



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 185 of 2008**

**SUDI CHEMICAL INDUSTRIES LTD.....1<sup>ST</sup> PLAINTIFF**

**AUTO CURE LIMITED.....2<sup>ND</sup> PLAINTIFF**

**KHUSH FURNITURE.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**SHAIMA INVESTMENTS LTD.....  
DEFENDANT**

**RULING**

1. The application herein is the Plaintiff's chamber summons dated 13/05/2008 and supported by the grounds on the face thereof and the supporting affidavit sworn by Hemanshu Roy Pattni. The Plaintiffs pray for the following main order

*THAT the defendant by itself, its agents, servant and/or employee by way of temporary injunction be restrained from levying distress against the plaintiffs, evicting the plaintiffs or carrying out construction/refurbishment of the suit premises or in any manner from interfering with the plaintiffs' quiet possession and enjoyment of the suit premises herein known as L.R. No.209/8604 at Industrial Area, Lunga Lunga Road, Nairobi, pending the hearing and determination of this suit.*

In addition to the above order, the Plaintiffs pray that all future monthly accruing rents payable by the Plaintiffs to the Defendant be deposited in court or in a designated account pending the hearing and determination of this application. The Plaintiffs also pray for an enquiry as to damages and want the Defendant to pay the costs of this application.

2. In support of the application, the Plaintiffs make the following allegations of fact:-

1. *THAT the defendant has refused to collect or accept rent from the plaintiffs with the aim of levying distress and/or evicting them.*

2. *THAT the defendant has illegally and unlawfully given the plaintiff, notice to vacate the suit premises and maliciously intends to commence alleged construction/refurbishment works on the suit premises thereby subjecting the plaintiffs to nuisance and hardship.*

3. *THAT the plaintiffs are statutorily protected tenants and the defendant's actions are in flagrant breach of the Landlord and Tenant Act Chapter 310 of the Laws of Kenya.*

4. *THAT the defendant is intentionally and maliciously subjecting the plaintiffs' businesses to disruption, uncertainty, instability, embarrassment and financial loss in order to force the plaintiffs to vacate the suit premises.*

5. *THAT after refusing to accept the rents payable, the defendant deliberately and maliciously levied distress against the 1<sup>st</sup> plaintiff thereby subjecting it to financial loss, public humiliation, inconvenience and suffering and may repeat this action at any time against all or any of the plaintiffs.*

6. *THAT the defendant is in gross abuse and violation of the process of distress for rent.*

3. The sworn affidavit of Hemanshu Roy Pattni, dated 13/05/2008 depones to the following matters, amongst others:-

§ *that the Plaintiffs are statutory tenants of the Defendant in the suit premises known as LR No. 209/8604 located along Lunga Lunga Road in the Industrial Area Nairobi for periods ranging between 6 and 25 years;*

§ *that in February, 2008, the Defendants' employees did not collect rent from the Plaintiffs' offices on some alleged instructions to them not to collect the rents;*

§ *that the Plaintiffs' efforts to remit the rents thereafter were thwarted and thereafter on 26/04/2008, the Defendant purported to levy distress through M/S Hebros Traders;*

§ *that the 1<sup>st</sup> Plaintiff was forced to pay "court brokers charges" amounting to Kshs.55,000/= in order to avoid a totally chaotic situation caused by M/s Hebros Traders*

§ *that on Monday 28/04/2008, the said court brokers went and collected bankers rent cheques from the Plaintiffs' advocates' offices, though no payment receipts have been issued to date*

§ *that the purported distress for rent was carried out without notice to the Plaintiffs*

§ *that by a letter dated 30/04/2008, but delivered to the Plaintiffs on 7/05/2008, the Defendant purported to give notice to the Plaintiffs to vacate the suit premises to allow Defendant to commence construction/ refurbishment of the suit premises*

§ *that the Defendant is using acts of vandalism and nuisance to force the Plaintiffs to vacate the suit premises.*

4. The Plaintiffs' application is opposed. The Defendant's case is premised on the Replying Affidavit sworn by Shailesh G. Shah in which the deponent alleges the following:-

