REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 104 of 2007

SANDEEP SINGH BENAWRA……..…… PLAINTIFF

VERSUS

SHIMMERS PLAZA LTD……1ST DEFENDANT

RAJ DEVANI ……..…….. 2ND DEFENDANT

RULING

The Plaintiff herein filed a plaint dated 31st January, 2007 filed on first February, 2007 against the defendants herein. The Key averments relevant to this ruling are that the first defendant owns plots No.1870/IX/128 together with the building thereon known as Shimmers Plaza. The Plaintiff is a tenant of the defendants at a rental value of Kshs 230,847.50 per month which rent the Plaintiff has paid at all times. Before taking possession (erroneously indicated in paragraph 8 of the plaint as April (2007), the Plaintiff carried out renovations in excess of Kshs 10,000,000.00. That the first defendant is in breach of the said tenancy agreement by reason of their wrongful conduct of its servants, agents and or Directors as particularized in paragraph 12 of the plaint which acts were done out of malice as particularized in paragraph 13 of the Plaint which acts have caused the Plaintiff loss and damage particularized in paragraph 14 to the tune of Kshs 275,000.000.00 loss of business as a result of close closure of business premises from Saturday 13th January 2007 till Monday 15th January 2007, Kshs 200,000.00 loss of business, as a result of closure of business from 27th January 2007 till Monday 29th January 2007. Further the Plaintiff spent 10 million to renovate/refurbish the premises.

In consequence thereof the plaint's claim from the defendants judgment for special damages of kshs 475,000.00

(b) General damages

(c) Costs of this suit

(d) Interest on (a), (b) and (c) above at court rates from the date of filing this suit until payment in full.

(e) An injunction to restrain the defendants from evicting and/or harassing the plaintiff or interfering with the plaintiffs use and quiet enjoyment of the suit premises or interfering with, blocking the ingress and engress to the suit premises for the staff, customers or invitees and/or to restraining the 2nd defendant from disturbing the Plaintiffs business and/or from entering into the suit premises after sunset.

The Plaint was accompanied by an interim application dated and filed the same date as the plaint but amended on 1st day of February, 2007 and filed the same date of 1st February 2007. Prayer 2 and 3 of the said application seeks to restrain the defendants pending the hearing of the application inter parties in the

first instance and pending the hearing of the main suit in the second instance. The restraint order is to restrain the defendants by themselves, their servants and or agents from interfering with the plaintiffs use and quiet enjoyment of the suit premises situated on 1st floor of Plot No.1870/IX/128 or from interfering with or blocking the plaintiffs and or his staff or customers ingress and engress into the said premises or in any manner interfering with the plaintiffs use of the said premises. Interim orders were granted on 1.2.2007 and subsist to the present day. This ruling is in respect of the inter parties hearing.

The grounds in support are set out in the supporting affidavit, further affidavit annextures, oral submissions in court and the case law cited. In his oral submissions in court Counsel for the applicant reiterated the averments in the plaint as regards the sequence of events leading to the filing of the action and then stressed the following points

1. That injunctive orders were first issued in their favour on 1.2.2007 which were duly extracted and served on the Respondents who have disobeyed the same and there is an application for contempt of the court orders already pending determination herein.

2. It is the duty of the litigants to obey court orders.

3. Turning to the current application counsel submitted that it is not disputed that there is no registered lease between the disputants but nonetheless a tenancy has been subsisting between the parties until events leading to these proceedings occurred.

4. That since taking possession of the premises, the applicant has been paying rent faithfully with the exception of one cheque which was not paid but it was replaced and accepted.

5. The plaintiff also spent a colossal amount of money to the tune of 10,000,000.00 repairing the premises to ready them for own use but since then the plaintiffs have not been enjoying quiet possession and use of the said premises.

6. There has been undisputed disruption of the plaintiffs business notably from 13th – 15th and 27 – 29th January 2007 allegedly for purposes of repairs, and fumigation which matters are not provided for in the tenancy agreement. These actions were directed at the Plaintiffs business only while other tenants carried on their businesses uninterrupted.

7. In addition to complaints in number 6 above the defendant purported to terminate the tenancy by issuing a notice requiring the plaintiff to vacate the premises by 31.1.2007. The threat of eviction and persistent violations of the agreement forced the plaintiff to file these proceedings to seek protection of the law.

