



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT 219 OF 2008**

**ABDUL SHAKOOR KHILJI**

**(suing on behalf of Mohammed Idris Khilji alias Mohammad Idris Khilji  
alias**

**Muhammad Idris Khelji).....PLAINTIFF/APPLICANT**

**VERSUS**

**CITY SQUARE PROPERTIES LIMITED.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. The Plaintiff/Applicant (herein referred too as the Plaintiff) filed suit on 30/05/08 alleging that the Defendant/Respondent (defendant) intends to unlawfully terminate the lease agreement between itself and the Plaintiff on the ground that the Defendant intends to repair/renovate the suit premises standing on L.R. number 209/2711 and IR 5846/1 and specifically the shop premises situate on the ground floor of the building on the said plot. The Plaintiff alleges that he still has a lease with the Defendant over the same suit premises for ten (10) years commencing 1/10/2002. The Plaintiff prays for judgment against the Defendant as follows:-

***(a) A declaration that the actions of the Defendant are unlawful and that the repairs sought can be carried out by either the Defendant or the tenant while the tenant is still in possession of the suit premises known as plot LR Number 209/2711 and IR 5846/1.***

***(b) An order of permanent injunction restraining the Defendant by itself and or its agents and or its servants and or its employees from interfering with the Plaintiff's quiet possession of the premises known [as] LR Number 209/2711 and IR 5846/1 until the expiry of the remainder of the lease term or save in accordance with the law***

***(c) Costs of this suit.***

***(d) Any other and further orders that this court may deem fit so to grant.***

2. Contemporaneously with the suit, the Plaintiff filed the instant application under Certificate of Urgency on grounds that the Defendant has demanded that the Plaintiff herein vacates the suit premises before expiry of the lease term which is November 2012. The Chamber Summons is brought under Order

39 Rules 1, 2 and 9, Order 5 Rule 17 and Order 49 Rule 5 of the Civil Procedure Rules and Sections 3A and 95 of the Civil Procedure Act and all other enabling provisions of the law and by it the Applicant seeks ORDERS ?

1. *That this application be certified as urgent and service of the same be dispensed with in the first instance and the same be heard exparte.*
2. *That an order of injunction do issue restraining the Respondent/Defendant by itself or its servants and or its employees and or its agents from interfering in any manner with the plaintiffs' quiet possession of those premises known as L.R. Number 209/2711 and I.R. 5846/1 and specifically the shop premises situate on the Ground floor of the building on the said plot until this application is heard interparte.*
3. *That an order of injunction do issue restraining the Respondent/Defendant by itself and or its servants and or its employees and or its agents from interfering in any manner with the plaintiff's quiet possession of those premises known as L.R. Number 209/2711 and I.R. 5846/1 and specifically the shop premises situate on the Ground floor of the building on the said plot until this suit is heard and determined.*
4. *The plaintiff and or the tenant be at liberty to carry out any required renovations and repairs on those premises known as that plot known L.R. Number 209/2711 and I.R.5846/1 and specifically on the shop premises situate on the Ground floor of the building on the said plot and offset the costs from future rent.*
5. *Costs of this application be provided for.*

3. The application is premised on the grounds that

1. *The tenant's lease term vide a lease agreement runs out in the year 2012 November.*
2. *The defendant is demanding that the tenant herein vacates the lease premises before expiry of the lease term.*
3. *The tenant is ready and willing to carry out any required repairs on the leased premises and offset his cost from future rent.*
4. *The mentioned repairs by the defendant can be carried out while the tenant is still in possession of the leased premises.*
5. *The tenant stands to suffer irreparably unless this application is granted.*
6. *That it is in the interest of justice that this application is granted.*

4. There is also an affidavit in support sworn by **Abdul Shakoor Khilji** who says that he brings this suit on behalf of one Mohammed Idris Khilji alias Muhammad Idris Khilji alias Muhammad Idris Khelji under a Power of Attorney donated to him by Mohammed Idris Khilji (the tenant) as can be seen from the annexure marked "ASK 1". The Power of Attorney is dated 24/03/08 and authorizes the Plaintiff to be the lawful attorney to transact any lawful transaction in respect of the suit property. The deponent says that on 1/10/2002 the Defendant and the tenant entered into a written lease agreement over the suit property for a period of ten (10) years starting from 1/10/2002 in which the following salient conditions appear –

