



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Environmental & Land Case 568 of 2008

JAMES MUNUTHI WATHINGIRA.....1ST PLAINTIFF

ROBERT MUTITU MUTONYI.....2ND PLAINTIFF

VERSUS

STEPHEN MUCHIRI KARIUKI.....1ST RESPONDENT

MAMUKA VALUERS MANAGEMENT LTD.....2ND RESPONDENT

TIRITU SERVICE STATION LTD.....3RD RESPONDENT

RULING

The Application

1. The application before me is the Chamber Summons dated 18/11/2008 by which the Plaintiffs seek injunctive orders against the Defendants herein to restrain the Defendants from forcibly and/or otherwise evicting the Plaintiffs from the suit premises known as L.R. No. 37/254/31 at Nairobi West (the suit premises) where they say they have been operating therefrom since the years 1992 and 2003 respectively.

The application is premised on the following grounds:-

- (1) *THAT the Plaintiffs have been Tenants occupying the suit premises L.R. No. 37/254/31 at Nairobi West where they have been operating their businesses since the years 1992 and 2003 respectively.*
- (2) *THAT the Plaintiffs have variously received letters dated 27th May 2008, 4th November, 2008 and 7th November 2008 requiring them to deliver vacant possession of the suit premises.*
- (3) *THAT the letter dated 4th November 2008 to the 1st Plaintiff requires him to deliver vacant possession of the suit premises by the 30th November 2008.*
- (4) *THAT the Plaintiffs had previously lodged complaints with the Business Premises Rent Tribunal which complaints were dismissed on ground that the Tribunal did not have jurisdiction upon receipt of the letter dated 27th May 2008.*
- (5) *THAT the said tribunal ruled that the respective executed tenancy agreements executed with the 2nd Defendant were within the meaning of a "tenancy reduced in writing" as defined in Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act thus leading to the ruling that their complaints were outside the jurisdiction of the said court.*
- (6) *THAT the tenancy agreements were executed with the 2nd Defendant on behalf of the 1st Defendant. The tenancy terms were to expire on 30th November 2013 in the case of 1st Plaintiff and 30th June 2013 in the case of the 2nd Plaintiff.*

- (7) *THAT both the Plaintiffs carry out businesses on the suit premises which stand to be closed down if the impugned letters are to take effect.*
- (8) *THAT the Plaintiff cannot conceivably quantify the losses they stand to suffer from the eminent (sic) closure of their businesses more so given the goodwill that both have acquired from their “long” use operations in the suit premises.*
- (9) *THAT based on the representations made to the Plaintiffs by the 1st and 2nd Defendant (sic) that their tenancy terms would run uninterrupted, the Plaintiffs embarked on substantial renovations of the suit premises.*
- (10) *THAT no amount of damages can compensate the Plaintiffs if they are forced to vacate the premises.*
- (11) *THAT the Plaintiffs depend on the businesses ran (sic) in the suit premises for their source of livelihood.*
- (12) *THAT it is therefore meet and just that this application is allowed.*

2. The application is also supported by the sworn affidavit of **James Munuthu Wathingira** dated 18/11/2008. The deponent avers that –

- In the year 1992, he entered into a tenancy agreement and took possession of the suit premises belonging to the 1st Defendant; that the initial lease agreement was executed by the deponents wife on 6/04/1992

- Since then, he has been running a restaurant business under the style and name of “West Njeri Jet Eating House popularly known as “JJ Café”

- On or about 1/07/2003 he accepted an offer made by the 2nd Defendant as the 1st Defendant’s agent to continue renting the suit premises for a term of 5 years 3 months expiring 30/09/2008, and that the 2nd Plaintiff/Applicant also made similar arrangements but with the 5 year 3 months’ lease expiring on 31/05/2008.

- On expiry of the 2nd Plaintiff’s lease, the Defendants refused or declined to renew the lease and to recover the rent, forcing the 2nd Plaintiff to file BPRT case No. 325 of 2008 which case was dismissed on 8/09/2008.

- The 1st Defendant’s lease was renewed and extended for a term of 5 years and 1 month but that despite such renewal, the 1st Plaintiff has been served with two letters dated 4/11 and 7/11/2008 requiring him to vacate the suit premises.

