allowed. The application is dismissed, with costs to the plaintiff/respondent.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 27th day of May, 2011.

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J. B. OJWANG

JUDGE