1. *This court has no jurisdiction to entertain the application and by extension, the entire suit as the same only resides in the Tribunal established under the Landlords & Tenant (Shops Hotels and Catering establishments) Act Cap 301 of the Laws of Kenya.*

2. *The defendant purchased the suit premises from the previous owner free of all encumbrances including the plaintiffs' leases, if any.*

3. *The defendant is desirous of renovating the suit premises to suit its plans and requirements.*

4. *The proposed renovation on the suit property was also necessitated by the fact that the premises was in poor condition. In particular, that the floor of the premises was dilapidated, the wall surrounding the premises was very low and thus insecure, and the defendant plans to increase it from the current height of approximately 5 meters to at least 8 meters and subsequently install an electric wire thereon.*

5. *The plaintiffs have previously sought to exclude the defendant, violently, from accessing the suit*

premises

6. Only the 2<sup>nd</sup> plaintiff was issued with the notice to vacate on the legal justification that the premises required to be renovated and as such the other plaintiffs' have no cause of action against the Defendant.

7. Since only the 2<sup>nd</sup> plaintiff was served with the notice to vacate to pave way for renovation of the go-down it occupies, the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs' have no causes of action against the defendant.

8. In any event, the notice issued to the 2<sup>nd</sup> plaintiff also informed the 2<sup>nd</sup> plaintiff that it will be accorded the first opportunity to re-occupy the premises once the refurbishment or repair work was finalized.

9. The defendant intends to effect refurbishments, renovations and repairs on all the 6 (six) go-downs in the suit premises one after the other in turns so as not to occasion inconveniences to the plaintiffs. Accordingly, therefore, it is baseless for the defendants to allege malice and harassment against the defendant.

10. Since the tenancy relationship between the plaintiffs and the defendant, if any, is not in writing, the same automatically converts into that of tenancy at will or tenancy from month to month, in which event only a month's notice is required, which was the period given to the 2<sup>nd</sup> plaintiff.

11. This court cannot pronounce an injunction perpetually stopping the plaintiff from levying distress, which in any case is a statutory right, even in cases of default in the payment of rent.

12. Further, this court cannot pronounce an injunction perpetually stopping defendant from renovating/ repairing/improving its decayed premises.

13. If the 2<sup>nd</sup> plaintiff had any objection to the notice served on it, the appropriate cause of action was for the 2<sup>nd</sup> plaintiff to lodge the objection before the Tribunal before the period given in the notice to vacate lapsed.

14. It is not true that the defendant has refused to collect or accept rent as its advocates on record have routinely collected the same on the defendant's behalf.

5. The Defendant filed a Further Affidavit sworn by Manish G. Shah in which he says that the Plaintiffs obtained ex-parte orders on 13/05/2008 restraining the Defendant from levying distress and that thereafter the Plaintiffs have abused the aforesaid orders on grounds that:-

(i) Rent is always paid late and the defendant's right in law have been gagged by the exparte Orders obtained by the plaintiffs' herein (sic);

(ii) Rent for July 2008 was paid on 7<sup>th</sup> July 2008.

(iii) Rent for August 2008 was paid on 7<sup>th</sup> August 2008.

(iv) Rent for September 2008 was paid on 9<sup>th</sup> September, 2008;

(v) Rent for October 2008 was paid on 13<sup>th</sup> October 2008;

(vi) Rent for November 2008 was paid on 12<sup>th</sup> November 2008;

The Defendant prays that the interim restraining orders be discharged.

6. The parties' learned counsel made both oral and written submissions; but before I consider the details of those submissions, it is necessary to set out the Plaintiffs' claim as per the plaint filed in court on 13/05/2008. The Plaintiffs' claim is based on alleged unlawful distress for rent and the consequences arising therefrom and the Plaintiffs jointly and severally pray for judgment against the Defendant for:-

(a) *General damages*

(b) *Special damages being Kshs.55,000/=.*

(c) *A perpetual order of injunction restraining the defendant by itself, its agents, servants and/or employees from levying distress, evicting the plaintiffs, carrying out construction/refurbishment and/or in any other manner interfering with the plaintiffs' quiet possession and enjoyment of the suit premises known as L.R. No.209/8604 at Industrial Area, Lunga Lunga Road, Nairobi.*

