REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 241 of 2009

JURGEN FUKS T/A SHAKATAK DISCO……..PLAINTIFF/APPLICANT

-VERSUS-

DIANI PROPERTIES LIMITED……..DEFENDANT/RESPONDENT

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RULING

The plaintiff moved the Court by Chamber Summons dated 16th July, 2009 and brought under Order ***XXXIX,*** rules 1,2,3,9 of the Civil Procedure Rules and ss.3A and 63(e) of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The plaintiff was seeking orders that the defendant by itself, its servants, agents and employees be compelled to reconnect water and continue with supply of water to the plaintiff's premises situate on plot No. Kwale/Diani Beach/63 pending the hearing and determination of the suit.

The application was founded on the general grounds

that –

(i) the plaintiff is a protected tenant since October 1990;

(ii) the plaintiff's rent is inclusive of water charges supplied by the defendant from an underground borehole within the plot on which the suit premises is situate;

(iii) there is no other source of water within the suit premises;

(iv) the plaintiff is not in arrears of rent and the tenancy has not been terminated;

(v) the defendant has, without any justification or authority disconnected water for the suit premises, subjecting the plaintiff to annoyance, inconvenience and frustration;

(vi) the nature of the plaintiff's business is such that without water, this business will come to a complete standstill and is liable to be closed by the public authorities;

(vii) the plaintiff will suffer irreparable loss and damage unless the Court urgently intervenes;

(viii) the plaintiff is ready and willing to give such undertaking as to damages as the Court may direct.

The applicant swore a supporting affidavit on *16th July, 2009* giving the evidential basis for the application. To the said depositions, *Harald Kampa*, a director of the defendant, swore a replying affidavit on 22nd July, 2009 in which he depones that there are several other disputes touching on the suit property, and in relation to the tenancy of the plaintiff/applicant. The deponent denies the plaintiff's averment that the plaintiff is not indebted in respect of rent. The deponent deposes: "As can be seen from that statement the plaintiff has been in arrears of rent and at some point the

arrears had again exceeded Kshs. 4,000,000/= part of which he liquidated by small instalments totaling Kshs. 860,000/=".

The deponent averred that the defendant in the suit is an agent of a disclosed principal, Cotswold Estate Ltd., and hence the suit should have been lodged against the said principal.

Learned counsel *Mr. Munyithya*, for the applicant, submitted that the applicant's interlocutory prayers are justified – since the applicant, in the main suit, was seeking a mandatory injunction to compel the defendant to reconnect water to the suit premises, and also seeking a permanent restraining order to prevent future water disconnections by the defendant and/or the defendant's agents.

Counsel highlighted the applicant's evidence: that he is a protected tenant; that no rent assessment has been done by the Business Premises Rent Tribunal and so there was no rent increment; that water for the applicant's business is bore-hole water from the suit premises; that the availability of borehole water was an integral aspect of the applicant's tenancy and that such supply was free of charge; that there is an acute shortage of water in the locality of the premises, and therefore borehole water is a vital supply; that the borehole was constructed by the applicant.

From the foregoing statements of fact, counsel submitted that the plaintiff/applicant has a case with a high probability of success.

Mr. Munyithya submitted that the applicant had met the basic principles for grant of a mandatory injunction at the interlocutory stage – by satisfying the established requirements set out in the Court of Appeal decision in *Giella v. Cassman Brown Ltd & Another* [1973] 358.

Counsel urged that since the applicant was a protected tenant, the lessor may not disconnect the applicant's supply of water without seeking the decision of the Business Premises Rent Tribunal: Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301, Laws of Kenya). Counsel urged that issues relating to rent increase and arrears of rent had to be taken up by the lessor, in the first place, before the Business Premises Rent Tribunal.

Counsel urged that the applicant had demonstrated that he would suffer irreparable damage in his business, if the orders prayed for were not granted.

Counsel also submitted that the balance of convenience tilted in favour of the applicant: he is a protected tenant of some 19 years-standing; he is the one who constructed the borehole in question; no prejudice will be suffered by the respondent; if the respondent alleges any injury to itself, the same may be settled through pecuniary arrangements.

Counsel asked the Court to overlook the applicant's procedural error in filing the interlocutory claim by Chamber Summons instead of by Notice of Motion – and he cites authority to support such an exercise of discretion.

Learned counsel *Mr. Kinyua*, for the respondent, urged that the standard of proof in applications for mandatory injunction is higher than that for ordinary restraining orders. Counsel contested the claim that the applicant had met the standards laid down in *Giella v. Cassman Brown*. He submitted that mandatory injunctions cannot be granted at this stage as they would have the effect of disposing of the suit.

Counsel denied that the respondent is the applicant's landlord, and submitted that, consequently, the respondent could not be compelled to provide the services sought by the applicant.

Learned counsel submitted that the balance of convenience does not favour the plaintiff – because the plaintiff/applicant owes rent in excess of Kshs. 5,000,000/=.

A review of the application of 16th July, 2009 and the affidavits sworn on both sides, and a consideration of all the material put forward by learned counsel in their respective submissions, shows the pertinent issues to be far too detailed and complex to be properly made the subject of interlocutory orders. The effect is that the applicant has not succeeded in proving on a *prima facie* basis, that his claim has high chances of success; he has not shown that he will suffer irreparable damage unless his prayers are granted; and he has not proved at this stage, that the balance of convenience lies in his favour. The applicant has only disclosed highly contentious matters which can only be fairly resolved after a

full hearing of the main cause.

Consequently, the main prayers in the application are refused. The applicant shall bear the respondent's costs in this application.

Orders accordingly.

SIGNED

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J. B. OJWANG

JUDGE

DATED and DELIVERED at MOMBASA this 26th day of February, 2010.