- The 2nd Defendant acted as if he had all the authority to execute the tenancy agreements on behalf of the 1st Defendant

- At some point, the 1st Defendant intimated that he wanted to sell the suit premises and as a result, the two Plaintiffs carried out some substantial renovations of the premises that have resulted in improved market value of the premises.

The two Plaintiffs have paid their rent religiously over the years

Since 1992 when he became tenant the deponent has acquired substantial goodwill which cannot be compensated by any amount of damages.

3. It is to be noted that the 2nd Plaintiff did not swear any affidavit. The 1st Plaintiff says he has authority to swear the affidavit on behalf of 2nd Plaintiff, but there is no evidence of such authority on the file.

4. The application was opposed. The 1st Defendant, Stephen Muchiri Muriuki swore his Replying Affidavit on 25/11/2008 in which he says that the purported lease documents are invalid in law both under the provisions of the RTA, Cap 281 and the Companies Act, Cap 486 and the Stamp Duty Act on the ground that the person who executed the said documents had no authority to do so on behalf of the 1st Defendant and that he had no basis for the demand of the renovation charges. The deponent also says that since the Plaintiffs have quantified the damages suffered by them, then it cannot be said that the alleged loss is beyond compensation by way of damages.

5. The 2nd Defendant's Replying Affidavit was sworn by Stevenson Wachira Wanjohi, the property manager of the 2nd Defendant Company who are the duly appointed Managing Agents of the estate of the late Robert Kariuki Muchiri while the 1st Defendant is one of the Administrators of the estate of Robert Kariuki Muchiri. The deponent says that the mandate of the 2nd Defendant with regard to the estate of the late Robert Kariuki Muchiri (the estate) was restricted to collection of rents and ensuring that the tenancies were properly documented and renewed from time to time as they expire. He also says that the Plaintiffs tenancies were renewed in the normal course of management of the estate. The deponent denies any knowledge of a communication to the Plaintiffs that the Defendants intended to sell the suit premises. He also denies making any representations to the Plaintiffs as to whether their renewal leases would run their full term.

6. The 2nd Defendant's affidavit also denies any liability against it since it was dealing with the Plaintiffs on behalf of a disclosed principal and pleads that the 2nd Defendant has been wrongly sued, and prays that the Plaintiff's suit against the 2nd Defendant be dismissed with costs.

7. The 3rd Defendant's Replying Affidavit dated 25/11/2008 is sworn by David Njuguna Ngoi, who avers that the Plaintiffs' application is devoid of any merit for failure to comply with the requirements of the RTA, the Companies Act and the Stamp Duty Act. Just like the 1st and 2nd Defendants, the 3rd Defendant says that the Plaintiffs' loss, if any, has been fully quantified and that the same can be compensated in monetary terms.

8. The application proceeded by way of written submissions. The Plaintiff's submissions were filed by M/s Maina & Maina Advocates. According to the Plaintiffs, the facts of the case are that the Plaintiffs have been tenants of the suit premises since the years 1992 and 2003 respectively; that the 2nd Defendant, as property manager of the 1st Defendant has continued to collect rent up to and including the month of November 2008; that by a letter dated 7/11/2008, the Plaintiffs were asked to vacate the suit premises. The Plaintiffs argue that the Plaintiffs have established a prima facie case against the Defendants to warrant the granting of the injunctive orders sought.

9. As against the 1st and 2nd Defendants, the Plaintiffs allege that the 2nd Defendant renewed the leases of the Plaintiffs on the authority and instruction of the 1st Defendant and that as such, the 1st Defendant is vicariously liable for the actions of the 2nd Defendant. The Plaintiffs contend that whether or not the said leases were executed with the authority of the 1st Defendant, the actions of the 2nd Defendant are still binding on both the 1st and the 2nd Defendants as was held in **Mombasa Civil Appeal No. 13 of 1968 – Nanji Bhai Prabhudas & Co. Ltd. –vs- The Standard Bank Limited**. The Plaintiffs contend that both section 37 and section 38 of the Companies Act come to the aid of the Plaintiffs by recognizing the rubber stamps as being used to authenticate documents instead of the company seal, and in particular, section 38 thereof which provides for authentication of a company document without necessarily using a common seal.