(d) *Costs of this suit and interest thereon and on (a) and (b) above at court rates from 26/4/2008 until payment in full and final satisfaction of the decree herein.*

(e) *Any other relief that this Honourable Court may deem fit and just to grant.*

7. In their written submissions filed in court on 19/08/2008, the Plaintiffs contend that the Defendant's contention that this court has no jurisdiction to hear and determine this suit is flawed and based on a wrong interpretation of the law, namely the Landlord and Tenant Act, Chapter 301 Laws of Kenya (the Act). Learned counsel for the Plaintiffs, Mr. Nzamba Kitonga says that where the reliefs sought by a Plaintiff are for injunctions, special and general damages, the Business Premises Tribunal has no jurisdiction as per the decisions in *Re Hebtulla Properties Limited [1979] KLR 96* and *Narshidas & Company Limited -vs- Nyali Air Conditioning & Refrigeration Services Limited Nairobi CA No. 205 of 1995*. In the Hebtulla case, the court held that the tribunal has no jurisdiction to make an order on the application of a tenant who has been forcibly dispossessed by his landlord, and that the jurisdiction of the tribunal to hear complaints under Section 12(4) of the Act, is restricted to minor matters. In the case, Hebtulla Properties Ltd. had applied to the High Court for an order of prohibition to prohibit the Business Premises Rent Tribunal, Nairobi, from proceeding with the further hearing of a complaint by Electro Service and Equipment Ltd, (the interested party). Mr. Nzamba Kitonga, learned counsel for the Plaintiff argues that the Plaintiff's claim herein is clearly one seeking injunctive damages; and that in the circumstances, this is the proper court with the jurisdiction to hear and determine this suit; as the tribunal has no jurisdiction whatsoever to deal with the same.

8. It is further argued by the Plaintiff that it is the Defendant who forced the Plaintiff to come before this court after it (Defendant) unlawfully levied distress against the 1<sup>st</sup> Plaintiff herein. That the Defendant aggravated the situation further by purporting to terminate the 2<sup>nd</sup> Plaintiff's tenancy by a letter dated 30/04/2008. The Plaintiffs seem to be reading some mischief in the Defendants' actions which are clearly at variance with the Defendant's admission that the Plaintiffs are protected tenants. The Plaintiffs argue that the Defendant failed to act in accordance with the provisions of section 12 of the Act with regard to the levying of distress and in particular, section 12(1)(d) thereof which requires the Defendant as landlord to seek the permission of the Tribunal to levy distress. The Plaintiffs say that the Defendant, by sending the auctioneers to levy distress and to do so without notice was to incite the Plaintiff to come to this court.

9. Section 12 of the Act deals with powers of Tribunals Subsection (1)(d) thereof cited by the Plaintiffs provides inter alia that:-

*“12 (1) A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power –*

(a)

(b)

(c)

(d) *where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of the service charge.*

It is not quite clear to the court how the above subsection (d) applies to the matters in issue in this case.

10. As regards the 2<sup>nd</sup> Plaintiff's case, learned counsel appearing argues that the Defendant did not adopt the mandatory procedure for the issuance of a notice of termination of tenancy as provided under section 4 of the Act. Section 4 of the Act provides for termination of and alteration of terms and conditions in, controlled tenancy and subsection (2) thereof provides as follows:-

*“(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.”*

The landlord is also required under subsection (5) to specify the grounds upon which the tenancy was to be terminated and to ask the tenant to indicate within one month of receipt of the notice whether the tenant agrees to comply with the notice. Learned counsel for the Plaintiffs says that the Defendant flouted this well laid out procedure by purporting to terminate the 2<sup>nd</sup> Plaintiff's tenancy by a mere letter giving the 2<sup>nd</sup> Plaintiff three weeks to vacate the premises on the pretext that the Defendant wanted to renovate the premises. Learned counsel also argues that this conduct by the Defendant against the 2<sup>nd</sup> Plaintiff is illegal under the Act and amounts to malicious and high handed mischief on the part of the Defendant. Learned counsel for the Plaintiffs contends that these facts are not disputed by the Defendant.

