



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

**Civil Suit 12 of 2008**

**STYLESHOES COMPANY LIMITED..... PLAINTIFF**

**VERSUS**

**HIGBURY PROPERTIES LIMITED..... DEFENDANT**

**RULING**

By notice of motion dated 15.01.08 stated to be brought under section 4 (2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap.301, Order L rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Cap. 21, the plaintiff applied for the following orders, namely, that:-

- a) This application be certified as urgent and service of the same be dispensed with in the first instance.
- b) The defendant/respondent, its agents and/or servants and/or employees be restrained from undertaking any structural repairs, alterations and/or renovations to the demised premises being a hotel on the ground floor of Land Reference No.209/928/3, more particularly known as “Whitespot Restaurant” inconsistent with the plaintiff’s controlled tenancy with the defendant until the final determination of this application.
- c) The plaintiff/applicant be granted the first option to re-occupy the demised premises being a hotel on the ground floor of Land Reference No.209/928/3, more particularly known as “Whitespot Restaurant” upon repairs and/or renovations to the demised premises in compliance with Magistrate’s Court (City Court) Order in Criminal Case No.M 291 (A) of 2006 made on 26.11.07.
- d) The costs of this application be provided for.

The grounds upon which the application is based are:-

1. The plaintiff has been a tenant of the defendant/respondent for all that demised premises being a hotel on the ground floor of Land Reference No.209/923/3, more particularly known as “Whitespot Restaurant” along Moi Avenue, Nairobi at a monthly rent of Kesh.3,700/=, declared by the Business Premises Rent Tribunal as the Standard Rent in BPRT Case No.157 of 1997.
2. The defendant/respondent has, during the tenancy, been harassing the plaintiff, together with the other tenants by attempting to alter, vary and even terminate the tenancy in contravention of the provisions of

the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap.301 which precipitated BPRT Case No.157 of 1997. The plaintiff has been depositing monthly rent with the tribunal.

3. On 26.11.07 the Magistrate's Court (City Court), Nairobi issued an order in Criminal Case M 291 (A) of 2006, under the provisions of the Public Health Act, Cap.242 closing the demised premises and, accordingly, the defendant ordered to undertake renovations and/or repairs to the premises within 90 days.

4. On 24.12.07 the defendant through its agents and/or servants illegally evicted the plaintiff from the premises without any notice.

5. The repairs and renovations notice is due for expiry on 28.02.08.

The application is supported by the affidavit of James Njoroge Mwigani, a director of the plaintiff/applicant company sworn on 15.01.08 plus his supplementary affidavit sworn 18.01.08.

On 24.01.08 the matter came up before me. The plaintiff/applicant was represented by learned counsel, Mr N. Kamau while there was no appearance for the defendant/respondent. Plaintiff's/applicant's counsel informed the court that the matter was supposed to be for *inter-partes* hearing that day but that the plaintiff/applicant had not been able to serve the defendant/respondent, which is a limited liability company. Plaintiff's/applicant's counsel asked for a hearing date within 7 days and undertook to serve the defendant/respondent by registered post through the defendant's/respondent's registered office address. The court fixed 04.02.08 for *inter-partes* hearing and directed the plaintiff/applicant to serve the defendant/respondent.

On 04.02.08 the plaintiff/applicant continued to be represented by learned counsel, Mr N. Kamau but there was no appearance for the defendant/respondent. Plaintiff's/applicant's counsel informed the court that the defendant/respondent had been served by registered post through Box 56614, Nairobi and that the court papers had been posted on 28.01.08. There is in the file an affidavit of service by William Kungu Mundia, process server sworn on 01.02.08 to that effect, accompanied by a Certificate of Posting Registered Postal 'Artile'. The last term 'Artile' seems to be a mis-spelling of the term Aricle. This court reckoned that the 7 days that had elapsed between 28.01.08 when the court papers were posted and 04.02.08 when the matter came up for hearing was adequate time for the papers to have reached the defendant/respondent and that there was adequate service under Order V rule 2 (b) of the Civil Procedure Rules. Accordingly, the court heard the notice of motion application notwithstanding the defendant's/respondent's absence.

Plaintiff's/applicant's counsel essentially adopted the notice of motion and its supporting documents.

I have given due consideration to the application and the supporting affidavits along with their annexures.

I note from the supporting affidavit of James Njoroge Mwigani sworn on 15.01.08:-

a) That the Public Health Department of the City Council of Nairobi initiated proceedings in the Magistrate's Court (City Court) requiring the defendant to undertake repairs and renovations to the roof and upper floors of the suit premises which have been in a poor state of repair.

b) That the Magistrate's Court (City Court) Nairobi issued an order on 26.11.07 in Criminal Case No. M 291 (A) of 2006 in which the defendant was ordered to close the premises and undertake repairs and renovations within 90 days.