10. The Plaintiffs also submitted that even if the said lease agreements were invalid, the 2nd Defendant continued to receive rent on behalf of the 1st Defendant upto and including November 2008. In the alternative, the Plaintiffs argued that if the lease agreements were invalid, then the Plaintiffs became protected tenants whose tenancies could only be terminated in accordance with section 4(1) of the Landlord and Tenant (Shops Hotels and Restaurant) Act, Cap 301. That in any event, an instrument liable to Stamp Duty can still be stamped out of time and may be relied on in evidence pursuant to section 19(3) of the Stamp duty Act. Section 19 of the Stamp Duty Act Cap 480 Laws of Kenya provides as follows:-

“19 (1) Subject to the provisions of Section 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except –

(a) in criminal proceedings

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped

(2) No instrument chargeable with stamp duty shall be filed enrolled, registered or acted upon by any person unless it is duly stamped.

(3) Upon the production in any court other than a criminal court, arbitrator, referee, company or other corporations, or to any officer or servant of any or servant of any public body of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or any other corporation, officer or servant shall take notice of the omission or insufficiency of the stamps on the instrument and thereupon take action in accordance with the following provisions –

(a) If the period of time or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall be forwarded to a collector.

(b) In any case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires be given a reasonable opportunity of applying to a collector for leave under section 20 or of obtaining a certificate under section 21.

(c) In any other cases, unless otherwise expressly provided in this Act, the instrument shall saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection (5), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.”

The Plaintiff’s Case As Against the 3rd Defendant

11. As regards the 3rd Defendant, the Plaintiffs concede that the suit premises were registered in favour of the 3rd Defendant sometime in September 2008, but state that notwithstanding all the Defendants have failed to comply with section 106 of the RTA Cap 281 with regard to termination of tenancies. Incidentally, Cap 281 Laws of Kenya does not have section 106. Probably, and I am only saying probably, the Applicants meant to refer to Section 106 of the ITPA. Section 106 of the ITPA provides:-

“106. In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year terminable on the part of either lessor or lessee, by six months’ notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purposes shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days’ notice expiring with the end of a month of tenancy.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property”.

12. What I understand the Plaintiffs to be saying, if Section 106 of the ITPA is what they intended to refer to) is that their leases, being leases for purposes other than agricultural or manufacturing, are leases from month to month terminable in accordance with the provisions of the said section. The Plaintiffs further submit that since the suit premises were transferred to the 3rd Defendant when the Plaintiffs were sitting tenants, they have an equitable interest in the suit premises which interest should be protected as against the 3rd Defendant. The Plaintiffs rely on **Mulla, The Transfer of Property Act, 9th Edition** which cited a passage from the judgment of **Barnhart –vs- Greenshield (1853) 9 Moo P.C 18/32** and as applied in **Nishit Bikhubhai Shah –vs- Kirit Babulal Bukrania [2004] e KLR** which says -

“With respect to the effect of possession merely, we take the law to be that if there be a tenant in possession of land, a purchaser is bound by all equities which the tenant could enforce against the Vendor, and the equity of the tenants extends not only to interests connected with his tenancy, as in **Taylor V Stibbert**, but also to interests under collateral agreements as in **Daniel V Davison** and **Allen V Anthony**, the principle being the same in both classes of cases; namely that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that

fact is bound, according to the ordinary rule, either to inquire what interest is, or to give effect to it, whatever it may be”.

13. On the basis of the above, the Plaintiffs allege that they are protected tenants and that the Defendants are bound by that very fact that the Plaintiffs are protected tenants and that the 3rd Defendant ought to have inquired what other interest the Plaintiffs may have or to give effect to it.

