REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Case 42 of 2010

MERU COUNTY HOTEL TRAVELLERS LTD .....PLAINTIFF
VERSUS

COUNTY COUNCIL OF MERU CENTRAL.....DEFENDANT

RULING

The plaintiff filed this action against the defendant seeking judgment that the plaintiff was a lawful tenant in Meru County Hotel until the tenancy is terminated. Further, the plaintiff sought an order that the defendant is obliged to execute a ten year lease with the plaintiff. Finally, the plaintiff prayed for an order of permanent injunction to stop the defendant from leasing or evicting or taking possession of the Meru County Hotel (the Hotel). The plaintiff has filed an interlocutory application by way of Chamber Summons dated 19th March 2010. It is brought under Sections 1A, 3A and 63C of the Civil Procedure Act and Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules. By that application, the plaintiff seeks that an injunction be issued to restrain the defendant from taking possession, evicting or whatsoever interfering with the plaintiff's occupation of the hotel until the final determination of this suit. It is accepted by both parties that there had been a landlord and tenant relationship between the plaintiff and the defendant. The tenancy agreement was entered into on 24th April 2008, whereby the plaintiff obtained a lease over the hotel for 5 years and 3 months with effect from 1st November 2004. That tenancy ended on 31st January 2010. The plaintiff deponed that when it took the premises, the same were a shell without equipment or furniture. The plaintiff stated that it put furniture fittings and equipment in that hotel for the value of Kshs. 9,403,875/=. The plaintiff stated that it negotiated with the defendant to carry out itemized repairs at the hotel by its letter dated 25th November 2008. In that letter, the plaintiff stated thus:-

"..... We propose that we finance the above four items at the request of the council and the amount of money spent on them is recovered in instalments over a period of 10 years starting September 2009."

The defendant responded to that letter by theirs dated 28th November 2008 which stated:-

"……Please note that during our finance committee meeting held on 25th November 2008, discussed (sic) the said issue at length and agreed that the council should give you express authority to repair the county hotel. Treat this letter as authority for you to carry out the necessary repairs."

The plaintiff annexed to its application another letter dated 30th October 2009 by which letter the plaintiff was requesting the defendant to renew the lease. That letter did not receive a response from the defendant. The plaintiff, however, in the supporting affidavit stated that there was a verbal agreement with the defendant that the lease would be renewed. In making that deposition, the plaintiff did not give the name of the person in the defendant's institution who gave that undertaking. The plaintiff deponed that although the lease between it and the defendant terminated on 31st January 2010, the defendant had however accepted the rent for the month of February 2010. Further, the plaintiff deponed that in the defendant's acceptance of that rent the defendant had created a month to month tenancy which could only be terminated as provided under Cap 301 Landlord and Tenant (Shop Hotels and Catering Establishment). The plaintiff deponed that despite it having a controlled tenancy as defined by Cap 301 and that despite the verbal promise to renew the lease, the defendant proceeded to advertise for tenders to lease out the hotel. The plaintiff stated that the tenders had been opened and it was apprehensive that the defendant would lease the hotel to another person. The plaintiff appeared before court and was granted an *ex parte* injunction on 23rd March 2010. That *ex parte* injunction was extended until the reading of this ruling on 6th June 2010. The defendant in its replying affidavit sworn by the clerk to the County Council stated that on the tenancy with the plaintiff terminating it's advertise for tenders for the running of the hotel. After meticulously going through each tender document, the defendant awarded a tender to Mercy Muthoni Kariu who tendered for Kshs. 575,000/=. She was the highest tender. The plaintiff, according to the clerk to the County Council, fully participated in the tender process but was unsuccessful. Further, that the plaintiff was given a reasonable period within which it could vacate the hotel so that the winner of the tender could occupy it. The defendant was of the view that the plaintiff rushed to court with this action after it was informed that it had not succeeded in its tender. It was argued by the defendant's counsel that the injunction application should be dismissed because the plaintiff at the *ex parte* stage failed to disclose that it had participated in the tender. In this regard, the defendant relied on the case **Tiwi Beach Hotel Limited Vs. Juliane Ulrike Stamm** [1990] KAR. In that case, the court held thus:-

> ***"It is the clear duty of an applicant seeking relief from the court, particularly on an ex parte application, to make full disclosure of all the facts material to the application which are known to him or her."***

