



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 126 of 2007**

**DORIS MUTHONI MWATHAMIA**

**Trading as COMMERCIAL VIEW ENTERPRISES ..... FIRST PLAINTIFF**

**ANN KAJUJU MBABU AND LAWRENCE MBABU**

**Trading as GOODPRICE SHOPPING OUTLETS ..... SECOND PLAINTIFF**

**VERSUS**

**WELCOME PROPERTIES LIMITED ..... FIRST DEFENDANT**

**CHARLES NDUNGU MWANGI ..... SECOND DEFENDANT**

**RULING**

Before me is an application dated 22<sup>nd</sup> May, 2007 by way of Chamber Summons. It is premised under Section 3A and 63(e) of Civil Procedure Act and Order XXXIX Rules 1 and 2 of Civil Procedure Rules, and seeks temporary injunction against the two defendants, their agents, or servants from interfering with their quiet and peaceful possession of the premises situate at ground and first floor, Welcome House, (L.R. No.209/477/37) River Road, Nairobi (hereinafter referred to as “**the suit premises**”).

The first Defendant Welcome Properties Limited was previous proprietor of the suit premises and the first and second plaintiff entered into lease Agreements with the 1<sup>st</sup> Defendant on 1<sup>st</sup> January, 2004 and 1<sup>st</sup> January, 2005 respectively for a period of 5 years and one month.

It also emerged that the two Plaintiffs are not occupying the suit premises but have sub-let the same to several tenants whose full details as well as that of the tenancy agreements have not been divulged to the court.

The lease agreement duly executed have not been registered although it is averred that the necessary payments for stamp duty and registration thereof had been made to the 1<sup>st</sup> Defendant.

By a letter dated 19<sup>th</sup> April, 2007 the 1<sup>st</sup> Defendant informed the plaintiffs that it has sold the Welcome House to Charles Ndungu Mwangi, the 2<sup>nd</sup> Defendant with effect from 1<sup>st</sup> May, 2007.

The 2<sup>nd</sup> Defendant thereafter, through his Advocates, issued Notice of termination expiring on 1<sup>st</sup> July, 2007 under Section 4(2) of the Landlord and Tenants (shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya.

The Plaintiffs through their Advocates notified the 2<sup>nd</sup> Defendant that they would not comply with the notice and filed a Reference being BPRT case No.218/07 in the Business Premises Rent Tribunal. The reference is pending the hearing.

The application is supported by the grounds set out on the face thereof and the supporting affidavits and further affidavits sworn by the plaintiffs.

The Defendants have also sworn and filed their replying affidavits in opposition to the application.

The Learned Counsel for the Plaintiffs Ms Ithondeka, submitted that the plaintiffs have executed lease agreements for the period of 5 years and one month with the 1<sup>st</sup> Defendant. Moreover, the Sale Agreement dated 1<sup>st</sup> November, 2006, does recognize and stipulates vide its clause 2.2 that the property was sold with the following tenants in possession.

The names of the two plaintiffs are set out in the sale agreement with indication of term of their respective leases. Thus, according to her, the sale was conditional to their rights as tenants as stipulated, and in the premises they are not controlled tenants and 2<sup>nd</sup> Defendant cannot issue notice of termination against them.

I may state that the said issue is also before the Business Premises Rent Tribunal.

It was further contended that the lease agreements were not registered even after due payments received. However, that fact cannot have any bearing as the unregistered lease agreements are binding contracts between the plaintiffs and 1<sup>st</sup> Defendant and also the 2<sup>nd</sup> Defendant due to the fact that the Agreement for sale was conditional upon the existing leases in their favour.

The learned counsel relied upon replying affidavit of the Managing Director of the 1<sup>st</sup> Defendant.

In paragraphs 6 and 7 of the said affidavit, it is averred:

**“6. That nevertheless as appears in clause 2.2 of the sale agreement the sale was made subject to all the 4 subsisting tenancies all of which were clearly stated to be for 5 years and one month.**

**7. That in the premises although it sold the suit property before registering the lease by it to the 1<sup>st</sup> Plaintiff the 1<sup>st</sup> Defendant nevertheless ensured that the said lease was recognized by the 2<sup>nd</sup> Defendant for the residue thereof”.**

The case of the 1<sup>st</sup> Defendant thus is clear and supports the contention of the two plaintiffs that the sale agreement was subject to the lease agreements. However, it is also stated by the 1<sup>st</sup> Defendant that the sub-letting of the suit premises by the plaintiff were not consented to by it in writing and thus the 1<sup>st</sup> Defendant was entitled to terminate the lease and retake possession of the leased premises.