According to James Njoroge Mwigani, the repairs and renovations notice is due to expire on 28.02.08. However, he contends that the repairs the defendant company embarked upon go beyond repairs and renovations to the roof and upper floors of the suit premises and that the defendant is using the Magistrates Court's repair and renovation order to evict the plaintiff and that since the plaintiff's tenancy of the suit premises is a controlled tenancy, the defendant and/or his agents should be restrained from

using the repair and renovation order to evict the plaintiff and terminate his tenancy of the suit premises.

The supporting affidavit of James Njoroge Mwigani sworn on 15.01.08, *inter alia*, depones as follows;

**‘8. That on 24<sup>th</sup> December, 2007 the defendant through his agents and/or servants descended upon the demised premises at around mid-might and broke into the premises, threw out furniture, food and other material in the premises and fenced off the premises purportedly in order to carry out repairs in the premises.**

**10. That the order nevertheless did not order eviction of the plaintiff from the premises and therefore the defendant ought to have sought from the court an order for vacant possession by the plaintiff, among other tenants, in order to be able to fully comply with the order to undertake repairs and renovations in the premises, which would have taken care of the tenancy after the renovations.**

**11. That it would appear, given the manner and the timing the eviction was carried out, that the defendant wanted to use the order as a cloak, device or contrivance to evict the plaintiff and the other tenants from the premises which it could not otherwise lawfully do under the provisions of Cap.301 of Laws of Kenya.**

**12. That I have visited the demised premises and it is clear that the renovations being carried out are intended to change the structure of the premises different from a hotel business so that the defendant can put in other tenants and increase rent after the renovations.**

**13. That the plaintiff is entitled to be given the first option to re-occupy the premises after the repairs have been carried out because legally the tenancy is still in force until it has been terminated under the provisions of Cap.301 Laws of Kenya.**

**14. That meanwhile the defendant should be stopped from undertaking any structural repairs, alternations and/or renovations inconsistent with the hotel business the plaintiff has been carrying out in the premises.’**

The supplementary affidavit of James Njoroge Mwigani sworn on 18.01.08, *inter alia*, depones:

**‘4. That the premises (sic) being undertaken are inconsistent with the plaintiff’s tenancy as the respondent is partitioning the premises into small portions which I believe are intended to be let out to many tenants as stalls, upon completion of the repairs.**

**5. That it is clear that the intention of the respondent is to illegally terminate the tenancy.’**

The supporting affidavit of James Njoroge Mwigani also depones that there has been a dispute between the plaintiff and defendant with regard to the tenancy owing to the defendant’s constant illegal attempts to alter, vary and even terminate the tenancy of the plaintiff, among other tenants; that the dispute was taken to the Business Premises Rent Tribunal (BPRT) by the plaintiff, together with other tenants and that the Tribunal assessed the rent at Kshs.3,700/= per month; and that the plaintiff has not been in breach of any covenant of the tenancy, particularly the covenant to pay rent and that the plaintiff has deposited with the Tribunal monthly rent for up to the month of December, 2007.

The claims made on oath by James Njoroge Mwigani as director of the plaintiff company against the defendant company are serious and depict the defendant in negative light. The defendant company has filed no response to the plaintiff’s claims, which remain uncontroverted.

The substantive suit filed on 16.01.08 regarding the suit premises prays for judgment against the defendant for:-

a) An order granting the plaintiff the first option to re-occupy the demised premises being a hotel on the

ground floor of Land Reference No.209/928/3 Nairobi, more particularly known as “Whitespot Restaurant” upon completion of repairs and/or renovations in compliance with Magistrate’s Court (City Court) Order in Criminal Case No. M 291 (A) of 2006 made on 26.11.06.

b) Costs of this suit and interest.

I am satisfied on the uncontroverted affidavit evidence filed in support of the notice of motion application dated 15.01.08 that the plaintiff/applicant has genuine cause for his apprehension that the defendant/respondent has a sinister motive for descending upon the suit premises at around mid-night on 24.12.07 and throwing out the plaintiff’s/applicant’s furniture, food and other material in the premises and that the plaintiff/applicant is entitled to be protected by the court. I make the following orders:-

1. Interim restraining orders are hereby issued in terms of prayer (b) in the notice of motion dated 15.01.08 until hearing and determination of the main suit.
2. Prayer (c) in the notice of motion dated 15.01.08 is suspended pending hearing and determination of the main suit, which suit should be fixed for hearing on a date after 28.02.08 when the notice of repairs and renovations to the suit premises is due to expire.
3. Costs of the notice of motion application shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 19<sup>th</sup> day of February, 2008.

**B.P. KUBO**

**JUDGE**