



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. MISC. 353 OF 2009**

**TOTAL KENYA  
LIMITED.....PLAINTIFF**

**VERSUS**

**EASTERN KITUI STORES LIMITED.....1<sup>ST</sup> DEFENDANT  
INTERWORLD LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

Total Kenya Limited the Plaintiff/Applicant herein, seeks orders of the court under **Section 3, 3A and 63 (e) of the Civil Procedure Act, Orders XXXIX Rules 1, 2, and 3 of the Civil Procedure Rules (2009 Revised Edition)**, praying that the Defendant/Respondents be restrained, by a temporary injunction, from interfering with the Applicant's quiet possession of **L.R. No. 4096/137** also known as **KITUI MUNICIPALITY/BLOCK 11/122** and the operation of the Applicant's business carried thereon, under the name and style of Kitui Total Filling Station, pending the hearing and determination of the suit herein.

The application was precipitated by a demand notice issued by the 2<sup>nd</sup> Defendant/Respondent requiring the Applicant to vacate the suit premises and to pay rent of KShs. 45,000/=, backdated to cover the period January 2009 to May 2009. According to the Applicant the said notice issued by the 2<sup>nd</sup> Respondent as the new owner of the suit premises, should not be allowed to take effect because the sale of the suit premises to the 2<sup>nd</sup> Respondent was done in contravention of a lease entered between the Applicant and the 1<sup>st</sup> Respondent on 15<sup>th</sup> June 1967, renewed from time to time and extended on 30<sup>th</sup> June 2008, under a Deed of Variation of that date, to 31<sup>st</sup> December 2013, whereupon the agreed rent in respect thereto was

paid in advance for the entire period.

A copy of the said lease is annexed to the affidavit filed in support of the application. Of the terms said to have been breached is an express provision under **Clause 3 (c)** that the 1<sup>st</sup> Respondent would seek prior consent from the Applicant should the 1<sup>st</sup> Respondent desire to alienate or dispose of the suit property during the currency of the term and that before doing so to offer the same to the Applicant who would have the right of first refusal in any event.

The Applicant contends that, besides paying the rent for the entire term, it has also invested heavily in the infrastructure, built a large clientele base and was in the process of remodelling the station at the time of the eviction notice, with a contractor being already on site. It also has in place, a binding Marketing License Agreement with a third party petroleum dealer. For these reasons the Applicant has submitted that it has established a prima facie case with a likelihood of success against the Respondents and is bound to suffer irreparable loss not capable of being compensated in damages, if the Respondent's intentions are not curtailed.

The 1<sup>st</sup> Defendant/Respondent did not file any reply to the application despite service. The 2<sup>nd</sup> Defendant/Respondent filed a Replying Affidavit sworn by Shahim Salim Abdalla on 18<sup>th</sup> June 2009, deponing mainly that the 2<sup>nd</sup> Respondent is a stranger to the dealings between the Applicant and the 1<sup>st</sup> Respondent and that the deed of variation relied upon by the Applicant to justify continued possession of the suit premises is of no value having not been registered. The 2<sup>nd</sup> Respondent has submitted therefore that no prima facie case has been made out to warrant the granting of the orders sought and that both the application and the suit should be dismissed with costs, adding that any loss as would be sustained by the Applicant is capable of compensation by an award in damages.

The demand and eviction notice served upon the Applicant alludes to the fact that the Applicant's lease expired on 31<sup>st</sup> December 2008, and that the property had reverted to the 2<sup>nd</sup> Respondent as the new owner of the same. It is silent about the particulars of the lease or deed of variation, yet demands rent from the Applicant for the period after 31<sup>st</sup> December 2008, having never claimed any rental income from the Applicant for the period 24<sup>th</sup> July 2008, to 31<sup>st</sup> December 2008 during which period, it was already the registered owner of the property as appears from the copy of official search, annexed to the Supporting Affidavit as "CA 10".

Although claiming that there was no privity of contract between the Applicant and 2<sup>nd</sup> Respondent as regards the lease, which, in the 2<sup>nd</sup> Respondent's opinion did not bind the latter, it is admitted that the 2<sup>nd</sup> Respondent received the rent of KShs. 510,000/= "being rent money due to it by virtue of being the new proprietor of the premises." In the letter dated 22<sup>nd</sup> October 2008, addressed to the Applicant by the 2<sup>nd</sup> Respondent the following is stated:-

**“---we will not renew your lease which is due for renewal. We will however allow you to continue occupying until 31<sup>st</sup> December 2008.”** (underlining by the court)

It is obvious from annexure "CA 4" to the Supporting Affidavit that the rent of KShs. 510,000/=, acknowledged by the 2<sup>nd</sup> Respondent, was negotiated by the 1<sup>st</sup> Respondent on the basis of the agreement that the Applicant would be in possession until 31<sup>st</sup> December 2013. It is curious that as late as 10<sup>th</sup> March 2009, eight months after the 2<sup>nd</sup> Respondent was registered the new owner, the 1<sup>st</sup> Respondent

would be renegotiating the rent and advising that the 2<sup>nd</sup> Respondent would be increasing the same to KShs. 45,000/=, if indeed the two entities are not related in some way. I am satisfied, prima facie, that the 2<sup>nd</sup> Respondent cannot escape liability herein on the basis of privity of contract, more so because the three parties are interested in the same property. Any orders made against the 1<sup>st</sup> Respondent would, of essence, affect the 2<sup>nd</sup> Respondent directly. As to whether there was a valid variation of contract as to pass a lessee's interest to the Applicant is a matter for the trial judge.

As at the moment, and having considered all the facts as presented in this application, I am satisfied that I prima facie case has been established against both Respondents and that irreparable loss has been demonstrated within the requirements of **GIELLA V CASMAN BROWN & CO. LTD [1973] E. A. 358**. I therefore allow the application and grant the orders sought in terms of prayer (iii) with costs. The Applicant having paid rent in advance, I shall not make an order for security.

**DATED, SIGNED and DELIVERED at NAIROBI this 12<sup>TH</sup> day of SEPTEMBER, 2011**

**M.G. MUGO**

**JUDGE**

In the presence of :

Mr. Onyango holding brief for Mrs. Kariuki For the Applicant  
Mr. Wambugu holding bief for Mr. Kingara For the Respondents