- (i) *Monthly rent would be Kshs.40,000/= (read forty thousand);*
- (ii) *There would be a 15% rent increment after two years;*

***(iii) The tenant would have quiet possession and enjoyment of the suit premises upon payment of rent and observance of the terms and conditions of the aforesaid lease;***

which conditions the deponent says the tenant has faithfully complied with and that the tenant had enjoyed quiet possession until the 29/04/08 when a director of the Defendant approached the Plaintiff seeking mutual consent from the Plaintiff to give vacant possession to the Defendant so as to enable the Defendant carry out repairs on the suit premises; that the Plaintiff declined such overtures, but that by a letter dated 30/04/08 to the Plaintiff, in which the writer simply signed off as “Director” the defendant says” ?

“30<sup>th</sup> April 2008

Mr. Mohammed Idris Khelji

P.O. Box 14414

NAIROBI.

BY HAND DELIVERY AT:

REDBRICKS HOUSE

LUTHULI AVENUE

NAIROBI.

Dear Sir,

**RE: RENOVATIONS OVER L.R. NO.209/2711 LUTHULI AVENUE NAIROBI**

We reference our meeting of yesterday with your personal representative Mr. Shoaib Mohammed whereof the captioned matter was discussed.

The undertaking of these works is a consequence of a feasibility study by a consultant intended to provide more and better designed space.

This translates to tenants giving vacant possession of the premises for the duration of the works and securing tenancy once the building is ready for occupation.

In the referred meeting, it was agreed that:-

1. you deliver vacant possession of the premises on or before 30<sup>th</sup> June 2008 to facilitate site preparation by the contractor who estimates the works to take four (4) months to completion if commencement date of 1<sup>st</sup> July 2008 is adhered.
2. you will secure tenancy on the basis of your ruptured lease once the building is ready for occupation and the ruptured lease will be brought to an early end facilitating negotiations for a new lease.
3. we shall bear no losses or any consequential inconveniences arising from this arrangement.

We take this opportunity to thank you for your continued support and look forward to your usual cooperation to a smooth handover.

Yours faithfully,

## **DIRECTOR”**

5. The deponent also says that in the month of November 2007, the Defendant had raised a similar issue with the Plaintiff thus prompting the tenant to seek the protection of the Business Premises Rent Tribunal in Tribunal Case Number 585 of 2007 but realized later that the Business Premises Rent Tribunal did not have the jurisdiction to deal with the matter, hence these proceedings. The deponent contends that the intended repairs are not such as would require the tenant to give vacant possession to the Defendant and that the Plaintiff is genuinely apprehensive that the Defendant’s main intention is to terminate the lease agreement which as of now, still has four (4) years of the term before expiry. The deponent says that the tenant is himself ready and willing to carry out the repairs required at an agreed cost between himself and the Defendant and to offset the cost of such repairs against future rent. The deponent also says that the tenant continues to pay rent due timeously up to and including May 2008. The deponent says that unless the orders sought are granted the tenant is likely to suffer irreparable loss; that the court ought to allow the current lease to run its full term up to November 2012.

6. The application is opposed by the Replying Affidavit sworn by **Kaburu A.P. Kiugu**, a Manager with the Defendant company. He says that the main reason why the Defendant seeks vacant possession is for the Defendant to carry out repairs, rehabilitation and renovations since the Defendant has been taken to court over the delay to effect the repairs, rehabilitation and renovations; that to allow this application would amount to continuing to put the Defendant company under criminal liability and to perpetuate a health hazard as observed by the City Council of Nairobi’s notices. The deponent also says that the responsibility to repair, renovate and rehabilitate the suit premises falls squarely on the Defendant’s shoulders whether or not the tenant is willing to carry out the same; that the repairs required by the City Council of Nairobi are extensive, elaborate, fundamental and hazardous and that it is therefore not possible to carry out such repairs while the tenant is still in occupation of the suit premises. The Defendant lists the following as some of the repairs required of it by the City Council of Nairobi –