However, I do note that the 1<sup>st</sup> Defendant did not take any steps to repossess the suit premises and went ahead to sell the same mentioning the existence of the tenancies in favour of the plaintiffs along with other two tenants. Furthermore it is not averred that the 1<sup>st</sup> Defendant was not aware of the existence of sub-tenancies. It is also noted that the plaintiffs were unable to produce evidence of approval by the 1<sup>st</sup>

Defendant as regards these sub-tenancies, as per order of this court made on 23<sup>rd</sup> May, 2007. It is only averred that when the plaintiffs took over the suit premises were used as Exhibition Hall and occupied by several sub-tenants and thus it is the plaintiffs case that there was an awareness and implied approval of such sub-tenancies by the 1<sup>st</sup> Defendant.

The Plaintiffs' counsel relied on several authorities on the binding nature of the unregistered lease as a contract. They were **Souza and Figueiredo and Co. Ltd. Vs. Moderings Hotel Co. Ltd. (1960) E.A.C.A. 926** and **Bachelor's Bakery Ltd. Vs. Westlands Securities Ltd. (1982) KLR 366**.

These two cases recognized that the unregistered lease agreement is valid as contract inter partes but gives no protection against the rights of third parties.

It is also on record that the 2<sup>nd</sup> Defendant through his advocate demanded the rent as from 1<sup>st</sup> May, 2007 vide a letter of 27<sup>th</sup> April, 2007 although in the same letter he has also given notice of termination as specified hereinbefore.

Be that as it may, the contention of the 2<sup>nd</sup> Defendant is that the leases between the plaintiffs and the 1<sup>st</sup> Defendant were unregistered and he being a third party, it is not enforceable against him. As per Section 107 of Transfer of Property Act a lease for more than one year has to be registered and non registered lease becomes a monthly tenancy under Section 106 of the said Act. Reliance was placed on the case of **Grosvenor vs. Rogan Kamper (1977) KLR 123** to show that the unregistered lease in respect of third party became a monthly tenancy.

The 2<sup>nd</sup> Defendant also relied on the letter of 1<sup>st</sup> Defendant to the plaintiffs which stipulated that they have to agree new terms and conditions with the new owner. That fact showed that there was no intention to make the sale agreement subject to the lease agreements of 5 years and one month.

It was also contended that as the plaintiffs have sub-let without permission from the 1<sup>st</sup> Defendant or the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant is entitled to evict them under tenancy agreement. Instead he has opted to give them two months' notice. It is also stressed that having filed the reference in the Business Premises Rent Tribunal, the plaintiffs cannot now come before this court, seeking remedies similar to what is sought before the said Tribunal. Moreover, 2<sup>nd</sup> Defendant is required to carry out major renovations in the suit premises and thus shall suffer damages if the same is not done as required by the Nairobi City Council.

It was lastly stressed that the plaintiffs have failed to prove prima facie case and in any event it was urged that the damages shall be an adequate remedy.

This case, apart from having change of ownership while the tenants are occupying the suit premises under unregistered lease agreements, has a serious twist therein with the issue of sub-tenancy.

It is on record that the plaintiffs are not in occupation of the suit premises as they have sub-let the same to several persons. Obviously, there is no written permission on record, either from the 1<sup>st</sup> Defendant or from the 2<sup>nd</sup> Defendant. The sale agreement relied upon by the plaintiffs mentions only the lease agreements executed by them with the 1<sup>st</sup> Defendant. There is no mention of the sub-tenants. Thus the 2<sup>nd</sup> Defendant in any event is not made aware or ought to be aware of such sub-tenancies.

Before I deal with this issue of sub-tenants, I shall have to find whether there is prima facie case shown by the plaintiff vis-à-vis the 2<sup>nd</sup> Defendant as to their right of tenancy tenure from the lease agreement.

From the sale agreement, and from perusal of clause 2.2 thereof I may, at this stage, be persuaded to find that the 2<sup>nd</sup> Defendant was aware of the lease agreement with the term of Tenancy. They purchased the same with due awareness of the said tenancies. Thus they may not be termed as a third party, strictly, as is used in law and in the authorities cited before me.

But, must the 2<sup>nd</sup> Respondent accept or be bound by the sub-tenancies created by the plaintiffs in the circumstance of this case? At this juncture, I shall hesitate to find so. Moreover the plaintiffs have gone before the Business Premises Rent Tribunal and pending the hearing of the said reference there is no imminent danger of them being evicted.

Considering all the facts as premised, I am not in a position to find that the balance of convenience tilts in favour of the plaintiffs.

I thus dismiss the application with costs.

Dated and signed at Nairobi this 29<sup>th</sup> day of June, 2007.

**K.H. RAWAL**

**JUDGE**

**29.6.07**