REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 1352 of 2006

FRANCIS MUIRURI..... APPLICANT

VERSUS

BERNARD GATHUKU NGUG.....DEFENDANT

RULING

The Plaintiff has filed a plaint dated 18th December 2006 and filed on the same date. The averments relevant to this ruling are paragraphs 3, 4,5,6,7,8 and 9, the spirit of which is that there is a mutual binding tenancy agreement between the disputants, that the tenancy is controlled, the Plaintiff applicant has been paying rent promptly, regularly, the defendant began harassing the Plaintiff in the month of May 2006, in November 2006 the defendant issued an illegal notice to vacate the premises to the Plaintiff, a complaint was filed in the business premises rent tribunal but could not get any relief there in because it is not functional due to lack of an officer to preside over it.

In consequence thereof the Plaintiff seeks to restrain the defendant from evicting him and or interfering with his peaceful enjoyment of the premises. In his prayers the Plaintiff claimed a permanent injunction to restrain evicting the plaintiff from the premises and/or interfering with the plaintiffs quiet enjoyment of the premises, costs and any other relief that this Honourable Court may deem fit and just to grant.

The plaint had initially been accompanied by a chamber summons dated 18.12.2006 and filed on 20.12.2006 which seems not to have been proceeded with. The application subject of this ruling is the one filed by way of Chamber Summons dated 18.1.2007 and filed on 19.1.2007. It is brought under Section 3 A and 63 (c) and (e) of the Civil Procedure Act, Order 39 rules 1, 1(a) 2, 3 and 9 of the Civil Procedure rules and all other enabling provisions of the law and procedure and the land lord and tenant (shops) Hotels and Catering Establishment) Act Cap.301. The application seeks the following orders:-

1. A temporary injunction to issue restraining the Respondent/his servants or agents from interfering, letting out, and/or in any way dealing with the Plaintiff's business premises known as stall number 4 situated on LR 37/240/4, Nairobi West (Kombelo Investments) facing Nyayo Police Post pending the hearing and determination of this application.

2. A mandatory injunction do issue against the defendant compelling him to reinstate/restore the Plaintiff/Applicant into the suit premises.

3. That an injunction do issue restraining the defendant from interfering in any way whether by eviction or threats with the Plaintiff's quiet and un interrupted possession of the suit premises pending the

hearing and determination of the suit.

4. Costs to be provided for.

The initial application filed on 20.12.2006 had only sought restraint orders against he Defendant to prevent eviction, to desist from threats of eviction, which were to remain in force pending the hearing of the application and the main suit.

The major grounds in support of the application as set out in the supporting affidavits, further affidavit and other supporting affidavits as well as oral submissions in Court are that:-

· There is a valid tenancy agreement between the plaintiff and the defendant.

· The tenancy is protected and it falls under the provisions of the landlord and tenant (shops Hotels and Catering Establishment) Act Cap. 301 Laws of Kenya.

· That the Plaintiff paid rent promptly as per the annextures exhibited.

· That all of a sudden the defendant started demanding unreasonable amounts not stipulated in the agreement and when the Plaintiff declined to meet those demands the defendant, started harassing him. The harassment culminated into issuance of an illegal notice of termination of tenancy within 45 days. The Plaintiff moved to challenge the notice by filing objection with the relevant rent tribunal but unfortunately there is no presiding officer.

· That since the relevant rent tribunal was not sitting the Plaintiff had no alternative but to turn to the court for relief. The first application which sought restraint orders only was overtaken by events as it was filed at the time the high Court vacation was on.

· In the meantime the defendant came and wrongfully removed the doors of the premises exposing the plaintiffs merchandize to risk of loss and thus constructively evicted the Plaintiff from the premises.

· That they seek a mandatory injunction to restore him back into the premises pending the hearing and determination of the case.

· That they are within the principles governing the granting of such reliefs as they have shown a *prima facie* case with a probability of success, they are within the proper forum, that an illegality has been shown to have been committed it should not be allowed to stand and that the balance of convenience is also on their side.

· They are within the principles of law in cases cited to court.

The defendant/respondent has opposed the application on the basis of the grounds set out in the replying affidavit; oral submissions, in court and principles of law in cases cited and the major ones are that;-

· Cap.301 Laws of Kenya confers only appellate jurisdiction on this court on matters falling under that Act and so this court has not jurisdiction to entertain the Plaintiffs claim in the first instance.

· The application does not conform with the Plaint as the orders being sought are not stated in the plaint. The prayers cannot succeed as they do not comply with the requirements of order 39 Civil Procedure Rules which makes it mandatory for the existence of a suit to support injunctive orders.

· That on 14.11.2006 the Defendant issued a 45 days notice to vacate the premises which notice was within the agreement and upon the lapse of the notice the applicant vacated the premises in compliance with the notice.

