



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Commercial Civil Suit 135 of 1997**

**COMARCO PROPERTIES LTD. ....PLAINTIFF**

**VERSUS**

**ERES ENTERPRISES & ANOTHER .....DEFENDANT**

**R U L I N G**

The defendants in this matter namely: Eres Enterprises Ltd and Eres N.V. took out a motion pursuant to section 3A of the Civil Procedure Act and under Order XXXIX rules 1,2,3 and 9 of the Civil Procedure rules in which they sought for the following orders interalia against the plaintiff herein, Comarco Properties Ltd:

- (a) An order of Mandatory injunction to compel the plaintiff to reinstate the defendants to the suit premises.
- (b) An order of injunction restraining the plaintiff from forfeiting, wasting or in any way interfering with the defendants' assets, Equipment and property situate on the suit premises.

The motion is vehemently opposed by the plaintiff who filed the replying affidavit of Simon Philips and grounds of opposition.

It is the averment of the defendants that they were unlawfully evicted from the suit premises in the year 2002 contrary to the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301 Laws of Kenya

is alleged by the defendants that they are protected tenants since 1993 when they entered into the suit premises whereupon they constructed storage tanks for bitumen. It is said that the plaintiff acted in bad faith and without lawful justification with the intention of harassing and frustrating the defendants. The defendants prayed for the orders sought in the motion to be given. The defendants offered to provide security and promised to abide by any terms fixed by this court. The defendants aver that they stand to suffer irreparable loss and damage unless the motion is allowed.

The motion is strenuously opposed by the plaintiff who submitted to the effect that the defendants cannot be reinstated 3 years after the eviction. It is also alleged that the motion is supported by documents and advice obtained in breach of the privilege accorded to an advocate/client relationship. It is further the averment of the plaintiff that the defendant vacated the suit premises on their own volition in 1998. According to the plaintiff, there is no shop, hotel nor catering establishment within the suit premises hence the provisions of Chapter 301 Laws of Kenya do not apply.

The above issues were the main issues raised by the parties to this dispute. It is not disputed that there is a pending application dated 24.4.2002 which remains un-prosecuted. The same seeks for both mandatory and prohibitive orders of injunction. The current motion seeks for similar orders though the prayers are put in different words. In my view the defendants appear to be unsure of what they require from courts of law. Their conduct of filing new applications similar to the previous ones amounts to an abuse of the court process and hence contrary to section 6 of the Civil Procedure Act. In exercise of my inherent power I hereby strike out the entire motion and direct the defendants to prosecute the pending summons

dated 24<sup>th</sup> April 2002. The plaintiff shall have the costs of the motion. I have intentionally avoided to consider the merits of the motion because similar grounds have been raised in the aforesaid summons dated 24.4.2002 which is yet to be listed for interpartes hearing. In short I did not want to prejudice the outcome of that summons.

**Dated and delivered at Mombasa this 27<sup>th</sup> day of February 2007.**

J.K. SERGON

J U D G E

In open court in the presence of Mr. Abeid for the defendant/applicant. Mrs. Mwangi h/b

Kinyua for the plaintiff/Respondent