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

Civil Suit 115 of 2008

SUPER COSMETIC……..PLAINTIFF/APPLICANT

VERSUS

JUBILEE INSURANCE CO. LTD…….....DEFENDANT/RESPONDENT

R U L I N G

1. The instant application is brought under Order 39 Rules 1, 3(1), (2) and (3) and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all enabling provisions of the law by way of Chamber Summons dated 1/04/2008. The applicant prays for orders:

(1) THAT this application be heard as a matter of urgency.

(2) THAT service be dispensed with and the application be heard ex-parte in the first instance.

(3) THAT the Defendant do hereby be restrained from denying the Plaintiff access to the suit premises by compelling the Defendant to remove the locks on the suit premises being Shop Number 1 situated on Land Reference Number 209/4914 in the building known as Jubilee Insurance Exchange, Mama Ngina Street, Nairobi and replace the same with new ones and hand the keys over to the Plaintiff and withdraw it's agents and/or servants, namely, the personnel from the security company.

(4) THAT the Honourable Court be pleased to grant a Temporary Injunction valid for 14 days by restraining the Defendant by itself or through it's agents, servants and/or employees from barring and/or denying access to the said premises.

(5) THAT this Honourable Court be pleased to grant a Temporary Injunction valid for 14 days by restraining the Defendant by itself or through it's agents, servants and/or employees from entering into the said premises and removing the Plaintiff's goods, stock-in-trade, furniture, fixtures and fittings.

(6) THAT costs of this application be provided for.

(7) Any other or further relief as this Honourable Court may deem fit and just and convenient to grant in the circumstances"

on the grounds:

(a) That the Defendant has acted unlawfully by restraining the Plaintiff from entering it's place of business and/or accessing it's goods, stock-in-trade, furniture, fixtures and fittings.

(b) That there is no court order whereby the Defendant was entitled to seal and lock up the premises of the Plaintiff.

(c) That the Plaintiff's employees will suffer as their salaries which are due cannot be paid to them.

(d) That the Plaintiff has a bona fide suit with more than probable chances of success.

(e) That in the circumstances on the grounds of convenience and the fact that damages cannot compensate the Plaintiff for loss of business and credibility in business whereby it would suffer irreparably.

(f) The Plaintiff is ready to give an undertaking in damages in case its claim herein fails or the injunction turns out to be unjustified.

(g) That the interests of justice can only be met by granting this application as enumerated hereinabove.

(h) ***And on grounds as set out in the Affidavit of MOHAMED FAZAL VIRANI and on further grounds and reasons to be adduced at the hearing.***

2. The affidavit in support is sworn by **Mohamed Fazal Virani** who says that he is the Managing Director and principal shareholder of the plaintiff company and that he has been duly authorized by his co-director, **Hanif Virani** to make and swear the Affidavit. He avers that on 1/04/2005, the Defendant/Respondent (landlord) welded other looks upon the plaintiff's existing locks despite the fact that the plaintiff/applicant owed no rent arrears; and despite the fact that there was no court order to back up the Defendant's actions; and that for these reasons, the court should not be misled into upholding the respondent's illegal actions. The applicant has given an undertaking to pay the sum of Kshs.15,000,000/= incase his claim against the defendant/respondent fails.

3. The applicant has annexed to his affidavit a bundle of correspondence. The real dispute between the parties is whether there was a lease between them and if there was, whether the tenancy was a controlled one or not. Contemporaneously with the application, the applicant has filed suit accusing the defendant that on 1st April 2005, and without a valid court order, the Defendant through its agents servants and/or employees sealed the shop hitherto occupied by the applicant for his cosmetics business by welding other padlocks thereon thereby causing damage to the applicant's property. The plaintiff/applicant alleges that by the defendant's actions, the plaintiff/applicant has suffered immeasurable damage and loss and thus prays for judgment against the defendant for:?

a. ***An Order compelling the Defendant to immediately remove all it's locks from the premises being Shop Number 1 situated on Land Reference Number 209/4914 in the building known as Jubilee Insurance Exchange, Mama Ngina Street, Nairobi.***

b. ***An Order restraining the Defendant by itself or through it's agents, servants and/or employees from barring and/or denying access to the said premises.***

c. ***An order restraining the Defendant from entering into the said premises and removing the Plaintiff's goods, stock-in-trade, furniture, fixtures and fittings.***

d. ***That if the goods have been removed a judgment for the Plaintiff against the Defendant in the***

sum of Kshs.15,000,000/=.

