



**REPUBLIC OF KENYA**

**AT THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL CASE 65 OF 2007**

**IN THE MATTER OF AN APPLCIATION LEAVE TO APPLY FOR**

**JUDICIAL REVIEW**

**ORDERS OF RPOHIBITION**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF THE PHYSICAL PLANNING ACT**

**AND**

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT**

**GLOBAL MERCHANTS LIMITED**

**GLOBAL BEVERAGES LIMITED.....APPLICANTS**

**VERSUS**

**THE THIKA MUNICIPAL COUNCIL .....RESPONDENT**

**HEZEKIAH NJUGUNA MWAURA .....INTERESTED PARTY**

**RULING**

1. Land and Environmental Law Division
2. Subject of main suit: Judicial Review

Prohibition to

- i) Stop Thika Municipal Council from harassing employees servant workers.
- ii] M/s Global Merchants Ltd

M/s Global Beverage Ltd rented godown from Hezekiah Njuguna Mwaura for 35,000/- per month.

- iii) Lease with effect from 1.9.2006 of 5 years and one day.
- iv) Relationship Tenant/Landlord
- v) Tenant alters godown without leave of Landlord and Municipal Council
- vi) Landlord files suit in Magistrate court for injunction CM 756/07 at Thika Kidula CM.
- vii) Preliminary Objection
  - Suit struck out on grounds matter falls under Business Premises Rent Tribunal
- viii) Landlord requests council to stop alteration
- ix) Judicial review filed seeking leave to file for orders of prohibition.

3. Held:

- a) CM 756/07 called up
- b) Matter not a BPTC
- c) Tenancy not controlled.
- d) Lease has clause 10 and 16 clearly stating no alteration
- e) Non disclosure by applicant of material fact
- f) Application for leave declined and dismissed.

4. Case law – Nil

5. Advocates:-

C. Omulele and Christopher Omulele & Co. Advocates for the plaintiff/exparte applicant - present

I: Application 30 October 2007

1. This file before me is for leave to commence Judicial Review Proceedings of Prohibition against the Municipality of Thika. M/s Global Merchants Ltd and M/s Global Beverage Ltd (herein the tenant) had entered into a lease agreement with Hezekial Njuguna Mwaura, (the landlord) to rent his godown situated on LRNo.4953/437 Thika with effect from 1 September 2007. The lease agreement was duly executed between the parties for a monthly rent of Ksh.35,000/- with a three months deposit of Ksh.105,000/-. It was the term of agreement – clause 6 that ‘no alteration or addition to the demise premises [ would be under taken] without the written consent and or “not to injure any of the walls or timbers thereof nor suffer the same to be done.”. Clause 10 that the “demised premises [shall be used] for a godown only or such other purpose to be communicated to the lessor by the lessee in writing.”

2. The tenant proceeded to make alternation. They said they had authority from the Landlord to do so. The Landlord had given no authority and filed suit at the magistrate’s court to stop the construction. To bring back the premises to the state, it would cost the Landlord to return the premises to its state would be Ksh.543,500/-. He filed suit in the Chief Magistrates court at Thika. He obtained exparte injunction orders from the Senior Resident Magistrate L. W. Gicheche. At the inter parties hearing before Kidula Chief Magistrate it was argued in a preliminary objection that the court had no jurisdiction to hear the

matter. Subsequently the suit was struck out on grounds that it should have been filed under the Business Premises Rent Tribunal and not the Magistrate court. In reality if the trial magistrate had examined the lease contained in her file she would have noted that the Commercial lease was in fact not controlled. The advocate in question misled that court which is clearly a breach of trust of the said advocate's oath to be a friend to the court and not hide anything but to disclose the truth on material facts.

3. The effects of striking out the plant meant the injunction was lifted. The Landlord wrote to the Municipality Social of Thika to protect himself from prosecution, namely alternating the premises without permission of the Municipality and indeed the Environmental Law impact assessment audit.

4. The Municipality of Thika acted and stopped the alteration/construction. The tenant reacted by filing this Judicial Review to prohibit the said Municipality Council from harassing their workers servants official and or agents from performing their duties on the suit premises LR 4953/437 Thika.

## II: Should leave to commence proceeding of Judicial Review under prohibition be issued?

5. The applicant seeking leave for Judicial Review failed to disclose material facts before the magistrate's court and misled the court to think that the court had no jurisdiction to hear the matter when it did.

6. The applicant further failed to disclose that at no time were they permitted to under taken alteration to the godown. If they were, permission was to be sought in writing and leave from the Municipality Council and the Environmental Management Audit report.

7. The applicant failed to disclose that the Landlord at no time sought increase of rent but the sum of Ksh.543,000/- being the valuation of restoring the premises to its rightful state.

## III: Finding

8. The application for leave seeking leave to commence Judicial Review of Prohibition be and is hereby declined and dismissed.

9. A copy of this ruling be served upon the Registrar of the High Court of Kenya

respondents and the interested party.

10. The applicant will bear his own costs.

Dated this 13<sup>th</sup> day of November 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

C. Omulele and Christopher Omulele & Co. Advocates for the plaintiff/exparte applicant - present