- (a) Fixing and laying water supply devises on the whole building.*
- (b) Repairing and cleaning the building walls, internal and external*
- (c) Re-fixing broken windows and panels*
- (d) Mounting and fixing at least three (3) refuse receptacles with tight lids on every floor.*
- (e) Re-fixing all the plumbing systems of the entire building*
- (f) Mounting and fixing new flushing cisterns in the entire building*
- (g) Repairing the roof and ceilings*
- (h) Demolishing illegal structures*
- (i) Mounting and fixing proper wiring system in the building, and removing all the loose and hanging electrical wires in the building*
- (j) Repairing all chipped stairs.*
- (k) Replacing worn out floor titles on the ground, 1<sup>st</sup> and 2<sup>nd</sup> Floors.*

7. The deponent also says that all other tenants on the 1<sup>st</sup> and 2<sup>nd</sup> floors have since moved out of the premises to enable the Defendant carry out the repairs, renovations and rehabilitation required and that the continued stay of the Applicant in its part of the suit premises is –

- (a) Inhibiting other tenants from coming into occupation*

(b) *Preventing the Defendant from enjoying income from his premises*

(c) *Subjecting the Defendant to continued and infinite criminal liability*

8. The deponent contends that once the repairs, renovations and rehabilitation are completed, the tenant will be allowed to reoccupy the premises and be compensated for the period of absence. In the Defendant's letter dated 30/04/08, the Defendant says that it was agreed between the tenant and the Defendant, inter alia, that the Defendant would "**bear no losses or any consequential inconveniences arising from this arrangement.**" The deponent says finally that the Plaintiff's suit is incompetent le mine as inter alia, the purported lease does not support the Plaintiff's case and further that the purported Power of Attorney does not confer upon the Plaintiff the authority to deal with the suit property in the manner that the Plaintiff has set out to do.

9. The application was vigorously canvassed before me on the 2/07/08 but it was not possible to deliver this ruling either immediately or on earlier than today due to great pressure of work. Mrs. Wanjau who prosecuted the application reiterated the averments of the supporting affidavit and also the grounds on the face of the application. She contended that the notice dated 19/02/07 given to the tenant was considered not genuine because of the contents of the Defendant's letter dated 30/04/08. She also said that the proposed repairs could very conveniently and adequately be carried out by the tenant. She argued further that according to the Plaintiff's further Affidavit dated 18/06/08 at paragraph 3 thereof it is clear that no plumbing work is required in the tenant's shop. That the tenant does not require tiles as the tenant has already fixed the same; that the premises staircase is located outside the tenant's shop; that the tenant's shop has been inspected and licensed and is in compliance with the requirements by the City Council Medical Officer of Health. The annexure marked ASK IIA is a copy of a **LARGE TRADER SHOP RETAIL SERVICE** payment receipt dated 9/04/08 while annexure marked ASK IIB is a copy of the Single Business Permit granted to HARAMAYN FREE MARKET, the date of issue being 9/04/08 and due to expire on 31/12/08. At the bottom of the licence appears the following NOTICE –

***“Granting this permit does not exempt the business identified above from complying with current regulations on Health and Safety as established by the GoK and City Council of Nairobi.”***

10. The Plaintiff further contends that it is not clear whether the Defendant truly wants to comply with the City Council notice or whether the proposed works are as a result of "**a feasibility study by a consultant to provide more and better designed space**"; that in any event any intended repairs can be carried out by the occupier of the business to whom all the notices herein should have been addressed. It is contended further that even if the two notices served upon the tenant were genuine, that is to say the notices dated 19/10/07 and the one dated 28/06/07, the Defendant should not require the tenant to vacate. The Plaintiff contends that the provision of running and clean water and the painting of external walls does not need the tenant to vacate. Further, it is contended that failure by the tenant to register the lease under the Registration of Titles Act does not oust the tenant and landlord relationship. Counsel for the Applicant referred the court to the case of **Batchelors Bakery Limited –vs- Westlands Securities Limited – Court of Appeal** at Nairobi, **Civil Appeal No. 2 of 1978**. One of the bones of contention in the said case was the failure to register the lease instrument as required by section 107 of the Transfer of Property Act. It was contended that because of such failure, the Appellant's occupation of the shop became a lease from month to month under section 106 of the ITPA and that the tenancy became a controlled tenancy. The court held, inter alia,