My immediate response to that argument is that the non-disclosure of the tender process which the plaintiff participated did not affect the court when *ex parte* injunction was issued. In other words, if the court had the knowledge that the plaintiff participated in the tender, it would in all probability had issued the *ex parte* injunction because the plaintiff's claim was that a controlled tenancy had been created. The defendant stated that it could not fail to invite for tenders because it would be contrary to the Public Procurement Act. The defendant also denied having made verbal promises to the plaintiff to renew the lease. It however confirmed that the plaintiff was allowed to carry out repairs. The plaintiff filed a further affidavit and in the further affidavit stated that it was the clerk to the County Council who gave the plaintiff's representative verbal assurance that the plaintiff's lease would be extended. That it was the same clerk who

encouraged the plaintiff to submit its tender on the promise that it would be given the tender because the defendant was not bound to accept the highest tender. The plaintiff in the further affidavit deponed that the clerk to the County Council called the plaintiff's director named Barnabas Mutuiri Kinoti to Nairobi where they had breakfast at Hilton Hotel and it was during that breakfast that the plaintiff director was informed that the defendant had changed its mind and was not willing to renew the plaintiff's lease. To prove that they had breakfast with the clerk of the County Council, the plaintiff annexed a receipt of the Intercontinental Nairobi. It is clear that Intercontinental Nairobi is not the same as the Hilton Hotel. That annexure therefore does not advance the plaintiff's case. The defendant's clerk denied having breakfast with the plaintiff. He deponed in his affidavit thus:-

"That the defendant is a public body which performs its duties through several committees and the full council. My role is inter alia to communicate the decision of the defendant through writing. I have never communicated to the plaintiff that a lease in its favour would be formalized for 10 years after the one that existed expired on 31st January 2010."

For the plaintiff to qualify for an injunction, it has to satisfy the principles set out in the cerebrated case of **Giella Vs. Cassman Brown & Co. Ltd E.A. 1973**. The principles are as follows:-

(a) An applicant must show a prima facie case with a probability of success
(b) ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;***

(c) ***When the court is in doubt, it will decide the application on the balance of convenience."***

The plaintiff argued that the defendant alleged verbal assurance from its clerk was ground to the granting of an injunction on the basis that the defendant was estopped from reneging from that agreement. The plaintiff raised the doctrine of equitable estoppel. The basis of the doctrine is as stated in the Book **Snell's Equity** 12th Edition – Page 569 to 579. The Book had this to say on the doctrine:-

"The system of estoppel developed by equity to supplement the rather narrow rules at common law is based on the unconscionable or inequitable conduct of a party. It may be that such a party was seeking to do no more than enforce his legal rights (e.g. as to payment of rent, or to possession of his land), and yet he had been guilty of such conduct that equity would intervene to deny him his remedy and thus protect the other party."

The plaintiff on a *prima facie* failed to prove that the defendant gave the verbal assurance as alleged. Even the receipt alleged to be the proof of the meeting of plaintiff's director and the clerk of the County Council is discredited as stated above. The other argument raised by the plaintiff was that the defendant in accepting the February rent created a month to month tenancy that is a controlled tenancy. Controlled tenancy is defined in Cap 301 as:-

"Controlled tenancy means 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 5 years;"

From that definition and taking into account the defendant's acceptance of the plaintiff's rent for the month of February 2010, when there did not exist a written lease, the plaintiff may be correct in arguing that a controlled tenancy was created. As can be seen above, the first principle of granting an injunction is that a party has to show a *prima facie* case with probability of success. Does the plaintiff show a *prima* facie case with probability of success by alleging that a controlled tenancy was created? The defendant stated that it had advertised for tenders of rental of the hotel in obedience to the Public Procumbent and Disposal Act No. 3 of 2005. As can be seen in Section 4 (1) of that Act, the renting of premises is required to be tendered when a public body is involved. The defendant therefore was correct to have tendered for the hotel because the defendant under that Section is a public entity. The question then that arises is, where does the requirement to tender fall when one considers that the defendant created a controlled tenancy? The answer is to be found in Section 5 of that Act. That section provides:-

"5. (1) If there is a conflict between this Act or the regulations made under this Act and any other Act or regulations, in matters relating to procurement and disposal, this Act or the regulations made under this Act shall prevail."

From that Section, it is clear that the conflict which is possibly present in this case is resolved. What that section provides is that when there is conflict, the Public Procurement and Disposal Act prevails. It therefore means that even though the defendant may have created a controlled tenancy as provided by Cap 301, the rights that may accrue as a result of that controlled tenancy have no legal effect because the provisions of the Public Procumbent and Disposal Act prevails. The defendants in argument submitted that the plaintiff's application is defeated because of the swearing of an affidavit in support by a person who had no authority from the plaintiff's company and who failed to annex the board resolution authorizing this action. In support of that argument, the defendant relied on the case **Happyland Inn Limited Vs. Nairobi City Council** [2010] eKLR where the court held that such authority was necessary. The court stated thus:-

"The question of authority by a company to its officials/directors is fundamental to corporate management. A man cannot just wake up one day and decide to take action without first of all seeking the authority of the company on whose behalf he purports to act. The courts have made it clear since the days of Salomon & Co. Ltd – Vs. Salomon [1897] AC 22 that there is a clear distinction between the company as a legal entity and the human persons who run the company; and that every action taken on behalf of the company must be authorized in order to protect the company against the whims of directors and/or shareholders.