8. By reason of matters complained of herein the applicant has moved some of his goods to a safer location while some are still locked up in the defendants premises.

9. That the defendants have alleged that the plaintiff has moved to a new location to do business but therein no proof although there is nothing to prevent him from starting such a business.

10. It is their stand that they have established the ingredients for granting an injunction in terms of the principles in the case of **GIELLA VERSUS CASSMAN BROWN (1973) E.A.358**

(i) prima facie case has been established because there is no dispute that notices interfering with the running of the plaintiffs business were issued.

(ii) No dispute that the defendant has issued notice to terminate the tenancy agreement without any justifiable cause.

(iii) They content there is no rent outstanding from their client to the Respondent as they issued a cheques with instructions not to bank it but they mischievously banked it but it was replaced and

accepted.

(iv) The tenant is ready and willing to pay more rent but the defendant has declined to accept anymore rent from the plaintiff.

(v) Since the plaintiff has spent a colossal amount of money on repairs it is un fair to allow the defendant loose the premises to another person.

(vi) They contend that where rent has been accepted then there is no valid termination.

(vii) They contend that the balance of convenience tilts in favour of the applicant.

On the basis of the foregoing counsel urged the court to grant the orders prayed in favour of the applicant.

The Respondent on the other hand has opposed the application on the basis of the grounds set out in the replying affidavit, further replying affidavit, oral submissions in court, annextures and the case law cited. The major grounds relied upon are that the applicant is not entitled to the reliefs being sought because:-

(1) The interim injunction was obtained without full disclosure that they were in breach of the agreement.

(2) The termination of tenancy cannot be faulted as there is no prayer in the plaint seeking a declaration that the termination was unlawful.

(3) They content that the applicants accepted the terms of the agreement which gave the landlord the right to terminate upon breach. It is their stand that there was breach which invited termination which termination cannot be challenged because the applicant is not a protected tenant. Neither have they pleaded that their tenancy is protected. For this reason they cannot avail themselves of the provisions of Cap.301 Laws of Kenya

The defendant has enumerated breaches of the contract which made the defendant to move to terminate the tenancy which the plaintiff did not declare neither have they controverted in their papers filed herein. These breaches are:-

(i) They have persistently defaulted in the payment of rent. The agreement allows the defendant to terminate upon a single default.

(ii) The applicant contracted the premises for use as a sports bar but without authority from the landlord changed the premises to be used as a night club and disco for 8 months. This change of user was not sanctioned by the landlord.

5. They contend that notice to terminate was justified as the applicants agreed that in the events of any breach the landlord could move in immediately and take possession but instead chose to give sufficient time to move out.

6). Upon receipt of the termination notice the plaintiffs removed themselves from the premises and relocated elsewhere and are carrying on business there. Before departure they damaged fixtures estimated to cost the Defendant the estimated sum of Kshs 7 million to put the premises to rent able condition

7. They deny the Plaintiffs allegations that they spent a colossal amount of money on repairs before getting into the premises as they inspected the premises before accepting to rent the premises.

8. They defend action taken by the defendant to close the premises on the days complained of as this was done both for security and health reasons.

9. The Court was asked to ignore allegation of breach of court orders as they have not been properly placed before it. The applicant should seek leave of Court before laying them before court. Further that

they carry no weight to the grant of the orders sought.

10. They maintain that for the reasons given all the 3 principles for granting injunctions have not been satisfied because:-

(i) The lease is not registered and so the claim of the plaintiff is not superior to that of the landlord more so when they have not deponed so.

(ii) They are un likely to suffer irreparable loss as they have already relocated and started operating the same business in another location within the same locality. Further their losses can be quantified and paid for by way of damages.

(iii) The balance of convenience is not in their favour as they have already relocated elsewhere.

(iv) They are not entitled to any orders due to non-disclosure of a material fact that they had already relocated elsewhere.

(v) They have not given an undertaking as to damages.

In response to the defence counsels' submissions counsel for the plaintiff reiterated the earlier submissions and then added the following:

(i) They maintain that they have established a prima facie case with a probability of success.

(ii) They maintain there was no inconsistence in the running of the business by their client as there was no information communicated to him earlier on that they were running business in, inconsistence to the terms of the tenancy.

