



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**ELC CASE NO. 246 OF 2011**

**EXPRESS BAKERY LIMITED.....PLAINTIFF**

**V E R S U S**

**SAYANI INVESTMENTS LIMITED**

**2. ABAR HALANI.....DEFENDANTS**

**1.**

**R U L I N G**

The Plaintiff has pleaded in its plaint dated 27<sup>th</sup> May, 2011 that it is the 1<sup>st</sup> Defendant's tenant in business premises standing on **L.R. Nos. 209/923 and 209/924, Nairobi (Shops Nos. 9 and 10)**. The Plaintiff has further pleaded that its tenancy is a controlled one under the **Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap. 301**. It is the Plaintiff's case that its tenancy can only be terminated as provided for in the said Act, including the giving of a 2-month notice of termination.

The Plaintiff has complained in its suit that the Defendants have served it with a one-month notice of termination of tenancy contrary to the provisions of Cap. 301 aforesaid.

The Plaintiff therefore seeks the following main reliefs:-

1. An injunction to restrain the Defendants from unlawfully evicting the Plaintiff from the suit premises.
2. An injunction to restrain the Defendants from interfering with the Plaintiff's peaceful and quiet possession of the suit premises.

Together with the plaint the Plaintiff filed **notice of motion dated 17<sup>th</sup> May, 2011**. It seeks the main order of temporary injunction to protect its possession of the suit premises pending disposal of the suit. The application is supported by the affidavit of one **Azmina Jiwa**, a director of the Plaintiff.

The Defendants have opposed the application by replying affidavit sworn by one **Zerakhanu Haiderali Kanji Sayani**, a director of the 1<sup>st</sup> Defendant. The main ground of opposition is that the Plaintiff's tenancy is a periodic month-to-month tenancy terminable upon giving a one-month notice, and that it is not a controlled tenancy under Cap. 301 aforesaid. It is the Defendants' further case that due notice was given to the Plaintiff.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing, including the authorities cited.

**"Controlled tenancy"** is defined in section 2 of Cap. 301 as -

**"...a tenancy of a shop, hotel or catering establishment-**

**(a) which has not been reduced into writing; or**

**(b) which has been reduced into writing and which-**

**(i) is for a period not exceeding five years;**

**or**

**(ii) contains provisions for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or**

**(iii) relates to premises of a class specified under subsection (2) of this section:**

**Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy."**

It is common ground that the Plaintiff's formal written lease of five years and one month expired on 14<sup>th</sup> February, 1997. The Plaintiff then held over the premises and continued to occupy them without a written lease, paying a new negotiated monthly rent. That has been the position since 14<sup>th</sup> February, 1997 to-date.

Among the businesses that the Plaintiff runs in the premises is a shop selling some of the bakery products it makes. The Plaintiff's tenancy has not been reduced into writing since 15<sup>th</sup> February, 1997. It appears therefore, *prima facie*, that the tenancy is controlled under Cap. 301.

Cap. 301 is an Act of Parliament passed -

**"to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto."**

See the preamble to the Act.

The provisions of Cap.301, again *prima facie*, must thus supersede any other statute, including land registration and conveyancing statutes like the **Indian Transfer of Property Act, 1882**, where the issue is protection of a tenant. But all these are issues to be properly canvassed and determined at the trial of the action. For now I am satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success.

The Plaintiff must also demonstrate that it stands to suffer irreparable loss unless the temporary injunction sought is granted. The Plaintiff says that it has been conducting business in the premises for over 35 years. It is a bakery business involving the baking and sale of bakery products. The material now before the court shows that the Plaintiff's business may not have been doing very well lately. There is evidence that the Plaintiff wanted to sell the business as a going concern to a third party and stood to make a tidy sum in goodwill. The Defendants have refused to give consent for assignment of the premises to a third party. They would rather get their own new tenant. This issue would be neither here nor there if the Defendants followed the procedure for termination of a controlled tenancy set out in Cap.301.

A bakery business that has been running for over 30 years, coming to a sudden stop on account of a notice of termination of tenancy that may turn out to be unlawful, may involve a loss that may not be possible to quantify at this stage. Such loss may include loss of goodwill. A bakery business must entail expensive baking machinery. The Plaintiff surely is entitled to requisite statutory notice so that it may know what to do with its equipment upon termination of the tenancy.

In these circumstances, I am satisfied that the Plaintiff stands to suffer irreparable loss unless the temporary injunction sought is granted. I will in the circumstances allow the application and grant prayers 2 and 3 thereof pending disposal of the suit.

The temporary injunction is granted subject to the condition that the Plaintiff shall file an appropriate undertaking as to damages within 7 days of delivery of this ruling. Costs of the application shall be in the cause.

It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF SEPTEMBER, 2011**

**H.P.G. WAWERU**

**JUDGE.**

**DELIVERED THIS 2<sup>ND</sup> DAY OF SEPTEMBER, 2011**