e. ***An Order for General Damages.***

f. ***Interest at commercial rates from the date of conversion until the goods or the value thereof have been reimbursed and/or returned.***

g. ***Costs of this suit together with interest thereon at court rates.***

h. ***Such other or further relief as this Honourable Court may deem fit.***

4. The application is opposed. The Replying Affidavit is sworn by **Jackie Oyuyo** (Oyuyo), a Legal Officer of the Defendant/Respondent who says that there is no lease agreement entered into between the plaintiff and the defendant save that the Respondent offered one Mohamed Fazal Virani a month to month tenancy that was to expire on 31/03/2008, as per the letter of offer dated 11/07/2002. She says that Mr. Virani did not return a duly signed copy of that letter agreeing to the terms and conditions of the proposed lease. According to the said letter which was annexed to Oyuyo's affidavit and marked "***JO-1"*** the lease was for a term of 5 years and 7 months from 1/09/2002. Details of the yearly rent, payable quarterly in advance, the service charge, also paid quarterly in advance were set out in the said annexture JO-1. The applicant was required under the lease, to pay a deposit of Kshs.543,668/= representing three months' rent and service charge for the last quarter of the lease. It was also a term of the lease that the lease would be stamped and registered within three (3) months after acceptance of the offer and further that if the lease was not executed by the tenant and returned to the landlord within thirty (30) days after being received by the tenant and the legal fees thereof paid "***then the lease agreement shall automatically terminate***." The applicant was also asked to forward a cheque for Kshs.1,993 768/= representing rent for September, October, November and December 2002 and deposit. The applicant was also informed that later, he would be required to furnish a further cheque in the name of Christine Oraro & Company Advocates as soon as possible. The applicant was finally told that if his acceptance was not received by 16/08/2002, the landlord would conclude that he (applicant) did not wish to take the offer and that thereupon irrevocable arrangements for a new tenant would be made.

5. It is the above terms that are at the centre of this dispute. Oyuyo says that when the applicant failed to return the lease duly signed signaling agreement with the terms set out therein, the tenancy became a monthly tenancy, and that by notices dated 10/01/2008 and 12/03/2008 respectively the applicant was informed that the defendant/respondent would not be renewing the lease and that they anticipated to take possession of the premises on or before the close of business on 31/03/2008. She also says the applicant did not pay attention to the notices and that in the circumstances the applicant is the author of his own woes. The respondents were however ready and willing to open up the premises from the back to allow the applicant cart away its property therefrom.

6. During the hearing Mr. Rustam Hira who appeared for the applicant submitted that the letter of lease was returned to the defendants on 4/02/2003. There is on record and annexed to Mr. Virani's affidavit a letter dated February 4, 2003 a letter from the defendant to Mr. Mohamed F. Virani which reads:?

"**February 4, 2003**

Mohamed F. Virani

Jubilee Insurance Exchange

NAIROBI.

Dear Sir,

LEASE OF SHOP NO. 1 – JUBILEE INSURANCE EXCHANGE

To enable us prepare the lease we require the names and addresses of two Directors and you have supplied the names of Mr. M.F. Virani and Mr. H.M. Virani as being the Directors of Super Cosmetic Ltd.

We however have no documentation with us pertaining to Super Cosmetics Ltd. We therefore require the Certificate of Incorporation for the above company to enable us to proceed with the above.

On the other hand, the letter of offer is in the name of Mohamed Fazal Virani which indicates that this business is owned by a sole proprietor. In such a case we require the names of two other guarantors apart from yourself in order to enable us to prepare the lease and comply with the legal requirements.

We need to sort out this urgently since this matter has been pending for a while. Kindly revert with details requested above so we may finalize this soon.

Yours faithfully,

Signed

ALICE KAMAU

FOR: EXECUTIVE MANAGER

PROPERTY & INVESTMENTS

C.C. Christine Oraro & Co.

Advocates

Corner House

NAIROBI."