It came up as an after thought.

(iii) They ask the court to ignore alleged complaints against the plaintiff by other customers as these were made out for the case as they were not copied to the plaintiff.

(iv) The Court was asked not to penalize the applicant for the service of the unsigned affidavit as they do not known how it happened.

(v) They still maintain that the balance of convenience is in their favour as the premises were let out at a consideration.

Both sides relied on case law to strengthen their stand. The plaintiffs Counsel relied on the case of **MUNGAI VERSUS HOUSING FINANCE CO. OF KENYA LTD AND ANOTHER [2002] 2 KLR 332** where to pre-empt pending eviction and transfer of his land to the 2nd defendant the Plaintiff filed this suit seeking *inter alia* an injunction restraining the defendants jointly and severally from alienating, wasting trespassing etc, it was held *inter alia* that it is not an inexorable rule of law that where damages may be an appropriate remedy an interlocutory injunction should never issue. The landmark case of **GIELLA VERSUS CASSMAN BROWN & CO. LTD [1973] E.A. 358** which laid down the principles for granting injunctions.

(iv)(v) and principle (vi) are the most relevant and most cited.

These states:- (iv) an applicant must show a prima facie case with a probability of success.

(vi) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

(vii) When the Court is in doubt will decide the application on the balance of convenience.

The other authorities cited by the plaintiff dwelt on termination of tenancy under Cap.301. Laws of Kenya not being inquired into these proceedings.

Turning to the defence, Counsel referred the Court to numerous authorities. In the case of **RAJPUT VERSUS BARCLAYS BANK OF KENYA LTD AND 3 OTHERS NAIROBI HCCC 38 OF 2004** one of the issues for determination was whether a failure to comply with the provisions of the Oaths and Statutory Declarations Act Cap.15 and its rules is a matter of substance or of form whether an affidavit which does not comply with the provisions and rules is incurable and should be struck out. It was held *inter alia* that failure to comply with the provisions of the Oaths and Statutory Declaration Act and the rules made these under is a matter of substance and not form. It is not a matter which is curable or about which the court should take a lenient view. The Plaintiffs affidavit in support of the second application was incompetent and it would be struck out.

The case of **MULUSIAH LAND CONSULTANTS AND COLOURGEMS LTD VERSUS INDUSTRIAL DEVELOPMENT BANK, LAWRENCE ODORI NABWANA AND TACT CONSULTANCY SERVICES NAIROBI HCCC MILIMANI CIVIL CASE NO. 211 OF2004.**

In this case a Preliminary Objection was raised specifically that the verifying and supporting affidavits are undated and for that ream the defendant/respondent avers that they are fatally defective and should be struck out and or expunged from the court record. At page 3 of the ruling, paragraph 2, O.K. Mutungi J. made the following observation:-

"*Dating of such documents is not a cosmetic requirement. The purpose of such requirement is very clear. Situations and circumstances do change leading to different legal positions. In the absence of such dates, the court is left to guess as to when the affidavits were made and hence their worthlessness in both law and fact"*. At page 4 paragraph 1 "*pausing at this point for now I have already held that the verifying affidavit was fatally defective for failure to comply with the provisions of Section 5 of Cap.15, Laws of Kenya*." At the bottom line 4 from the bottom on page 4. "The upshot of all the foregoing is that: "*I uphold the preliminary objection by the Defendants. The effects of these are that:-*

(a) all the affidavits verifying and supporting are expunged from the record".

The case of **MARY WAMBUI MARUNGO VERSUS ADAMSON MUKUNYA MWAURA AND MARY WANJIKU MUCHEMI NAKURU HCCC 22/2003 L. KIMARU J.** at page 3 of the ruling where the Court found as a fact that there was an admission by the Plaintiff that she had not been in occupation of the suit parcels of land, and further in view of the uncontroverted evident that the defendants were in occupation of the suit land, and it was clearly evidence that the plaintiff had not established a prima facie case with a probability of success, the court declined the granting of an injunction in favour of the applicant.

