



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Suit 185 of 2008**

**WONDERLAND CASINO LTD .....PLAINTIFF**

**VERSUS**

**UNIVERSITY OF NAIROBI .....  
DEFENDANT**

**R U L I N G**

Wonderland Casino Limited, the plaintiff herein took out a summons dated 21<sup>st</sup> July 2008 in which it prayed for an order of temporary injunction to restrain the University of Nairobi, the defendant herein, by itself, agents or its servants, representatives and or officers from evicting and or interfering in any way with the plaintiff's quiet possession and or enjoyment of the premises known as Mombasa/Block XIX/234, Mezzanine Floor, Mombasa Reinsurance Plaza pending the hearing and determination of this suit. The application is supported by the affidavit of Samuel Muguna sworn on 21<sup>st</sup> July 2008. The defendant opposed the summons by filing grounds of opposition, a replying affidavit of Professor Peter Mulwa Felix Mbithi and a further replying affidavit of Stephen Kamau.

It is the submission of Mr. Mengich, learned advocate for the plaintiff that the plaintiff has a prima facie case with a probability of success. It is said that the plaintiff has been in occupation of all that premises known as Mombasa/Block XIX/234, Mezzanine Floor, Mombasa, Reinsurance Plaza since 15.04.2003 following a lease agreement executed by it with Kenya Reinsurance Corporation Ltd for a term of five years and one month. It is claimed that before the lease lapsed the same was renewed for five years and one month with effect from 30/04/2008. The aforesaid premises was sold to the defendant herein who assumed ownership thereafter. It is claimed that the defendant received and accepted payment of rent of Kshs.305,210/15 for the month of June 2008. By a letter dated 12<sup>th</sup> July 2008, the plaintiff purported to return the aforesaid sum to the plaintiff alleging that no lease agreement had been effected by it with the plaintiff as from the date of sale.

The defendant has issued a notice for vacant possession which the defendant is of the view that the same was illegal and an affront to the provisions of the Land and Tenant (Shops, Hotels and Catering Establishment) Act. It is the submission of Mr. Mengich that the defendant following the transfer of the premises to the defendant, the plaintiff acquired the status of a protected tenant under the Land Lord and Tenant (Shops, Hotels and Catering Establishments) Act. In view of that, it is argued that this dispute should be referred to the business premises Tribunal.

Mr. Mengich further urged this court to find that the plaintiff stands to suffer irreparable loss of business, livelihood and damage which cannot be adequately compensated by an award for damages.

Mr. Lutta, learned advocate for the defendant beseeched this court to dismiss the summons because the plaintiff has not shown it has a prima facie case with a probability of success. It is pointed out that there is no lease agreement between the plaintiff and Kenya Re as of 3<sup>rd</sup> June 2008. It is said that there was no intimation from Kenya Reinsurance Corporation that the leases would be renewed. Mr. Lutta informed this court that the defendant's caretaker demanded for payment of rent without its authority. The defendant returned the money it was paid when it discovered that a demand for payment had been made by an unauthorized person. The demand and receipt of any month, according to Mr. Lutta, did not create a tenancy or any offer. It is said there was a total rejection of any request for renewal of the old lease and none can be implied.

It is also the argument of Mr. Lutta that Casino business does not fall within the category of a Shop, Hotel or a Catering Establishment. The Court was urged to treat the plaintiff as a trespasser in view of the non-existence of a tenancy relationship. It is also argued that the plaint amounts to an abuse of the process of court because the moment a party files a reference to the Business premises, the Landlord is automatically stopped from evicting the tenant pending the hearing and determination of the reference. The defendant is of the view that there is no evidence that the anticipated damages would be irreparable.

I have considered the oral submissions made by learned counsels from both sides. I have also taken into account the grounds set out on the face of the summons plus the affidavits filed for and against the application. The summons before this court is seeking for the grant of a temporary order of injunction. The Principles for granting or refusing orders of injunction are well settled. An applicant must show that he has a prima facie case with a probability of success. It must also show that if the order is denied it would suffer irreparable damage and if the court is in doubt it will decide the application on a balance of probabilities.

I must investigate whether the plaintiff has shown a prima facie case with a probability of success. The applicant has claimed that its lease with Kenya Re-Insurance Corporation Ltd was renewed for 5 years and one month before the property was sold to the defendant. It is said that the defendant recognized that by demanding payment arrears of rent. It is also said that if the tenancy between the plaintiff and Kenya Re-insurance Corporation Ltd was terminated then the plaintiff is deemed to have acquired the status of a protected tenant under Section 2(1) of Cap 301 Laws of Kenya.