14. In the alternative, the Plaintiffs allege that all that the Plaintiffs need prove is whether the Plaintiffs were occupying the suit premises as at the date of transfer of ownership. The Plaintiff's position is that they were in such occupation as at the date of transfer and that the 3rd Defendant purchased the suit property with full knowledge that the Plaintiffs were sitting tenants; and that the 3rd Defendant accepted rent from the Plaintiffs on that understanding. In the case of **Mega Fries Ltd. –vs- Mukasa Kumar Velji Savla & 3 Others [2003]e KLR**, the Applicant had entered into a lease agreement with the previous landlord. The previous landlord sold and transferred the premises to the Respondent. In accordance with the renewal clause of the lease with the previous landlord the Applicant notified the new landlord of his intention to renew the lease. The new landlord refused the request for renewal on the ground that the new landlord intended to renovate the premises and take possession. The Applicant's case was that since the Respondent had accepted rent from the Applicant under the terms of the old tenancy, he was bound by the terms of that old lease. The Respondent's case was that since he was not privy to the lease with the previous landlord, he was not bound by its terms. It was also the Applicant's case that since the Respondent had purchased the suit premises with the full knowledge that there were sitting tenants, and that since he had accepted rent from them, the tenancy should be regarded as a periodic tenancy and therefore protected under the provisions of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya.

15. After considering the provisions of Cap 301 and in particular Section 4(1) of the Act as regards the giving of notice leading to termination of protected tenancies, the court (Osiero J) found that the notice given by the new landlord to the Applicants contravened the provisions of section 4(1) of Cap 301 and was therefore null and void and had no effect in law and that *“the Applicant was under no duty, legal or otherwise to react to it”*. The Applicants have urged the court to apply the same principles in the instant case.

16. Regarding the jurisdiction of this court the Applicants argue that this court has unfettered jurisdiction to hear and determine this matter. The Applicants also contend that by the time they appeared before the Tribunal the Applicants were unaware that the 3rd Defendant had acquired the suit premises.

17. Finally, the Applicants contend that the balance of convenience tilts in favour of the Applicants for the reason that the 1st Plaintiff in particular has been in occupation of the suit premises since early 1992 and has over time accumulated immense goodwill and that if they were to be thrown out of the suit premises now, they would suffer substantial loss. For the above reasons, the Applicants urge the court to grant the orders sought.

The 1st and 3rd Defendant's Submissions

18. The 1st and 3rd Defendants have made the following submissions through M/s G. Kamonde, Advocate:-

(a) *That no orders of injunction can issue against the 1st Defendant on the ground that his legal interest and authority over the suit premises ceased on 5/09/2008 when the transfer in favour of the 3rd Defendant was registered, way before the filing of the instant application on 19/11/2008.*

(b) *That the purported lease being relied upon by the Plaintiffs was not signed by the 1st Defendant or any person holding a duly registered Power of Attorney under Section 50 of the RTA, Cap 281. Section 50 of the RTA provides as follows:-*

(c) *That the alleged leases were invalid for failure to comply with section 40 of the RTA requiring all leases for a period of over one year to be registered.*

(d) *That such unregistered leases have no effect on the 3rd Defendant as purchaser for the reason that by the time of the purchase, the 3rd Defendant did not have a notice of any sitting tenants,*

(e) *That the plaint as drawn does not show a Cause of Action against the 3rd Defendant*

(f) *That the issues brought by the Applicant before this court are issues for the BPRT which has the authority to determine whether or not a tenancy is controlled and that in any event, the BPRT has already ruled that the tenancies*

alleged by the Applicants are not controlled with the result that the Applicants are bound by Order VI Rule 6 of the Civil Procedure Rules which reads:-

“6(1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

(2) Subrule (1) shall not prejudice the right of a party to amend his previous pleading so as to plead the allegations or claims in the alternative”

(g) That since the Applicants have indicated that they would be adequately compensated in damages, then the injunctive orders sought ought not to be granted.

The 2nd Defendant's Submissions

20. The 2nd Defendant, represented by M/s Muchiri Gachara & Co. Advocates submitted that the Plaintiffs' case against the 2nd Defendant does not lie for the following reasons:-

(a) the 2nd Defendant/Respondent was the lawful Managing Agent of the 1st Defendant, a fact which is acknowledged by the Plaintiffs

(b) The 2nd Defendant/Respondent at all material times possessed lawful authority to renew lease agreements as and when they fell due; and that at the material time when he renewed the leases in issue, he was unaware of any sale having been concluded between the 1st and 3rd Defendants

(c) The 2nd Defendant/Respondent made no representations at the time of renewal of the leases in issue that they (Plaintiffs) would be in possession for the entire lease period.

(d) It was the Applicants' obligation to protect their interests in the suit premises by registering the leases.