The case of **WACHIRA MURIITHI KIBUCHI VERSUS CHRISTINE NDAVI AND ANOTHER NAIROBI HCCC MILIMANI COMMERCIAL COURT CIVIL CASE NO.208/2006.** In this case the Plaintiff was a tenant at the premises and that he operated a Salon business therein. The landlady disconnected water and electricity from the premises in December 2005. That action prompted disputes as the Plaintiff insisted that he was not in any arrears of rent. Arising from the dispute the first defendant issued a termination notice to the plaintiff. The notice was dated 31.1.2006 and required the plaintiff to vacate the premises by 1st April, 2006. The Plaintiff moved to Court seeking an order that the defendant be restrained from giving up the suit premises to 3rd parties and also to restore all amenities until the suit is heard and determined. In this case Fred A. Ochieng J. declined to issue the injunctive order as it would not be issued in vain as there was evidence that the premises had already been let out.

The case of **MOBILE KITALE SERVICE STATION VERSUS MOBIL OIL KENYA LIMITED AND ANOTHER [2004] 1 KLR 1.**

In this case, the defendants issued a termination notice. The Plaintiff moved to Court and obtained orders restraining the defendants from terminating a dealership agreement. For four years the plaintiff never set

down the case for hearing or even take out summons for enter appearance for services Wasame J. at page 7 of the ruling. Paragraph 5 – 10 had this to say "*In short he was using the court order for attack and protection, while actually it was meant only to protect him, by doing so the plaintiff was trampling on the rights of the 1st defendant to enjoy exclusively its proprietary rights. He was making the right to own property obsolete and useless …….… I should never allow the respondent or his ilk to derive an advantage from his own wrong and in my assessment an injunction would be discharged where the right protected and which the court of equity is asked to protect and assist itself to a certain extent brought or induced by the person who sought the orders".*

At paragraph 30 – 40 the learned judge continued "*To me the acts of using the court order to intimidate and harass the applicant is an assault on our judicial system, which I am bound to protect. I cannot extend my hand to a person who has assaulted my authority and dignity for he is un deserving. The Plaintiff does not need the orders of the Court, they have served him well, the orders have kept the 1st defendant away from its property for 5 years and definitely the orders were not sought in good faith. It was sought to frustrate, intimidate and above all to black mail the first defendant. How shall we attract investors when we use the courts orders to frustrate intimidate and erode the confidence of the said investors. The conduct of the plaintiff negatively impacts on our economy".*

Holding 1,2,and 3 are relevant to this ruling:

(1) That an interlocutory injunction is given on the courts understanding that the defendant is trampling on the rights of the plaintiff.

(2) An interlocutory injunction being an equitable remedy would be taken away (discharged) where it is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the court, which granted the orders which is the subject matter.

(3) The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose to shield the party against violations of his rights or threatened violations of the legal rights of the person seeking it.

In the case of **GICHUKI VERSUS MUNJUA AND ANOTHER [2004] 1 KLR 18.** In this case an issue arose as to whether a court of law can exercise its discretion in favour of a party who has not candidly disclosing material facts. At page 21 paragraph 35 Waki J. as he then was (now JA) made the following observations.

"*with respect, the application made in this matter is not only confusing but misleading. The applicant has chosen to give selective and inadequate information as the basis for the application. I think he is less than candid. The courts discretion cannot be sought or granted on the basis of such information. Equity would fraun on it"* The holding in this case is that when an applicant decides to give selective and in adequate information as the basis for the application the courts discretion cannot be exercised in his favour.

The foregoing principles are to be applied to the issues to be dealt with herein in order to determine whether the applicant has satisfied the ingredients for granting of the injunction sought. Among then issues relating to:- The effect of service of a defective affidavit on the respondents Counsel.

(2) The strength of the offer of lease agreement.

(3) The strength of the contractual relationship between the disputants.

(4) Whether there were breaches of the said offer of lease agreement and their effect on the relationship.

(5) Whether the applicant is guilty of any nondisclosure of vital information thus disentitling him to the reliefs sought.

(6) Whether the Plaintiffs have relocated themselves elsewhere thus tilting the balance of convenience away from their favour.