7. Though the respondents have not said anything about this letter in their Replying Affidavit, it would seem to me that this letter superceded the earlier letter dated 11/07/2002, since by this letter of 4/02/2003, the defendants/respondents were still talking of preparing a lease. For this reason, Mr. Hira submitted that in fact there has never been any written lease between the parties and that accordingly the tenancy arrangement between the two parties was governed by the provisions of Cap 301. Mr. Hira supported his arguments with the decision in the case of **Tiwi Beach Hotel Limited –vs- Juliane Ulrike Stamm [1990] 2 KAR 189**. Among the issues that arose in that case was consideration of an application for eviction of the tenant under prior agreement and it was held that each party to an application was expected to make full disclosure of all the facts material to the application which are known to him or her. Mr. Hira also submitted that according to the judgment in the **Tiwi case** the court disabused the

appellant (landlord) of the contention that letters can serve as notices for termination of a tenancy since in that case, the letters were not in the prescribed form and consequently had no effect on the respondent's tenancy. Mr. Hira submitted further that on this basis, the defendant/respondent in the instant case had no colour of right to lock out the applicant from the suit premises.

8. The applicant's counsel also cited from "**MULLA ON THE TRANSFER OF PROPERTY ACT, 1882 – Eighth Edition by R.K. Abichandani** where the following passage appears at page 927:-

"***Lessor can resume possession, only in a manner known to, or recognized by law. A lessor, with the best of title have no right to resume possession extra-judicially by the use of force from the lessee even after the expiry or earlier termination of the lease by the forfeiture or otherwise. The use of the expression "re-entry" in the lease deed does not authorise extra-judicial methods to resume possession. Under law, the possession of a lessee, even after the expiry or its earlier termination, is juridical possession and forcible dispossession is prohibited. A lesee cannot be dispossessed otherwise than in due course of law."***

9. Mr. Hira submitted that in the instant case the defendant/respondent acted extra judicially because they did not obtain a court order to lock the applicant out of the suit premises and that for this reason, the applicant is entitled to the mandatory order of injunction sought. The applicant also relied on the case of **Kamau Mucuha and The Ripples Limited – Court of Appeal at Nairobi, Civil Appeal No. 186 of 1992.** In the case, Kamau Mucuha (the applicant) had sublet a shop on plot LR No.209/4985, Mfangano Street Nairobi to the respondent (The Ripples Ltd) for a team of 5 years and 5 months from 1st February 1988, at a monthly rent of Kshs.10,000/= payable each month in advance, with a provision that the rent would be revised after 2½ years but with a limit of Kshs.13,000/= per month for the revised rent. The tenant also had the option to renew the sublease for a further term of 2 years and 6 months by sending a written request to the applicant not less than 3 months before the expiration of the term at a rent of Kshs.16,000/= per month. The tenant used the premises to run the business of a restaurant.

10. On the 17/07/1992 the applicant wrote to the tenant claiming Kshs.97,920/= by way of arrears of rent and interest. When the tenant refused to meet the demand, the applicant instructed a firm of auctioneers who invaded the tenant's premises and levied distress upon the tenant's goods and carried them away. The tenant was also evicted from the premises and immediately thereafter, the premises were sublet to a new tenant, **Unitrade Printers Limited**. It transpired that the new subtenant provided the transport to cart away the tenant's goods. Being aggrieved by the applicant's actions, the tenant filed a chamber summons seeking, *inter alia*, a mandatory injunction requiring the applicant to forthwith reinstate him in the premises unconditionally and also to return forthwith the tenants goods attached in their original condition in default for the applicant to pay their value.

11. After hearing the application which was vehemently opposed, the court (Mwera, J) issued both a prohibitory injunction restraining the applicant his servants and/or agents from alienating or demising the suit premises and also a mandatory injunction requiring the applicant to forthwith, reinstate the tenant into the premises. The applicant filed a notice of appeal and also filed the application before the Court of Appeal in which it was argued on behalf of the applicant that the Superior Court had not applied the proper test in granting the injunctions, and also argued that the suit premises had been substantially altered after they were sublet to the new tenant who carried on the business of a printing press and further that the learned Judge had not considered the detriment that would be suffered by the applicant vis-à-vis the benefits that would accrue to the tenant.