Mr. John Peter Kamau Ruhangi to institute this suit (by way of a board or general meeting minute), then the plaintiff's suit cannot be said to be a prima facie case with a probability of success."

Barnabas Mutuiri Kinoti who swore the verifying affidavit in support of the plaint and all the other affidavits in support of the present application described himself as a director of the plaintiff. Directors are appointed to act on behalf of shareholders to run the day to day affairs of the company. Bearing that responsibility in mind, who then ought to require

a person to confirm that they are authorized to act on behalf of the company? In my view, it is the shareholders and not the court. The deponent of the plaintiff's affidavit having described himself as the director of the plaintiff's company, it then not open for the defendant or even this court to ask such a defendant to display an authority allowing him to swear an affidavit or authorizing him to file a suit. I am of the view that if anybody else but the shareholders asks for such authority or resolution, such request is misplaced. In the end, because as I have found above that the Public Procurement and Disposal Act prevails, the plaintiff has failed to show a *prima facie* case with probability of success. The fact that that Act prevails, the claim for existence of controlled tenancy comes second place to the Public Procurement and Disposal Act Provisions. The plaintiff on a *prima facie* basis also failed to prove that there was an oral agreement to renew the lease. Additionally, the doctrine of equitable estoppel does not apply as stated above. *Prima facie* case was defined by Bosile J.A. in the case of **Mrao Limited Vs. First American Bank of Kenya Ltd** and two others (2003] KLR 125 where he stated:-

"I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an examination or rebuttle from the latter."

In the Lectic Law Library *prima facie* case is defined as:-

"Evidence that is sufficient to raise presumption of fact or to establish the fact in question unless rebutted."

The plaintiff in my view has not shown a *prima facie* case that has not shown infringement of a right or has not shown a fact requiring rebuttal. The plaintiff argued that the court can grant an injunction against the defendant even though it is a government ministry under Section 1A of the Civil Procedure Act. Section 16 (1) (i) of the Government Proceedings Act, the granting of an injunction against the Government is prohibited. That Section provides:-

"……The court shall not grant an injunction or make an order for specific performance ……but in lieu thereof make an order of decretory of the rights of the parties……..."

The plaintiff argued that Section 1A now termed as double 'O' principle can be used to issue an injunction against the government. I am wholly persuaded by the holding of the case **Morionson Holding Limited Vs. City Council of Nairobi** [2008] eKLR where the court held:-

"- The City Council of Nairobi is a local authority. It is a local authority and or body established under the Local Government Act.

- ***A local authority has power and duties that require them to service the public. The functions is defined in that Act. When a general election is called, the position of president, member of parliament and councilor being from a local authority are contested.***

- ***Its function is to make decisions and act in the affairs of the local authority through a council. These actions are the same as those generally exercised by the government and statutory bodies.***

- ***I would be persuaded by the decision in the Ali & Others Vs. The City Council of Nairobi (2002) KL 596 (supra) that no injunction can issue against the local authority. The remedy lies in a judicial review and from the decision above in damages."***

The plaintiff sought to rely on Section 1A of the Civil Procedure Act which provides as follows:-

"1.A (1) The overriding objective of this Act and rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act."

The duty of the court is well set out in Section 1B of the Civil Procedure Act. That duty is as follows:-

"1B (1) For the purpose of furthering the overriding objective specified in Section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:-

- ***(a) the just determination of the proceedings;***
- **(b)** ***the efficient disposal of the business of the court;***
- **(c)** ***the efficient use of the available judicial and administrative resources;***
- **(d)** ***the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and***
- **(e)** ***the use of suitable technology."***

The Court of Appeal in the case of **Hunker Trading Co. Ltd Vs. Elf Oil Kenya Ltd** (unreported) Civil Application No. 6 of 2010 NRB, refused to give an order to a party who was appealing because of that party having failed to obey a High Court order. The Court of Appeal in considering the double "O" principle had this to say in that case:-

"We would act unjustly if we were to allow it (the applicant) chance in this court to defeat justice by failing to obey an important order of the superior court."

The attempt to apply Section 1A cannot mean that the courts will do away with specific and clear provisions of statute such as section 16 (1) of the Government Proceedings Act to attain the overriding objective stated in that Section. I therefore find the plaintiff cannot obtain an injunction on the basis of the provisions of Section 1A. The plaintiff has failed to show a *prima facie* case and because I entertain no doubt in that regard, I will not proceed to consider the other two principles of granting an injunction. In the end, the Chamber Summons dated 19th March 2010 is dismissed with costs to the defendant and the stay issued on 23rd March 2010 is vacated.

Dated and delivered at Meru this 4th day of June 2010.

MARY KASANGO
JUDGE