(e) The Applicants contravened a term of the leases for carrying out improvements on the leased premises without authority;

(f) The 2nd Defendant as agent of a disclosed principal cannot be held liable for acts done on behalf of the principal and the 2nd Defendant is thus wrongly sued

(g) Any orders issued against the 2nd Defendant would be in vain as their authority/agency ceased the moment the suit property was transferred to the 3rd Defendant

(h) The Applicants have not established a prima facie case with a probability of success;

(i) The Applicants have quantified their alleged losses by estimating the cost of renovations and that in the circumstances, the orders for injunction are not warranted, not even on a balance of convenience.

(j) The Applicants are not protected tenants as alleged and as clearly indicated by the BPRT and that in the circumstances, the Applicants are asking this court to deal with matters that are res judicata and that in any event the Applicants have not pleaded any controlled tenancy issues in the plaint.

(k) The 2nd Defendant never accepted any rent from the Applicants on behalf of the 3rd Defendant

(l) All case law supports the Defendant's case that there can be no protection to a tenant of an unregistered lease agreement as against 3rd parties in terms of sections 40, 41 and 55 of the Transfer of Property Act.

21. On the basis of the above matters, the 2nd Defendant urges this court to dismiss the Applicant's application with costs to the 2nd Defendant.

The Facts

22. The Plaintiffs/Applicants James Munuthi Wathingira and Robert Mutitu Mutonyi alleged that at all times material

to this suit the two of them have been tenants of the 1st Defendant, Stephen Muchiri Kariuki at Nairobi West where they have been operating a restaurant and bar businesses respectively. They allege that they have paid their rents religiously since the year 1992 for the 1st Plaintiff and 2003 for the 2nd Plaintiff. They also allege that despite current lease agreements executed on 1/06/2008 and 1/03/2003, respectively for the 1st and 2nd Plaintiff by a letter dated 27/05/2008, the 1st Defendant instructed the 2nd Plaintiff, and also intimated that the 2nd Plaintiff should vacate the suit premises on or before 31/05/2008. As a result of the said letter by the 1st Defendant the 2nd Plaintiff filed a complaint at the BPRT. The complaint was dismissed on 8/09/2008. After dismissal of that complaint filed at the BPRT, the two Plaintiffs have come to this court, accusing the 1st Defendant of renegeing on a promise the 1st Defendant made that the two Plaintiffs would be given the 1st opportunity to purchase the suit premises should the 1st Defendant elect to sell the same. The Plaintiffs claim that any action seeking to terminate their lease terms before expiry of the stipulated terms is illegal, arbitrary and/or unjustified. The Plaintiffs claim that they have suffered much special damage and accordingly pray for judgment against the Defendant (sic) for

(a) *A declaration that the Defendants are not entitled to interfere with the 1st and 2nd Plaintiffs quiet possession of the suit premises and/or terminate their respective tenancy terms until the 30th November 2013 and 30th June 2013 respectively;*

(b) *A declaration that the letters dated 27th May 2008, 4th November 2008 and 7th November 2008 to the Plaintiffs are a nullity and void.*

(c) *A permanent injunction restraining the Defendants by themselves, agents, servants and/or employees from interfering with the Plaintiffs quiet possession of the suit premises on L.R. No. 37/254/31 until the expiry of the Plaintiffs respective tenancy terms as aforesaid prayed;*

(d) *General damages*

(e) *Special damages as follows:-*

In favour of 1st Plaintiff - Kshs.15,481,526/=

In favour of 2nd Plaintiff - Kshs.19,491,891/=

(f) *Interest on (d-e) above at the prevailing commercial rates from date of filing suit till payment in full.*

(g) *Costs of the suit and interest thereon at court rates till payment in full.*

(h) *Such further or other relief this court may deem just to grant.*

Further Submissions by the Plaintiffs

23. In reply to the submissions by the 1st and 3rd Defendants, the Applicants contend that where the tenancies are not registered as in the instant case, the same are to be treated as contract interparte, and that in such circumstances, this court has power to stop a breach of contract.

24. Secondly, the Applicants argue that the Plaintiffs' case against the 3rd Defendant is sustainable on the basis of the Court of Appeal decision in **A.W. Rogan – Kamper v Robert Grosvent Civil Appeal No. 33 of 1976** (unreported), as applied in **Bachelor's Bakery Ltd. –vs- Westlands Securities Limited [1982] KLR 366**.