· That the notice issued compiled with the statutory format as required by section 4(2) of Cap.301.

Form A which contains all the ingredients required by the Act.

· That section 6(1) of Cap.301 requires a party dissatisfied with the notice to object to the relevant authorities. That the applicant did not object to the notice but instead moved out of the premises and if any complaint was lodged with the tribunal it was not served on the Respondent as there is no return of service to that effect.

· That there is no evidence that the Respondent broke into the premises and the affidavits of strangers to the suit cannot be relied upon and they must be struck out.

· They maintain the facts presented herein do not warrant the granting of a mandatory injunction.

· That the principles set in the famous case of GIELLA VERSUS CASSMAN BROWN have not been satisfied and so they do not favour the applicant

· That the applicant has not taken steps to serve the Plaint and he is therefore abusing the due process of the court.

In response to the Respondents Counsel's submissions Counsel for the applicant reiterated her earlier submissions and added that they have not served summons because they have not been signed by the Deputy Registrar of this court. Secondly they will amend the plaint to reflect the second injunctive order of a mandatory injunction.

The Court was referred to a number of legal authorities on the subject. The court has read all of them but it will just note a few of them for purposes of the record. In the case of CALEDONIA SUPERMARKET LTD VERSUS KENYA NATIONAL EXAMINATION COUNCIL [2000] E.A. 357 one of the issues for determination by the Court of appeal in this matter involved a landlord and tenant relationship. The tenant was protected and he was unlawfully threatened with termination. The question arose whether the tenant can apply to the High court for an injunctive relief. It was held *inter alia* that as it was faced with an illegal eviction and it had been served with an invalid notice depriving the business premises tribunal (which in any case did not have power to grant injunctive relief) of jurisdiction, the Respondent had properly sought redress from the High Court. In the case the TIWI BEACH HOTEL LTD VERSUS JULIANE ULRIKE STAMM [1790] 2 KAR 189. At page 200 Kwach J.A. as he then was, last third paragraph the court made observation that '*where the notices to terminate the tenancy were not in the prescribed form and consequently had no effect on the respondents tenancy, for this reason the respondent was entitled to an order restraining the appellant and the judge was therefore perfectly justified in making the order*."

In the case of NARSHIDAS AND COMPNAY LIMITED VERSUS NYALI AIR CONDITIONING AND REFRIGERATION SERVICES LIMTED NAIROBI C.A. 205/1995, one of the issues for determination was whether the superior court was right in holding that it had no jurisdiction to deal with the issues raised as the tenancy in question was one within the ambit of the landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap.301 (the Act) laws of Kenya specially when the Plaintiff was seeking the protection of the superior court against unlawful eviction in the face of a notice to quit which was not in the statutory form as mandated by Section 4 (1) of the Act.

At page 3 of the Judgment the Court of Appeal asked this question:- "*what does a controlled tenant confronted with an illegal threat of forcible eviction do? He cannot go to the Business premises Rent Tribunal established under the Act as that tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. That tribunal has no jurisdiction to do so as was held by High Court in the case of the REPUBLIC VERSUS NAIROBI BUSINESS PREMISES RENT TRIBUNAL AND OTHERS; Ex parte KARESHA, (1979) KLR 147 and also in the case of RE; HEBTULLA PROPERTIES LIMITED 1979 KLR 96*". The Court of Appeal after due consideration of the matter held *inter alia* that it is quite obvious the superior court had the jurisdiction to adjudicate upon the issues before it. It is also obvious that the court was duty bound to grant the injunction.

In the case of GEOFFREY GIKONYO VERSUS MOHAMED IDRIS KHILJI AND 3 OTHERS NAIROBI HCCC NO.352 OF 2004 FRED A OCHIENG AG. J. as at the time of that decision at page 12 of the ruling quoted extensively from the case of CALEDONIA SUPERMARKET VERSUS KENYA NATIONAL EXAMINATION COUNCIL [2002] 2 E.A. 357 at 361 thus:-

"*Faced with what was clearly an illegal eviction, the appellant could not seek protection from the Business Premises Tribunal because the notice given being an invalid notice deprived the tribunal of the power to intervene. In any case the Tribunal has no power to issue an injunction. That left the appellant with only one cause of action. It had to seek redress from the High Court. In the case of TIWI BEACH HOTEL LIMITED VERSUS JULIAN ULRIKE STAMM [1990] 2 KAR* 189 where a protected tenant applied to the High Court for an injunction when, as in thepresent case she was threatned with an illegal eviction, Kwach JA.put the matter beyond dispute when in the course of his judgment he said at page 200:-