12. The Court of Appeal held in determining the appeal that it is clear both on authority and principle that there is jurisdiction to grant a mandatory injunction in an appropriate case". The court also found and held that the applicant was in flagrant contempt of the three orders that had been issued against him by the Superior Court. Kwach JA (as he then was) referred to the words of **Goddard L.J** in the case of **Thompson v Park [1944] 2 AII ER 477 at page 479 – E**: which, in my view would also reflect the applicant's situation in the instant case as put forth by his counsel Mr. Hira at the hearing hereof:?

"***Having got back into the house with strong hand and with multitude of people, he has established***

himself in the house, and then says:

"***I ought not to have an injunction given against me to make me go out because I got back here and got my boys back and therefore, I want the status quo preserved".***

The status quo that could be preserved was the status quo that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a court of law that we ought to help the defendant, who has trespassed and got himself into these premises in the way in which he has done and say that that would be preserving the status quo and that it would be a good reason for not granting an injunction."

13. As to whether or not a mandatory injunction can be granted, Kwach JA (as he then was), referred to the case of **Canadian Pacific Railway v Gand [1949]2 KB 239** where Cohen L.J. confirmed that a mandatory injunction in grantable when he said at page 249:?

"***Mr. Collard's fourth point raises the question whether interlocutory relief should be granted. I entirely agree with what he said at the end of his argument, that the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant but it can be granted."***

14. Mr. Monari for the defendant/respondent thinks otherwise. He argued on behalf of his client that in the absence of a formal lease between the parties, there was no controlled tenancy. He relied on the case of **Bachelors' Bakery Ltd. –vs- Westlands Securities Ltd. [1982) KLR 366** and argued that the contract in this case was in excess of 5 years and that it expired on 31/03/2008 and that requisite notice was given to the applicant to vacate the premises. Mr. Monari referred to the letter dated 10/01/2008 which he said gave notice to the applicant that the landlord would not be renewing the lease. The defendant/respondent did not unfortunately annex a copy of that letter of 10/01/2008 to their Replying Affidavit but the same appeared as annexture MFV1/A to Mr. Virani's supporting affidavit and the letter informed the applicant that the lease (no details given of what lease was being referred to) would be expiring on 31/03/2008 and that the defendant/respondent had no intention of renewing the same.

15. In the **Bachelor's Bakery Ltd.** case (above) the appellant occupied a shop premises owned by the respondent under an unregistered lease agreement for a period of six years and upon expiry of the lease, the appellant refused to give up vacant possession and the respondent filed suit for same. It was argued that since the lease was unregistered it created a monthly tenancy terminable by requisite notice, or in the alternative that it created a controlled tenancy terminable only by notice under section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301). On appeal against summary judgment that the lease though unregistered was still enforceable, the Court of Appeal held, *inter alia,* (a) That Cap 301 is designed to offer protection to tenants whose leases do not exceed five years and that have not been reduced into writing (b) that an agreement for lease exceeding five years makes the agreement a contract falling under the Transfer of Property Act (ITPA) 1882 section 106 and that such an agreement is valid between the parties even in the absence of registration; and (c) 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.

15. Mr. Monari also cited the case of **Saheb –vs- Hassanally [1984] KLR 186** and submitted that proper notice on the instant case was issued to the applicant and that upon expiry of that notice and the lease, the defendant/respondent was entitled to do what he did and that the plaintiff/applicant cannot now seek protection under Cap.301. Mr. Monari submitted further that the provisions of Cap 301 could only be availed to the applicant if he had filed a reference. Mr. Monari also submitted that the authorities cited by the applicant are inapplicable to the circumstances of this case.

16. Regarding the prayer for mandatory injunction, Mr. Monari submitted that the same is not available to the applicant on the authority of **Giella –vs- Cassman Brown & Co. Ltd. [1973]EA 358** and **Aikman –vs- Muchoki [1984] KLR 353.** The **Giella case** lays down the principles for the granting of injunctions, namely that (i) an applicant must show a prima facie case with a probability of success (ii) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury

and (iii) when the court is in doubt it will decide the application on a balance of convenience.