25. In **Bachelors Bakery Ltd. and Westlands Securities Ltd. case** (above) the Respondent, Westlands Securities Ltd. (as Plaintiff) filed suit in the High Court at Nairobi on 30/12/1975 seeking possession of a shop it had leased to the Appellant (as Defendant) by a written Agreement for lease dated 11/09/1969 for a term of 6 years from 5/10/1969 at the monthly rental of Kshs.2800/=. The Appellant took possession and dutifully paid rent for the entire lease term, but it refused to give up vacant possession of the suit premises at the expiry of the lease term. Aggrieved by the Appellant's refusal to give up vacant possession, the Respondent sued, seeking judgment of Kshs.5623/40 allegedly due by the Appellant in respect of 14 days arrears of rent and other items mesne profits from October 15, 1975 until actual delivery of possession.

26. In its defence dated 30/01/1976, the Appellant pleaded that the Agreement for lease not having been registered under the Registration of Titles Act (RTA) was invalid in law in creating a 6 year term, but resulted in a manufacturing or a monthly tenancy only terminable by requisite notice to quit. That no such notice had been given. In the alternative,

the Appellant pleaded that if the Agreement for lease was held to be valid in law in creating a 6 year term, the Respondent accepted rent after the expiry of that term which in law had the effect of creating a yearly or a monthly tenancy protected under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301); and only terminable under Section 4 of the Act and then by an order made on a Reference by the BPRT. The Appellant also denied liability for the other reliefs sought.

27. The Respondent filed an application for and obtained summary judgment under Order XXXV Rule 1 of the Civil Procedure Rules. By his ruling on 9/02/1977, Simpson J (as he then was) held inter alia that:-

- (a) *the Agreement for lease provided for the execution by the parties of a formal lease, which was never done; the parties being content to abide by the Agreement which they regarded as a contract which was binding on them;*
- (b) *the Agreement was capable of being specifically enforced, and did not require to be registered as proviso (e) to section 4 of the Registration of Documents Act (Cap 285) exempts from registration documents merely creating a right to obtain another document (see **Grosvenor –vs- Rogan Kamper** – above)*
- (c) *there was a tenancy of a shop which had been reduced into writing and was for a period exceeding 5 years – that such a tenancy was not a controlled tenancy within the meaning of section 2(1) of Cap 301 and that the Landlord (the Respondent in the appeal) was entitled to possession at the end of the term without notice*
- (d) *the parties had acted and relied on the Agreement for lease as a binding contract between them and the Appellant, had not claimed that it was invalid until the term of 6 years stipulated in the Agreement had expired.*

28. Being dissatisfied with the judgment of the High Court, the Appellant appealed to the Court of Appeal. The issues discussed by the Court of Appeal were, inter alia –

- § *the effect of an unregistered lease*
- § *unregistered lease not exceeding five years and the enforceability of such a lease*
- § *whether an unregistered lease not exceeding five years forms a controlled tenancy;*
- § *the meaning of a controlled tenancy and whether such a lease is a contract;*
- § *types of leases governed by Cap 301 section 2(1) thereof;*
- § *registration of documents and documents for registration*
- § *exemption of registration under section 4 of the Registration of Documents Act (Cap 285).*

The Court of Appeal held inter alia:-

1. *The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) is a special Act designed for the protection of tenants who have entered into a lease agreement not exceeding five years that has not been reduced in writing. The Act overrides any other written law which is in conflict with its provisions. This agreement, having been reduced in writing and being for a period exceeding five years, did not fall within the jurisdiction of the Act.*
2. *The parties entered into an agreement exceeding five years making the agreement a contract falling under the Transfer of Property Act, 1882, section 106. Such an agreement is valid between the parties even in the absence of registration.*
3. *The agreement between the parties was an unexecuted lease and not an agreement for lease. The Appellant had the full benefit of the term which it freely negotiated and was now bound to give up possession upon expiration of the term.*
4. *Not relevant to the instant case.*
5. *The agreement created a tenancy for a period exceeding five years which was not required to be registered, being a document thereby creating a right to obtain another document.*
6. *(Obiter Madan JA) “If the legislature had intended that section 107 of the Transfer of Property Act, 1882 or*

section 32 of the RTA (Cap 287) should apply, first it would not have gone to the trouble of enacting the definition of “controlled tenancy” and “tenancy” in the form in which it did; secondly it would have been the easiest of things to have said.