To begin with, the law is against a party who approbates and reprobates. The applicant claims to have a tenancy of 5 years and one month. On the other hand it says it has acquired the status of a protected tenant. The two cannot exist together. A party must choose which status it is. A critical look at the documents annexed to the affidavit of Professor Peter Mulwa Mbithi, will reveal that the University of Nairobi purchased the suit property from Kenya Re-Insurance Corporation Ltd on 3<sup>rd</sup> June 2008. By then the lease between the plaintiff and Kenya Re-insurance corporation Ltd had lapsed. In fact as early as 21<sup>st</sup> February 2008, Kenya Reinsurance Corporation Ltd informed the plaintiff that the lease would not be renewed because the ownership of the property would change hands. The correspondences between the duo was clear that the lease would not be renewed. In fact Kenya Re-insurance Corporation Ltd notified the plaintiff of the expiry of the lease on 8/2/2008. In reply to the aforesaid letter, the plaintiff by its letter dated 18<sup>th</sup> February 2008 applied to have the lease renewed. The original lease between Kenya Reinsurance Corporation Ltd and the plaintiff indeed lapsed on 30.04.2008. There is no evidence that the plaintiff applied for the lease to be renewed three months before the date of expiry. There is no doubt that the lease lapsed on 30/4/2008. The plaintiff was provoked to apply for its renewal 1<sup>1/2</sup> months before the expiry of the lease. It is obvious the application for extension was made against the terms of the lease. Perhaps the plaintiff knew about this inadequacy and that is why it opted to rely on the representation of the defendant's caretaker's demand for payment of rent to show that the lease had been renewed. I have considered that submission but I find no merit in it because, the rent was returned without acknowledgement of receipt. The applicant cannot therefore be regarded as holding over tenant so as it could be regarded as a protected tenant. The issue regarding holding over was clearly **explained in Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 27 pg. 37** as follows:

**"81. holding over. The tenancy arising by implication in favour of a tenant who holds over after**

**the expiration of his lease and pays rent is only deemed to be on the terms of the old lease in the absence of evidence of a different understanding. The question is one of fact and, in the absence of any facts excluding an implied agreement between the parties to hold upon the terms of the old lease so far as they are applicable to an annual tenancy, the law will imply a new agreement to that effect between them. Where nothing has been said by landlord or tenant with reference to any terms of negotiations after the expiration of the old lease with regard to the terms of a tenancy, it is a question of fact whether there has been a consent by both parties to a continuance of the old tenancy and, if so, upon what terms. The terms may be implied from the parties' relationship, as in the case of a landlord and tenant of an agricultural holding, from the use of certain words, such as the word "demise", and from the surrounding circumstances existing at the time when the parties consent to the continuance of the tenancy; and what terms are to be implied is in each case an inference of fact. Thus, where there have been negotiations for a letting at an increased rent, and the tenant stays on, it is not a necessary inference that he is liable only for the former rent; although if a different rent has been in fact agreed upon this will not prevent the new tenancy being upon the old terms in other respects."**

It is obvious from the above excerpt that the plaintiff cannot be regarded as a holding over tenant. My conclusion in this matter is that I am not convinced that the plaintiff has not shown it has a prima facie case with any prospect of success.

The applicant must also show that it is likely to suffer irreparable loss if the order of injunction is not given. Of course the plaintiff's business is that of a casino. If it is evicted, the applicant will obviously suffer loss which cannot be compensated by way of damages. It is a very expensive exercise for a party to secure other premises and to relocate. The Court of Appeal in **Pwani Development Ltd. =vs= Lotus Cinema Ltd C.A. No. 116 of 1998** expressed itself over a near similar issue as follows:

**It was unfortunate that the learned judge did not consider the second limb of Giella V Cassman-Brown case guidance, namely whether or not damages would be an adequate remedy if the injunction sought was not granted. Loss of a tenancy, especially in the case of a cinema hall, can cause very substantial damage. It is not as simple as, say, moving to another shop, when the tenancy in respect of the shop ends. The respondent was in actual possession of the suit premises at the time it sought the injunction. It would be prudent to maintain the status quo as then existing."**

I will apply the above statement of law to this matter.

I do not intend to consider the third principle of the balance of probabilities because I am not in doubt in the first two principles. In order for one to successfully obtain the order of injunction a party must first establish that it has a prima facie case with a probability of success so that the court can consider the second principle of irreparable loss. In this case the plaintiff has failed to establish the first principle. The end result is that the application must fail. I dismiss the same with costs to the defendant.

**Dated and delivered at Mombasa this 6<sup>th</sup> day of October 2008.**

**J.K. SERGON**

**J U D G E**

In open court in the presence of Mr. Mwakireti h/b Kipkenda Lilan & Co. Advocates for plaintiff and Mr. Luta for Defendant.