***“--- Section 106 is intended to regulate the giving of notice prior to determination of the lease by parties who have not themselves provided for it. It has no application to the period of the lease which is agreed by the parties in the agreement and therefore fails. I agree that such a contract is valid, inter partes even in the absence of registration, but it gives no protection against the rights of third parties – Grosvenor –vs- Rogan Kamper [1974] EA 446.”***

11. Mrs. Wanjau contends on the basis of the above authority that the lease agreement between the tenant and the Defendant was not disturbed by the notices and the lack of registration and that the same should be allowed to run its full course until November 2012.

12. The court was also referred to the case of **Souza Figueiredo & Co. Ltd. –vs- George Panagopoulos & Others [1959] EA 756** in which the assignment of lease was not registered. Mrs. Wanjau submitted that it was held therein that a party to the lease could incur either a benefit or incur a liability under such a lease. She added that even sections 20 and 21 of the Stamp Duty Act do not bar the user of an unstamped document in any proceedings on condition that such a document is taken to the Collector of Stamp Duty for stamping or payment of the requisite amount by the person who intends to rely on such a document. Mrs. Wanjau submitted that in the circumstances of this case, the Defendant is estopped from running away from the lease.

13. Regarding the Defendant's allegation that there are criminal charges hanging over its head, Mrs. Wanjau contended that the Defendant has not produced any evidence such as a charge sheet to show that indeed there were such charges and that in the circumstances, there is no reason why the tenant should be ordered out of the premises.

14. On the lease agreement itself, Mrs. Wanjau contended that the same provides for arbitration in case of disagreement and that any disagreement concerning this lease should be referred to arbitration as provided therein. Clause 4(f) of the lease provides that "***all questions hereafter in dispute between the parties hereto and all claims for compensation --- shall be referred to arbitration by a single arbitrator ----***". The court notes that this argument on behalf of the Plaintiff was misplaced since there is no prayer to refer this dispute to arbitration.

15. Mr. Katwa Kigen of the firm of Katwa & Kemboy Advocates argued the application on behalf of the Defendant and contended that the Defendant requires vacant possession of the suit premises for the purposes of carrying out repairs required of it by the City Council of Nairobi. He contended that even the Plaintiff himself acknowledges this fact through paragraph 5 and 9 of the Supporting Affidavit. At paragraphs 5 of of the Plaintiff's affidavit the Plaintiff refers to some "purported repairs" and at paragraph 9 the Plaintiff clearly says that he does not think that the repairs, if any are required at all, would require the Plaintiff to vacate the suit premises for the same to be done. Mr. Kigen also contended that the Defendant has undertaken to compensate the Plaintiff for any losses the Plaintiff might incur during the period of vacant possession and that this commitment by the Defendant to compensate the Plaintiff is a sign of good faith on the part of the Defendant in asking the Plaintiff to give vacant possession.

16. Mr. Kigen also argued that the Plaintiff has not demonstrated to the court what loss he would suffer if he was to give vacant possession of the suit premises and that since the Defendant has the responsibility of complying with the notices issued to it by the City Council of Nairobi, it is likely to suffer the consequences of non-compliance if the orders sought herein are granted and particularly because Criminal Case No.980 of 2007 is hanging over the Defendant's head, and further that the order would also perpetuate the public nuisance which the council seeks to remedy. Mr. Kigen urged the court to consider the fact that it is the interest of the public that is at stake in this case and therefore to find that the Plaintiff's interest should not override such an interest Mr. Kigen was particularly against the court granting prayer 4 of the Plaintiff's application since the terms of the lease between the Plaintiff and the Defendant are clear. He also contended that the Public Health Act and in particular that Section 120 thereof requires the Council to close the premises if the nuisance persists beyond the time given in the notices and that issuing the injunction sought would be inviting the Council to do exactly that.

