



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL SUIT NO. 509 OF 2009

NEWKEN PRINTERS LTD..... PLAINTIFF

V E R S U S

BELL INDUSTRIES LTD..... DEFENDANT

R U L I N G

The Plaintiff is the Defendant's tenant in part of the premises situated on **L.R. No. 209/8171, Industrial Area Nairobi** (the **suit premises**). It had been such tenant for about 15 years or so before suit was filed. The monthly rent was KShs. 30,000/00.

In May, 2008 the Defendant unilaterally raised the monthly rent from KShs. 30,000/00 to KShs. 66,840/00. The Plaintiff thought that this increase was outrageous and refused to pay the same. It then sought protection from the **Business Premises Rent Tribunal** (the **Tribunal**) vide **Nairobi BPRT Complaint No. 289 of 2008**.

On 28th August, 2009 the Tribunal ruled that the Plaintiff conducts in the suit premises a go-down business and not a shop, and that therefore the Tribunal did not have jurisdiction to hear and determine the complaint.

The Plaintiff then came to this court on the same day. It seeks the relief of permanent injunction against the Defendant to restrain it from "harassing, levying distress, attaching the Plaintiff's goods...(or) in any way interfering with the Plaintiff's enjoyment of the suit premises". It also seeks a declaration that the Defendant ought to pay its fair and proportionate share of electricity bills, and a further declaration that the Plaintiff did not owe any arrears of rent at the date of filing suit.

The Defendant duly entered appearance and filed defence. Its main defence is that since the Plaintiff was not a protected tenant under the **Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap. 301** the Defendant was entitled to increase rent as it deemed fit, which rent the Plaintiff must pay if it wished to continue in possession.

Regarding the electricity bills dispute, the Defendant pleaded that it has always insisted that the Plaintiff installs its own electricity meter, something that the Plaintiff has resisted doing.

Together with the plaint the Plaintiff applied by **chamber summons dated 28th September, 2009** for an appropriate temporary injunction to protect its quiet possession and enjoyment of the suit premises pending disposal of the suit. The grounds for the application are as follows:-

1. That the unilateral increase of rent was without justification.
2. That the notice of increased rent was defective.
3. That the Defendant refused to contribute its proportionate and fair share towards the electricity bills.
4. That the Defendant refused to carry out necessary repairs to the premises which it was obliged to do as landlord.
5. That the Defendant has threatened to use force to enforce payment of the enhanced rent.

There is a supporting affidavit sworn by the managing director of the Plaintiff. The factual basis for the grounds upon which the application is made is given.

The Defendant has opposed the application as set out in her replying affidavit sworn by its director and filed on 8th October 2009. In this affidavit it is admitted that the rent increase from KShs 30,000/00 to KShs 66,840/00 per month was unilateral. The Defendant reiterates the argument that because the Plaintiff was not a protected tenant, it was entitled to so increase the rent.

Regarding electricity bills, it is deponed that the Plaintiff was to install its own electricity meter at its own expense.

As to repairs of the suit premises, surprise is expressed in the replying affidavit that the issue of leaking roof was now being raised as the same had been raised in late 1990's and resolved.

The application was heard by way of written submissions (order of 2nd March, 2011). I have read and considered the submissions filed on behalf of both parties. No authorities were cited.

It is the Plaintiff's submission that the suit premises are governed by the **Indian Transfer of Property Act (the Act)**, an applied statute. It is further submitted that **section 106** of that Act stipulates that leases of immovable property for agricultural and manufacturing premises, are deemed to be leases **from-year-to-year** and that such leases are determinable by either party giving six months notice to the other party. It is also submitted that the same notice of six months is required to change any term of the lease, and that there was not such notice given by the Defendant to the Plaintiff for the rent increase.

Regarding electricity bills, it was submitted that the Defendant owed the Plaintiff KShs 307,465/30 as at 31st December, 2009, the same being the Defendant's fair share of the electricity bills.

It appears to be common grounds that the Plaintiff and Defendant get electricity from a common meter. The Plaintiff has deponed that it is unable to have a separate electricity meter installed for its premises because it is not assured of recovery of the cost thereof (about KShs 500, 000/00) when it eventually vacates the premises.

It seems to be the Defendant's stand that as long as the Plaintiff continues to use the Defendant's meter, the Plaintiff must meet all electricity expenses related to its use without refund whatsoever.

There are several issues that are likely to be canvassed at the trial of the action:-

1. What law controls the tenancy between the parties?
2. Whether the Defendant was entitled to unilaterally increase the rent.
3. If so, whether the Defendant was obliged to give notice of such increase to the Plaintiff, and if so, what kind of notice.

4. Whether the Defendant was obliged to provide a separate electricity meter to the Plaintiff or whether the Plaintiff was obliged to do so at its own expense.

5. Whether the Defendant owes the Plaintiff any money by way of refund for its fair and proportionate share of the electricity bills.

All these issues cannot be fully and properly determined in this interlocutory application upon untested affidavit evidence. They must await trial of the action.

For now, the submission made on behalf of the Plaintiff, that the suit premises are controlled by the Indian Transfer of Property Act, and that under the said applied statute the tenancy between the parties is a year-to-year tenancy, and further that alteration of any terms of such tenancy requires a six-month notice, has not elicited any answer in the submissions filed on behalf of the Defendant.

If such is the legal position, as submitted on behalf of the Plaintiff, then the Plaintiff would appear to have a strong case regarding the issue of the Defendant's unilateral increase of rent. Upon that basis, I am satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success.

As to irreparable loss, disruption of an established business that has been running for 15 years by way of levy of distress or forcible eviction would no doubt do great harm to such business. It may not be possible to quantify such loss, especially with regard to goodwill. I am therefore satisfied that the Plaintiff stands to suffer irreparable loss unless temporary injunction is granted.

In the circumstances I will allow the application as prayed in prayer 3 thereof. The temporary injunction is granted upon the following conditions:-

1. The Plaintiff shall file an appropriate undertaking as to damages within 14 days of delivery of this ruling.
2. The Plaintiff shall expeditiously prosecute its suit. In this regard parties shall have liberty to apply.
3. Cost of this application shall be in the cause.

Those shall be the orders of the court.

DATED AT NAIROBI THIS 21st DAY OF JUNE, 2011

**H. P. G. WAWERU
J U D G E**

DELIVERED THIS 24TH DAY OF JUNE, 2011