"*Although Mr. Lakha stressed that both letters constituted an offer for a lease, in my judgment it is plain beyond argument that they were a demand by a landlord for rent from the tenant claimed quite properly in my view statutory protection under the landlord and tenant (Shops, Hotel and Catering Establishment) Act and the appellant, as landlord of the premises was therefore obliged to comply with the statutory procedure under the Act if it was its intention either to terminate the tenancy or alter its terms to the detriment of the respondent. If the appellant thought that these letters were notices, it must disabuse it; of that notion by stating at once that they were not in the prescribed form and consequently had no effect on the Respondents tenancy. For this reason alone the Respondent was entitled to an order restraining the appellant and the judge was therefore perfectly justified in making the order*"

On the basis of the foregoing reasoning the learned judged made a finding at page 13 of that ruling to the effect that the quoted judgments being court of appeal judgments are binding on the superior court, that they both recognize the right of a party in a case pending before the Business Premises Rent Tribunal to seek redress from the High Court, so as to address unlawful actions by the other parties to the same case.

In the case of LOCABAIL INTERNATIONAL FINANCE LTD VERSUS AGROEXPORT AND OTHERS. THE SEA HAWK [1986] 1 ALL E.R. 901. The question for determination was circumstances in which a mandatory injunction may be granted in interlocutory proceedings – the test to be applied. It was held *inter alia* that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and when only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a single and summary act which could be easily remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover before granting a mandatory interlocutory injunction the Court, had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than was required for a prohibitory injunction."

The case of RAO JALVIRSINGHJI N AND 3 OTHERS VERSUS PRUDENTIAL DRY CLEARNERS LIMITED NAIROBI CA. 830 OF 1997. The case involved an injunction to restraint the defendant from evicting the plaintiffs from some premises in NAKURU town. At page 3 of the judgment Mr. OLE KEIWUA J. as he then was (now JA) observed "*As to the assertion made in paragraph 9, I agree with the Plaintiffs submission that the fact that, premises of which possession was obtained unlawfully, cannot be let and such letting will not stand in the way of this court to remedy that injustice"*. After due consideration the learned judge went ahead to rule at page 5 that: "*In those circumstances I am of the opinion that the defendant is not entitled to rely on its own act of illegality to resist the restoration of the position before the defendants illegal take over of the premises. This Court shall not allow the proposed new tenant to take over the premises"*

In the case of the RIPPLES LIMITED VERSUS KAMAU MUCUHA NAIROBI C.A. 4522 OF 1992 one of the orders sought was a mandatory injunction to compel the Defendant/Respondent to reinstate the plaintiff applicant into the shop with all his property, if it was not returned in its original condition, the defendant/respondent was to be ordered to pay for its value. At page 4 paragraph 2 of the judgment

Mwera J. observed "*in all the treatises, precedents and court arguments etc."* whenever an issue of a mandatory injunction arises it is clearly understood and accepted that such an injunction should only issues in the clearest and special cases only."

Turning to the law the applicant has relied on section 3A of the Civil Procedure Act. Section 3A of the Civil Procedure Act is a saving clause. It is usually invoked to cater for a situation which is not covered by the Civil Procedure Act and the rules made there under. The application herein is for injunctive orders which are catered for under order 39 Civil Procedure Rules. The matter also concerns a tenancy relationship also covered by Cap.301 Laws of Kenya. This being the case Section 3A cannot be called in to fill up any non-compliance with any of the two sets of law. Section 63(c) and (e) have also been cited. They state "*in order to prevent the ends of justice from being defeated, the/court may if it is so prescribed*

(c) grant a temporary injunction and incase of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.

(d) Make such other interlocutory orders as may appear to the court to be just and convenient"

The provisions of Section 63 (c) and (e) tie up with those of order 39 Civil Procedure Rule as they relate to interlocutory injunctive orders. Order 39 rule 1(a) states.

"*where in any suit it is proved by affidavit or otherwise (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree or*

(2) in any suit for restraining the defendant from committing a breach of contract or other injury of any kind whether compensation is claimed in the suit or not, the plaintiff may at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right"

Applying the principles in the decided cases some of which are of persuasive value and others binding as well as the provisions of law relied upon it is clear that the application herein can be disposed off on 3 fronts:

(1) Jurisdiction whether this court is properly seized of the matter in view of the clear admission by both sides of existence of a landlord and tenant relationship.

(2) Jurisdiction whether the application is properly anchored on the plaint.