17. Further, Mr. Kigen contended that the plaintiff herein is not a party to the lease and therefore lacks the locus standi on this matter, and that the Power of Attorney under which the Plaintiff brings the suit makes him a third party without locus. On the issue of arbitration Mr. Kigeu argued that once they submit themselves to the court then the issue of arbitration does not arise unless the parties apply to refer the matter to arbitration. I have already made my observation on this point and there is no need to say more about it.. It was also contended on behalf of the Defendant that if the Plaintiff wanted any mandatory orders issued against the Defendant, he should have come to court by way of Notice of Motion and not by Chamber summons, and that in any event, an applicant seeking mandatory injunctions is expected to meet a higher standard of proof.

18. The question that now arises is whether the Plaintiff has met the conditions for the granting of an

injunction as set out in the case of Giella -vs- Cassman Brown & Co. Ltd [1973] EA 358. The Plaintiff has contended that the Defendant has given two conflicting reasons why they want vacant possession in this case:- one is that the Council has asked the Defendant to comply with the Public Health Act, and secondly that a feasibility study is to be done for better design. The Plaintiff has also contended that the Defendant has not proved its allegation that there is a Criminal Case preferred against it by the Council. After carefully considering the facts of this case, I am satisfied that the Plaintiff has satisfied this court that it has a prima facie case with a probability of success. The lease between the parties is still running, and although the Defendant has said that the Plaintiff will be put back into the premises after the repairs, the reasons for the demand for vacant possession are not clear from the pleadings. Further, although in one breath the Defendant says that it will compensate the Plaintiff for any losses suffered during the period of vacant possession there is evidence on record from the Defendant's letter dated 30.04.2008 that the Defendant "shall bear no losses or any consequential inconveniences arising from this arrangement". I also find that the manner in which the Defendant made approaches to the tenant in a rather secretive manner, would seem to suggest to me that the Defendant has ulterior intentions against the Plaintiff. For these reasons, I am persuaded that the Plaintiff is entitled to an injunction.

19. Secondly, I am also persuaded that unless the orders sought are granted, the Plaintiff is likely to suffer irreparable loss. The reason for this is that there is no other independent evidence to show that other tenants in the building have vacated their respective premises as alleged by the Defendant. The Plaintiff might thus be the only person to be forced out of the premises if he fails on this application. The Plaintiff has also stated clearly that most of the repairs purportedly required to be done are not required. That the staircase for example which the Defendant says he will need to repair is situated outside the suit premises. It would seem to me therefore that the Defendant is trying to employ backdoor methods to evict the Plaintiff from the suit premises and if the same happens, the plaintiff is likely to suffer great loss of being unable to find other suitable premises for his business. Finally, and in the circumstances of this case, the balance of convenience would tilt in favour of the Plaintiff.

20. Mr. Kigen argued that the Plaintiff has no locus standi. I am unable to agree with Mr. Kigen on this point. The Power of Attorney under whose authority the Plaintiff brought this suit gives him the authority to deal with the suit premises on behalf of the tenant Mr. Kigen also argued that since the lease between the Plaintiff and the Defendant has not been registered, then the same is not binding. The Batchelor's case (supra) settled this point of law, and I need not say anything more about it because such a contract is valid as between the Plaintiff and the Defendant. It is only third parties who have no protection under such an agreement.

21. I have also considered Mr. Kigen's objection to prayer (4) of the Plaintiff's Chamber summons and I think that whatever repairs need to be done to the suit premises should be done in accordance with the lease agreement. It may not be possible for this court to go out there supervise or ensure compliance with the said order if the same is granted.

22. In the result, I would allow the Plaintiff's application dated 30.05.2008 in the following terms:-

***(1) That an order of injunction do issue restraining the Respondent/Defendant by itself and/or its servants and or its employees and or its agents from interfering in any manner with the Plaintiffs quiet possession of those premises known as L R Number 209/2711 and IR 5846/1 and specifically the shop premises situated on the ground floor of the building on the said plot until this suit is heard and determined.***

***(2) That costs of this application shall be borne by the Defendant.***

It is so ordered.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of October 2008.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:

Mrs. Kingoo-Wanjau (present) For the Plaintiff/Applicant

Mr. J. Bett holding brief for K. Kigen for the Defendant/Respondent