7. (Obiter Madan JA) The decisions in **Grosvenor –vs- Rogan Kamper and Bains –vs- Choglay** are and remain unassailable and binding when they are relevantly applied. And because the latter case of **A.W. Rogan – Kamper – Vs- Robert Grosvenor** has caused problems and difficulties among members of the legal profession, this case was decided on its own particular facts. Its circumstances are not likely to occur again. It is best laid to rest and not followed.

8. (Obiter Madan JA) “The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) is legislation of a special nature enacted solely for the protection of tenants. It allows parties a choice of occupation of premises under a controlled or uncontrolled tenancy, in the first case, within the ambit and in the second case, outside the ambit of the Act. In the instances to which the provisions of the Act are declared to apply, it overrides any other written law which is in conflict with its provisions. Notwithstanding the provisions of Section 107 [of the Transfer of Property Act, 1888 which is ---- an earlier Act, therefore secondary to the provisions of the late legislation of the Act, the Act sets up a new mode, which did not exist before, of creating a valid tenancy of immovable property for any term exceeding one year by a specifically enforceable agreement in writing without registering the instrument; and if the agreement confers a right to obtain a lease thereunder for a period exceeding five years, it is an uncontrolled tenancy and outside the ambit of the Act which then loses jurisdiction over it. The Act is a cleverly conceived piece of legislation”

The above decision has a direct application in the instant case.

30. The arguments by both parties are already on record. From the arguments and the pleadings, the following facts regarding the Plaintiffs’ disputed tenancy with the 1st Defendant emerge:-

- (a) On or about 6/04/1992, the wife to the 1st Plaintiff, James Munuthi Wathingira entered into a tenancy, agreement with the 1st Defendant, Stephen Muchiri Kariuki, and took possession of the suit premises at Nairobi West on LR No.37/253/31.
- (b) Apart from the fact that the initial rent, to be paid in advance on the 1st day of each month, with a 3 months’ deposit at the commencement of the tenancy, the lease did not specify the length of the lease term.
- (c) Either party was to give 3 months’ notice in case of termination of the tenancy
- (d) On or about 1/07/2003, the 1st Plaintiff accepted an offer to continue renting the suit premises for a term of 5 years 3 months expiring on 30/09/2008 at the monthly exclusive rent of Kshs.24,000/= (Kenya Shillings Twenty Four Thousand Only) payable monthly in advance before the 5th of each proceeding month.
- (e) The Agreement dated 1/07/2003 provided for the preparation of a formal lease without prejudice by the landlords/managing agents advocate at the tenant’s costs
- (f) Application for renewal of the lease was to be made three (3) months notice before expiration of the current lease and renewal of the lease or other decision would be made at the sole discretion of the landlord/managing agents
- (g) On or about 1/03/2003, the 2nd Plaintiff, entered into a tenancy agreement with the 1st Defendant for a term of 5 years and 3 months commencing on 1/03/2003 and expiring on 31/05/2008. The document exhibited to the supporting affidavit is Titled “Agreement to Lease – LR 37/254/31”. The rent payable under the Agreement was Kshs. 24,000/= (Twenty Four Thousand Only) payable monthly in advance. Like the agreement with the 1st Plaintiff, there was a provision in the Agreement to lease by the 2nd Plaintiff for preparation of a formal lease at the cost of the 2nd Plaintiff, Robert Mutitu Mutonyi. Three (3) months was required for giving notice of intention to renew or terminate.
- (h) On expiration of the tenancy term, the 2nd Plaintiff exercised the option to renew the lease. The request was allowed for a further term of 5 years one month with effect from 1/06/2008.
- (i) By a letter dated 27/05/2008 from G. Kamonde Advocate, the 2nd Defendant, Mamuka Holdings was instructed not to accept rent from Robert Mutitu Mutonyi, for reasons that the 2nd Defendant’s lease was expiring on 31/05/2008. The letter demanded vacant possession of the premises hitherto occupied by the 2nd Defendant by 31/05/2008.
- (j) The two Plaintiffs filed complaints with the BPRT being BPRT case numbers 325 and 453 of 2008 but the same

were dismissed on grounds of lack of jurisdiction.