(3) The merits

On the first question of jurisdiction there is no dispute that the relationship between the applicant and the Respondent is that of a landlord and tenant. The tenant is a protected tenant in terms of the provisions of the landlord and Tenant (Shops, Hotel and Catering Establishment) Act Cap.301 Laws of Kenya. Being a protected tenant the provisions of Section 4 of the said Act apply to him. Section 4 requires that a landlord wishing to terminate a protected tenancy has to issue a notice in the prescribed form and a tenant wishing to contest the notice has to apply to the relevant Business Premises Tribunal for Protection. It is on record from the applicant's papers both the plaint, the first application and the deponements in support of the current application, that when the applicant was threatened with eviction he moved to the Business Premises Rent Tribunal but there was no presiding chairman. That prompted him to move to court and file a suit accompanied by an interlocutory application. A reading of the plaint as set out earlier in this ruling, the averments indicated that there was a threatened eviction and the plaint as well as the accompanying interim application were meant to forestall that threatened eviction. However, that initial interim application was not proceeded with leaving the applicant unprotected.

The state of un protection led to the events which led to the second interim application being filed. The averments, in the second application supporting affidavits show that the status quo prevailing at the time of the filing of the plaint had been up set by the applicant being forced out by having the doors to the premises removed. This is what prompted the inclusion of the additional remedy of a mandatory injunction.

Against this background the Respondents Counsel has urged this court to find that it has no jurisdiction because the only jurisdiction given to this court by Cap.301 Laws of Kenya is appellate jurisdiction under section 15 of the Act. The Act gives the Tribunal Specific Jurisdiction under Section 6 and 9 of the Act. Section 6 makes provisions that when a reference is made to the tribunal and duly received the contested notice by the landlord ceases to have effect until the reference is determined by the tribunal. Herein the court has been informed that the tribunal lacked a chairman. In the absence of a presiding officer, the tribunal could not receive and act on the reference. This being the case the applicant could not avail himself of that process. Section 9 of the Act sets out the remedies that a tribunal can give to an aggrieved party. They do not include injunctive remedies. This being the case the applicant had no alternative but to turn to the High Court. He was right in doing so because the court of appeal has ruled in the case of CALEDONIA SUPERMARKET LTD VERSUS KENYA NATIONAL EXAMINATION COUNCIL SUPRA and NARSHIDAS & COMPANY LTD VERSUS NYALI AIR CONDITIONING AND REFRIGERATION SERVICES LTD NAIROBI C.A. 205 SUPRA that a tenant faced with imminent eviction cannot turn to the tribunal for a remedy as the tribunal has no power to grant injunctive orders. He has no alternative but to turn to the High Court which has power to grant injunctive orders. It therefore follows that the applicant rightly sought injunctive orders from this court. The appellate jurisdiction that the Respondent's counsel is relying upon vested under Section 15 of the Act arises where the process, provided for by section 6 and 9 of the Act have been exhausted.

Having ruled that this Court has jurisdiction and it is properly seized of the matter, the next question is whether the relief is properly anchored on the plaint in order for it to be granted. The Respondent has argued that it is not. The applicant's Counsel admitted that they will make some amendments and a draft amended plaint is ready somewhere waiting to be filed. The averments in the current plaint support application for a temporary injunction. It is trite law and there is a wealth of authorities on the subject that a temporary injunction is preemptive. It is meant to maintain the status quo prevailing at the time of the filing of the plaint. The status quo prevailing as at the time of the filing of the plaint was threatened eviction. That is the status that could be supported by an application for an interim injunction.

The status quo prevailing at the time of hearing of the second interim application is that the initial status quo has changed to one whereby the applicant has been forced out of the premises. This new status quo requires a mandatory injunction to issue to restore the applicant back in the premises and upon restoration through a mandatory injunction, then the interim injunction to issue to maintain him in the premises pending the hearing and the determination of the suit

It is trite law that an interim application has to be anchored on an existing suit. In fact all the provisions of order 39 Civil Procedure Rules the main provision of law under which the application is brought talks of "*in any suit"*. In the suit we have a mandatory injunction is not pleaded and prayed for and so this relief is not properly anchored in the plaint and so it cannot be entertained. The temporary injunction which is sought in the second application cannot be entertained either because it is supposed to be a rider on the mandatory injunction to be granted. If it is granted as currently sought then it will continue the very status that the applicant is complaining about as its primary function is to maintain a status quo. For the reasons given the application is flawed and cannot hold. The applicant's counsel has no alternative but to amend the plaint to plead a mandatory injunction followed by an interim injunction before applying for the relief. In this way the relief will be properly anchored on the plaint as required by law.

Having faulted the application on a point of technicality it is not proper to go into its merits as this might prejudice the outcome of the subsequent application after amendment of the plaint should the applicant choose to amend the plaint and then seek the very reliefs that he is currently seeking.

For the reasons given the applicants application dated 18th January, 2007 and filed on 19th January 2007

has been faulted on a point of technicality and it is refused with costs to the Respondents.

DATED, READ AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2007.

N. NAMBUYE

JUDGE