The complaint against the supporting affidavit is that it was sworn by a party who did not execute the offer to lease agreement and secondly the copy that was served on the Respondents was undated. Section 5 of the Oaths and Statutory Declarations Act Cap.15 of the Laws of Kenya states "*Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the Jurat or attestation at what place and on what date the oath or affidavit is taken or made"* This Section makes it mandatory for the affidavit to bear the date and the place where the oath has been taken. Section 21 of the Act excuses an affirmation without belief in any religion. It does not mention the effect of service of an undated affidavit. Order 18 rule 4 and 7 of the Civil Procedure Rules states: *"Every Affidavit shall state the description, the place of abode and postal address of the deponent and if the deponent is a minor shall state his age"* Rule 7 "*The court may receive any affidavit sworn for the purposes of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the forms thereof*" There is no provision barring a party from being served with a defective affidavit or what effect such a service can have on the proceedings. The address in order 18 rule 7 is to the court. The use of the word "may" gives the court a discretion to accept such an affidavit or not. The criteria to be used as shown by O.K. Mutungi J. In the case of MULUSIAH AND ANOTHER VERSUS INDUSTRIAL DEVELOPMENT BANK supra is whether the defect amounts to a want of form or want to substance. Where it is want of form order 18 rule 7 Civil Procedure Rules can be called into play to excuse the error. Where it is want of substance, the court has no alternative but to have it struck out. The court thus has power over that which is before it and not that which is in the custody of a party to the proceeding. No doubt practice requires that such papers also be perfect and in comp with the rules. Where there is no such complliance and the aggrieved party complains, the best a court of law can do is to fault service of such a document. Where such service is faulted room exists for ordering repeat service. The applicants' counsel was therefore right in submitting that had they received protest immediately upon service of the affected service they would have repeated the same. No authority has been cited to show that service of such a documents affects the proceedings where the document served in court complies with the rules.

As for deponing by a party who was not party to the agreement order 18 rule 3 (1) Civil Procedure Rules is relevant. It states "*Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove provided that in interlocutory proceedings or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof*". Paragraph 1 and 28 of the supporting affidavit satisfy order 18 rule 3 Civil Procedure Rules and so that affidavit is properly received in evidence.

As for the offer of lease agreement annexed as SSB1 to the supporting affidavit and RDI to the Respondents replying affidavits is simply an offer to make a lease. It does not qualify to be a lease in terms of legally drawn instrument in terms of Section 35 of the Advocates Act Cap.16 Laws of Kenya. It does not satisfy the format of a lease in terms of Section 4 of the Registration of Titles Act Cap.281 Laws of Kenya. Neither is it registered under Section 4 of the Registration of documents Act Cap.285 Laws of Kenya. Nor has stamp duty been paid in respect of it as required by Section 19 of the Stamp Duty Act Cap.480 Laws of Kenya. This being the case it is not enforceable perse as an agreement.

Since the said agreement is not enforceable the question to be determined is whether the relationship created between parties is capable of being protected by the law. It is common ground that the relationship created by that document is what is the subject of these proceedings. It is common ground that the relationship created was that of a landlord and tenant relationship. Offer of office space was made, it was accepted, consideration paid, consideration accepted and operation of business started. The business was carried on from the time the first monthly rent was accepted up to the period the events leading to these proceedings were set in motion. In terms of holding 2 in the case of BACHELORS BAKERY LTD VERSUS WESTLANDS SECURITIES LTD [1982] KLR 366, such an agreement is a contract valid between the parties even in the absence of registration. In terms of holding 1 in the case of **AROKO VERSUS NGOTHO AND ANOTHER [1991] KLR 178,** in the absence of a lease in writing then the lease was a periodic tenancy which periodic was a month to month tenancy as the rent was being

paid monthly. Such monthly tenancy would be terminated by one months notice. Applying this to this case since rent was paid monthly, the tenancy herein was a month to month tenancy.

A contractual relationship gives rise to duties and obligations. It is common ground that the agreement subject of the proceedings had such rights and obligation Clause 6 required payment of rent promptly on a monthly basis in advance, while clause 12 governed the user of the said premises while clause 25 spells out the consequences for breach or default. The Respondent relied on the terms of the said agreement when they issued annexture RD4 citing among others failure to pay rent in time and change of user without authority. It is further alleged that RD4 was a follow up to RD3. Clause 6.4. of the said agreement required rent to be paid by the 7th of each month clause 25 gave the landlord the right to repossess where there is a delay of rent payment for 14 days or for any other breach. Any one breach entitles a landlord to repossession.