(k) The 1st Plaintiff's tenancy was renewed for a further term of 5 years 3 months with effect from 1/09/2008.

(l) By a letter dated 7/11/2008, the 2nd Plaintiff was informed (by G. Kamonde Advocate) that his (2nd Plaintiff's) lease had expired and that he should hand over possession of the leased portion since the 1st Defendant had "sold the premises to Tiritu Service Station Ltd. who intends to renovate it." The transfer to Tiritu Service Station is entry No. 26 made on 5/09/2008, and on the same day the suit premises were charged to Savings and Loan Kenya Ltd. for Kshs.16,000,000/=.

31. It is on the basis of the above facts that the Plaintiffs contend that there are binding contracts in force binding the 1st Defendant in respect of the tenancies with each of the 2 Plaintiffs. It is also on the basis of the above facts that the Defendants contend that the purported leases are null and void for non-compliance with sections 40 and 41 of the RTA.

32. From the above, the issues that arise for determination are (a) whether the Plaintiffs are protected tenants under Cap 301 Laws of Kenya; (b) if the answer to (a) above is in the negative, what relationship existed between the Plaintiffs and the Defendants; (c) whether the plaint discloses a cause of action against the 2nd Defendant; (d) whether the Plaintiffs have fulfilled the principles for the granting of injunctions as set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**.

33. In determining the above issues, it is imperative to determine the nature of the agreements entered into between the Plaintiffs and the 1st Defendant. From the facts before me, these agreements are not agreements for lease. They are leases which set down the salient conditions to be observed by either party. The leases are all for 5 years and above and both are reduced in writing. What this means is that the tenancies are not controlled tenancies as the Plaintiff's imagine, and therefore lie outside the ambit of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301). As was held in **Bachelors Bakery Ltd.** case, (above), Cap 301 is designed for the protection of tenants who have entered into lease agreements not exceeding five years that have not been reduced in writing. In the instant case, both leases were for more than five years and both were reduced in writing. The BPRT was right in dismissing the Plaintiffs' complaints for lack of jurisdiction.

34. What agreements then existed between the parties herein? Having entered into agreements exceeding five years, the said agreements are contracts falling under the Transfer of Property Act, 1882, Section 106. According to the respective contracts, either party is required to give to the other three (3) months' notice to termination. From the available evidence, the contract with the 1st Plaintiff, James Munuthi Wathingira was renewed for a period of 5 years and 3 months with effect from 1/09/2008; while the contract with the 2nd Plaintiff was renewed for a period of 5 years one (1) month 1/06/2008. The previous agreements both provided for termination notice of three (3) months. The Plaintiffs ought therefore to have been given 3 months' notice. However, in the circumstances of this case, and considering the extent to which the relationship between the Plaintiffs and the Defendants has been eroded, I find that the notice given by the Defendants to the Plaintiffs was adequate.

35. As far as the 2nd Defendant is concerned, it is not disputed that the 2nd Defendant was acting as an agent of a disclosed principal and in the circumstances, there can be no case against him by the Plaintiffs herein.

36. The other issue for determination is whether the Plaintiffs have demonstrated that their case falls within the principles established by the **Giella** case for the granting of injunctions. The facts that have been placed before me show that the Plaintiffs have not met the test for those principles. I am unable to discern any case with a probability of success. The Plaintiffs have quantified the loss/damage they have suffered in renovating the premises if at all they did so, and for this reason they cannot argue that they will suffer irreparable loss and damage if the order for injunction is not granted. I agree with counsel for the Defendants that the Plaintiffs can be adequately compensated in damages if they eventually succeed on their claim against the 1st and 3rd Defendants.

37. In the result, I find and hold that the Plaintiff's application dated 18/11/2008 is without merit. The same is dismissed in its entirety with costs to the Defendants.

It is so ordered.

Dated and delivered at Nairobi this 25th day of September 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Miss Mumbi (Present) for the Plaintiffs/Applicants

M/s Gichara & Co (Absent) for the 2nd Defendants/Respondents

Mr Ndirangu for G Kamunde (Present) for 1st & 3rd Defendants

Weche– court clerk