11. The Plaintiffs' counsel also argues that though it is true that the Defendant purchased the suit premises, it is also true that the said purchase was subject to existing tenancies and that in the instant case of protected tenancies, the Defendant was bound by the provisions of the Act as regards protected tenancies. It is further argued on behalf of the Plaintiffs that they had to come to court to seek protection for themselves against the erratic and unpredictable conduct of the Defendant.

12. In light of the above, learned counsel for the Plaintiffs says that the Plaintiffs have established that they have a prima facie case with overwhelming chances of success; that the Plaintiffs have also demonstrated that they will suffer irreparable damage which cannot be compensated by damages unless the illegal and malicious activities on the part of the Defendant are stopped. Finally, the Plaintiffs argue that since they have been paying their rent regularly, no loss would accrue to the Defendant if the orders of injunction sought are granted, and that for this reason, the court should find that the balance of convenience tilts in the Plaintiffs' favour (see *Giella –vs- Cassman Brown & Co. Ltd. –vs- [1973] EA 358*).

13. The application is opposed. The Replying Affidavit is sworn by Shailesh G. Shah, a director of the Defendant herein. The gist of the Replying Affidavit is that by the time the Defendant purchased the suit property and had the same transferred to it on 14/05/2007, the Plaintiff's lease of 5 years 3 months had long lapsed in the year 2000 or thereabouts. The Defendant also filed written submissions and contends that it intends to remove the suit premises which are in poor condition and that it can only do so with the Plaintiffs out of the said premises. That though the Defendant did not originally purpose to eject the Plaintiffs from the suit premises, it decided to do so because of the Plaintiffs' violent and unbecoming conduct when the Defendant's representatives went to the suit premises with a view to seeking quotations for the proposed renovations. The Defendant admits serving a quit notice upon the 2<sup>nd</sup> Plaintiff on the understanding that the said 2<sup>nd</sup> Plaintiff would be given the 1<sup>st</sup> opportunity to get back into the premises once the renovations were done. The Defendant also says that its intention is to repair the suit premises one after another so as to cause least interference with the Plaintiffs' business. The Defendant explains that the reason why the other Plaintiffs in the suit premises were not issued with suit notices was because

of its desire to renovate the suit premises in stages. The Defendant urges the court not to grant the orders sought for reasons:-

- (a) *That the defendant bought the premises for its own benefit;*
- (b) *That the transfer was in effect of all rights appertaining thereto;*
- (c) *Those rights were not made subject to the tenants' occupation and indeed rights of the tenant cannot supersede those of the owner of the premises unless parties enter into an agreement ceding such rights for an agreed period;*
- (d) *That the tenancy herein, if any, and although without the express consent of the defendant, was one of month to month hence the one month's notice.*
- (e) *That this Honourable Court cannot grant orders that are capable of perpetually injunctioning a registered owner of the property from dealing with its own property as sought in the plaint and that neither can this court issue an order restraining the owner of the premises from carrying out renovations and improvement of premises which are in a dilapidated state.*

14. Regarding the notice to the 2<sup>nd</sup> Plaintiff, the Defendant contends that if the said 2<sup>nd</sup> Plaintiff had any objection to the same, he should have lodged an objection before the Tribunal prior to the lapse of the notice period as required by law and that as such the 2<sup>nd</sup> Plaintiff is barred from ventilating his case before this court. The Defendant admits that the Plaintiffs have regularly paid their rents through the Defendant's advocates. In summary, the Defendant prays for dismissal of the Plaintiffs' application on the following grounds:-

- (f) *That the rights of the defendant cannot be made subject to those of the Plaintiffs' in the absence of a contract to that effect or reservation of such rights in the register;*
- (g) *That the application for an inquiry as to damages, apart from the fact that it ought to be determined by the tribunal which has power to do so and hence the lack of jurisdiction by this court, it cannot also succeed as the applicants have not annexed any evidence or particulars of the nature and details of the alleged losses;*
- (h) *No notices were issued to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants and as such their claims herein are vexatious and raise no cause of action*

15. The Defendants relied on a number of authorities among them Jitendra Mathurdas Karabar & 2 Others –vs- Fish Limited – Civil Appeal No. 267 of 1996 in which the Court of Appeal said the following with regard to tenancy notices under the Act:

*“--- once a reference in accordance with section 6(1) of the Act has been made to the Tribunal and a tenancy notice to terminate the tenancy has taken effect from the date specified therein in terms of section 10 of the Act, the landlord/tenant relationship comes to an end. Thereafter, one can no longer talk of the existence of a controlled tenancy in terms of section 2 of the Act without which the Tribunal under the Act has no jurisdiction.”*

In such a situation, the court said that a landlord can “*come to court to enforce their rights to their property.*” In the present case, the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs were not issued with any notices, but the 2<sup>nd</sup> Plaintiff was issued with a purported notice dated 30/04/2008 whose subject was

*“LR No.209/8604 – Lunga Lunga Road Industrial Area – Nairobi.”*

The letter informed the addressee, M/s Auto Care Limited, the 2<sup>nd</sup> Plaintiff herein as follows:-

*“We wish to advise you that we intend to undertake refurbishment of the above captioned premises from 01<sup>st</sup> June 2008.*

*In the premises, kindly note to make alternative arrangements as the construction work may interfere with the normal running of the premises. We believe that there is sufficient notice for you to deal appropriately noting that we shall give you priority after we finalize (sic) the refurbishment/construction work.”*

16. Before the notice as above given expired the Plaintiffs came to this court. The question that arises is whether in the circumstances, the Plaintiffs should have come before this court at the time that they did. Section 10 of the Act dealing with notices provides as follows:-

*“10. Where a landlord has served a notice under section 4 of this Act on a tenant and the tenant fails to notify the landlord within the appropriate time of his unwillingness to comply with such notice or to refer the matter to a Tribunal, then, subject to Section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions thereof or rights or services enjoyed thereunder.”*

Section 6 of the Act gives a tenant who has notified the requesting party that he does not agree with the tenancy notice the opportunity to refer the matter to the Tribunal, and upon the making of a reference, the notice shall be of no effect until and subject to the determination of the reference by the Tribunal with the proviso that –

*“--- a Tribunal may for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section.”*

17. I have considered the application as filed, the supporting affidavits and annexures thereto. I have also considered the Replying Affidavits and the annexures thereto. I have also considered all the submissions, both oral and written by learned counsel appearing. I have also considered the law cited to me by both counsel and in particular the provisions of the Act with regard to the giving of notice by a landlord and how a party who has been served with a notice under section 4 of the Act should proceed upon receipt of the notice. In the instant case, the notice was given on 30/04/2008 and intended to take effect from 1/06/2008. The Plaintiffs came to court here on 13/05/2008, about one and a half months before the said notice expired. In my view, the Plaintiffs brought the dispute to this court prematurely and without any justification. The Plaintiffs had sufficient time to refer the dispute to the Tribunal for determination. If the Plaintiffs brought the dispute here after 1/06/2008, there would have been every reason for this court to find that the application was properly brought and to grant the orders sought since the landlord tenant relationship would have expired and either party would have been at liberty to come to this court to safeguard their interest. In any event, the purported notice by the Defendant to the 2<sup>nd</sup> Plaintiff (although the notice refers to the entire suit premises) was not in the form prescribed by Section 4(5) of the Act (supra). The situation that arises therefore is that there was non-compliance with the legal provisions of the Act as far as the 2<sup>nd</sup> Plaintiff is concerned. As for the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs, no notice had been issued to them by the time this suit was filed. Accordingly, the said 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs have no cause of action against the Defendant as of now. The two of them should have waited to be served with requisite notices before taking action before the proper forum.

17. In the result, I am persuaded that this matter is for the Tribunal under the Act and not for this court. The Plaintiffs are therefore not entitled to the order of injunction sought. I also find that there is no need for an order requiring payment of rents to the Defendant to be deposited in this court since both the Plaintiffs and the Defendant are in agreement that rents are being paid through the Defendant's advocates.

18. Accordingly, the application by the Plaintiffs dated 13/05/2008 is dismissed with no order as to costs. The parties should pursue their dispute before the right and competent forum.

Orders accordingly.

Dated and delivered at Nairobi this 16<sup>th</sup> day of July 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

M/s Nzamba Kitonga (Absent) for the Plaintiffs

Mr. Okeyo for Mr. Munge (Present) For the Defendant

Kinyua - court clerk