Regarding rent payment it is conceded by the plaintiff that a cheque was issued to the Respondents with instructions not to have it banked but unfortunately the Respondents banked it and when it was returned unpaid they issued a replacement which was accepted. The Respondent agrees that a cheque was given for payment of rent which was returned unpaid. They agree they received a replacement cheque but this was on a without prejudice basis and did not deter them from going ahead to issue RD4 in accordance with clause 25 of RDI. Construction of clause 25 of RDI and SSBI gives the landlord an absolute right to determine the existence of the breach and move to bring the agreement to an end. No room exists for qualification of that action by the tenant. The parties signed that agreement and they are bound. No protective clause was slotted in for the benefit of the tenant. By slotting into RD1 vide clause 4 a period of five years and six months, the tenant was robbed of the protection of the provisions of the landlord and tenant (Shops, Hotels and Catering Establishments Act Cap. 301 Laws of Kenya. Section 2 thereof protects a controlled tenancy which has not been reduced in writing and which is for a period not exceeding 5 years. Both conditions do not cover the situation herein. The plaintiff willingly endorsed that document and is bound. Even if other breaches are to be ignored failure to pay rent in time was enough to bring the agreement to an end.

It is the stand of the Respondent that the applicant is guilty of nondisclosure as they failed to disclose to court at the first instance that they were in breach of any of the terms of the contract especially as relates to payment of rent and change of user matters which the applicant has denied. As regards rent paragraph 8 of the supporting affidavit maintains issuance of a personal cheques with instructions not to bank it but the Respondent banked it and when they learned that it had been returned, they replaced it with a bankers cheque. There is no mention of the change of user. Save that they maintain that if they were in such a breach then the Respondent would not have waited for 8 months to notify them of the acts complained of. They alleged that they are not aware of complaints by other tenants as these were not brought to their attention as the said letters of complaints were not copied to them. Even RD3 which are correspondences addressed to the defendant by their lawyer, the applicants state that they are not aware of these contents firstly and secondly they condemned Sections of the building not under their control. Nothing has been annexed to show that these were brought to the attention of the applicants in order to penalize them for non-disclosure of material fact. However it is evident from the submissions of the applicants counsel that by reason of matters complained of in their supporting affidavit especially paragraph 12 – 24 there of the plaintiff moved some of its properties to safer grounds while others are still in the premises. The court is of the opinion that as submitted by the Respondents counsel had this fact been disclosed to the court which granted the exparte interim orders, those orders may not have been granted. These matters were within the applicant's knowledge as at the time they came to court and they chose not to disclose them. This conduct on their part satisfies the finding by Justice Waki J. as he then was (now JA.) in the case of **GICHUKI VERSUS MINJUA AND ANTOEHR [2004] IKLR 18 supra** that when an applicant decides to give selective and in adequate information as the basis for the application, the courts discretion cannot be exercised in his favour. Had this fact been disclosed definitely the court would have been on the alert that the status quo to be preserved had been partially altered by shifting part of their properties. It is not the business of this court to conjure up what the ultimate order would have been had this disclosure been made. It is enough to say that the court seized of the matter would have taken note of that and made appropriate orders.

The final hurdle in this assessment of the facts herein is the determination as to whether the applicant has brought himself within the principles governing the granting of the reliefs sought in the light of the findings on the facts presented here in as shown above. It is common ground that these principles are well known namely:-

(1) satisfaction of the existence of a prima facie case with a probability of success.

(2) Proof that damages will not be an adequate compensation.

(3) And lastly that if no 1 and 2 above do not apply then the balance of convenience tilts in favour of the applicant.

On a prima facie case with a probability of success it has to be shown that the agreement governing the relationship of the parties herein provides ample protection which this court can invoke firstly to ensure the continuance of the relationship and secondly to keep the defendant at Bay. As found earlier on in the absence of a registration of a follow up lease between the parties, the document remains an un registered agreement. Since it was in respect of a landlord and tenant relationship which was commenced by the applicant taking up possession and paying rent, which was accepted on a monthly basis, it is termed a month to month tenancy which the law allows to be brought to an end by one month notice.