17. The **Saheb** case dealt with an issue where notice had been given to the tenant under Cap 301 after which a reference was duly filed. In the **Aikman case**, the 1st appellants were put into possession of the estates of the 2nd and 3rd appellant companies as receivers and managers under the terms of a debenture. Claiming that the respondents who were directors of the two companies, had entered into the estate while the appellants' appointments were in force and forcibly ousted the appellants' servants and refused to permit them to enter the premises, the appellants instituted a suit in the High Court and thereafter applied for certain interlocutory injunctions against the respondents. The application was dismissed for not meeting the requirement for the grant of injunctions. On appeal which was allowed, the Court of Appeal reiterated the conditions for the granting of interlocutory injunctions as set out in the **Giella case,** and held that though these were properly understood by the court, they were wrongly applied. The following holdings are of relevance to the instant application ?

"***4. "The respondents having unlawfully seized possession of the estates were infringing on the rights of the appellants and ought to have been restrained by an injunction as equity does not assist law brokers."***

5. ***The position taken by the High Court that any injury suffered by the appellants as a result of the trespass was capable of being compensated by damages was wrong because a wrongdoer cannot keep what he has unlawfully taken just because he can pay for it. The real injury arose from the unlawful seizure of the estates by the defendants in defiance of the law.***

6. The judge was wrong in his observation that because liability was in dispute, granting an injunction would be unfair for being based on a contingent liability yet to be ascertained. Interlocutory injunctions can be properly granted where liability has not yet been ascertained.

7. *(Obiter)* ***To allow and protect the respondent's unlawful acts would render totally valueless the concept of sanctity of contract security of mortgages, debts, charges and debentures by sweeping the lost under the carpet and then leaving the field free for insurgents to play havoc by perpetrating illegal infringements. That is not the kind of legacy to leave for posterity***

8. *(Obiter)* ***In the field of civil law it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of common law courts to do so and if this tradition is departed from the nation will suffer."***

18. The above are the pleadings and the arguments and the law. I have considered all the pleadings and the submissions. Applying the law as set out to the circumstances of this case, I am persuaded that the applicant is entitled to the interlocutory injunctions sought. It is not in dispute that the defendant/respondent went ahead and closed the applicant's business premises without a valid court order. As stated in **Mulla**, the defendant/respondent gained entry into the suit premises through extra judicial means, whether or not both the notice and the lease (whatever its nature) had expired. The defendant/respondent was required to observe the law. I have also considered all the authorities cited to me by the defendant/respondent and found that in all these cases, the landlords did not take any action until the matter had been taken to court. When the tenants failed to give vacant possession as demanded the landlords immediately sued. In this case, the landlord simply moved to weld other locks on top of the applicant's locks. As both **Mulla** (above), and the **Kamau Mucuha** case (above) indicate it would be unfair in this case to refuse to grant the orders sought simply because the defendant/respondent purported to give notice to the applicant. In any event the defendant/respondent has not clearly explained to the court what happened between it and the applicant after it wrote its letter dated 4/02/2003. It is thus not clear what kind of lease it was talking about when it said that the lease was coming to an end on 31/03/2008. It is my view that the damage done by the defendant/respondent in this matter is so grievous that to allow the defendant/respondent to get away with it would be to bring the courts into disrepute. Although it is not stated in the applicant's pleadings that the tenancy in question is a '***controlled***' tenancy, I am guided by principle number (iii) of the **Giella case** and find and hold that the balance of convenience in this case tilts in favour of the applicant. If indeed the defendant/respondent had acted in accordance

with the law, and not taken the law into their own hands, I would not have had any hesitation in dismissing the applicant's application. I agree with what is stated in **Mulla** (above) that "**a lessor, with the best of title, has no right to reserve possession extra-judicially by the use of force from the lessee after the expiry or earlier termination of the lease."**

19. In the circumstances, I do allow the applicant's application and make the following orders:?

(a) That the defendant be and is hereby restrained from denying the plaintiff access to the suit premises and is hereby compelled to remove the locks on the suit premises being shop No. 1 situated on Land Reference Number 209/4914 in the building known as Jubilee Insurance Exchange, Mama Ngina Street, Nairobi and replace the same with new ones and hand the keys over to the plaintiff and to withdraw its agents and/or servants, namely the personnel from the security company'

(b) That the costs of this application shall be borne by the defendant/respondent.

It is so ordered.

Dated and Delivered at Nairobi this 14th day of May 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:?