It is on record that one month's notice was given giving rise to these proceedings. To fault that it has to be shown that the same was contrary to the terms contained therein. The terms empowered the landlord to terminate the relationship in the event of any breach occurring as regards the terms of the said agreement. The agreement does not say a combination of breaches but any breach. Herein rent was not paid on time and it was admitted by the applicant that a cheque was issued not paid and replaced but it was accepted and that default was therefore waived. Waiver can only arise if the terms of the contract allow it. Herein default on payment of rent in time and acceptance of the same by the landlord is not indicated to be a waiver to taking of any other step in the matter to bring down the relationship. It therefore follows that there is no way this court can compel the defendant to treat the acceptance of rent after default as a waiver and compel him to reinstate that relationship to its former position.

The next question is whether the strained relationship can be mended. From the deponents of both parties the relationship of the parties has been strained to such an extent that mending is not possible. The impossibility arises due to lack of legal tools which this court can employ to patch up the tears as a result of the parties failing to sign a lease for the full period contracted, and by contracting out of the protection of the provisions of Cap 301 Laws of Kenya.

Thirdly, being a contractual relationship the business of the court is to give effect to the terms agreed but not to rewrite them. Allowing the parties to go round clause 6, 12 and 25of the agreement would amount to rewriting the contract for the parties.

On the basis of the above observations a prima facie case with a probability of success, has not been established.

As for the second ingredient of suffering irreparable loss, the plaintiff's complaint has been loss of the cost of repairs and loss of business. Although costs of repairs deponed in paragraph 11 of the supporting affidavit is Ksh 10,000.000.00 and loss of business in paragraph 13 is Kshs 275,000.00, the amounts in the affidavit partially contradict the averments in paragraph 14 and 17 of the plaint. Paragraph 14 C of the plaint tallies with paragraph 11 of the affidavit. Whereas paragraph 14(a) of the plaint talks of Kshs 275,000,000.00 which contradict paragraph 13 of the affidavit. These two figures do not tally what is claimed as a special claim in paragraph 17 (a) of the plaint. Further no documentary proof was exhibited by the plaintiffs to show that they spent 10 million on repairs and lost profit to the magnitude of 275,000.000.00 as pleaded in the plaint.

In addition to this it is now trite law that where damages are known and have been computed, that should be deemed recoverable by way of special claim which does not require protection of an injunctive order.

All that is necessary is to show that the defendant is capable of meeting that claim. Herein the applicant has not only failed to show that he is entitled to claim kshs 285,000.000.00 from the defendant therefore requires protection, he has also not claimed that amount. The amount claimed of Kshs 475,000.00 has not been shown to be not capable of being met by the defendant. Nor the resultant general and exemplary damages. Being a contractual relationship it is now trite law that no General damages can be claimed in such circumstances. The claim has to be a special claim. Once the claim for General damages is defaulted that of exemplary damages is watered down and it alone cannot be employed to justify the granting of an injunctive order. This ingredient too fails.

As for the last ingredient of the balance of convenience being in favour of the applicant, it has to be shown that the status quo prevailing between the parties still subsists.

(b) That the applicant is willing to avail himself of the same and

(c) That he has asked the court to consider availing it.

Applying the above to the facts of this case the balance of convenience would only favour the applicant if there is evidence that the two contracting parties are willing to continue co existing as before. Herein it is evident the relationship is stained and so coexistence is ruled out. As regards willingness to avail himself of the convenience order, this has been negated by the admission that they had removed some of the goods to safer grounds in view of the alleged violation of the contract by the defendant. This is proof of willingness not to be tied on to an unwilling partner.

As regards the ability of the court to award the same, it is clear from the prayers sought that there is no prayer for a declaration that the notice issued by the defendant purporting to terminate the tenancy is to be declared null and void. As long as that notice stands the agreement which is the basis of the rights claimed herein has been terminated and once terminated nothing is left for enforcement in order to protect the rights of the plaintiff. For this reasons this ingredients also fails.

Having failed to sustain the application on all the three ingredients, there is no basis for the continued existence of the interim orders granted herein on 1.2.2007. The plaintiffs amended application amended on 1.2.2007 and filed the same date be and is hereby dismissed with costs to the Respondents.

(2) The interim orders granted herein in pursuance of the same on 1.2.2007 be and are hereby discharged forthwith.

DATED, READ AND DELIVERED AT NAIROBI THIS 25TH MAY 2007

R. NAMBUYE
JUDGE