



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

**Civil Case 171 of 2006**

**NGARA ROAD SELF SERVICE STORE .....PLAINTIFF**

**VERSUS**

**KIAMBU MWITUMBERIA (1971) LTD. ....DEFENDANT**

**RULING**

Ngara Road Self Service Store (“**the Plaintiff**”) instituted this suit on the 21<sup>st</sup> February 2006 seeking an injunction to restrain Kiambu Mwitumberia (1971) Ltd. (“**the Defendant**”) from evicting the Plaintiff from the piece or parcel of land known as L.R. No. 209/2490/14 Ngara, Nairobi a portion whereof (comprising a departmental store, bar and butchery and the temporary structures appurtenant thereto (“**the suit premises**”) is occupied by the Plaintiff as a tenant of the Defendant.

Simultaneously with the filing of the Complaint dated the 21<sup>st</sup> February 2006, the Plaintiff took out a Chamber Summons of even date therewith under Order 39 rules 1, 2, 2A and 9 of the Civil Procedure Rules in which the Plaintiff asks for a temporary injunction to restrain the Defendant from evicting the Plaintiff from the suit premises until the hearing and determination of the suit. The Application is supported by the affidavit of James Muthaka Muthee sworn on the 21<sup>st</sup> February 2006.

In his submissions, Mr. Kimathi, learned counsel for the Plaintiff, contended that as the Plaintiff’s tenancy of the suit premises is a “**controlled tenancy**” within the meaning of Section 2. (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act [Cap.301] (“**the Act**”), it can be determined only in the manner set out in section 4 of the Act. Mr. Kimathi also submitted that the Defendant’s two notices requiring the Plaintiff to vacate the suit premises did not comply with the Act and are therefore illegal and unenforceable.

The Defendant relied on the Replying Affidavit of Peter Kabi Gitinu made on the 2<sup>nd</sup> March 2006 to oppose the Application. Its learned counsel, Mr. Kiai, conceding that the Act applies and further that the Defendant’s said two notices to quit were not in the prescribed form, argued that the Plaintiff having earlier given its verbal assurance that it would vacate the suit premises, the Plaintiff was now precluded from resiling that agreement. Mr. Kiai further contended that the Defendant’s notices to quit could not be invalidated by reason only that they were not in the statutory form as in any event, the Defendant had acted within its rights under Section 7. (1) (b) of the Act.

I have considered the Application in conjunction with the submissions of both learned counsel. Under Section 4. (2) of the Act, the Defendant is required to give notice “**in the prescribed form**”, such notice “**not being less than two months** after the receipt thereof by the Plaintiff as stipulated in Section 4.(4) of the Act. The form of notice the Defendant ought to have issued is prescribed in regulation 4.(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations and set out in Form A of the Schedule thereto. Section 4.(5) of the Act provides that a tenancy notice shall not be effective unless it “**requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice**”.

In light of these provisions and following the Court of Appeal decisions in Manaver N. Alibhai t/a Diani Boutique v South Coast Fitness & Sports Centre Ltd. (Civil Appeal No. 203 of 1994 (unreported)) and Tiwi Beach Hotel Ltd. v Juliane Ulrike Stamm [1990] 2 KAR 189, it seems to me that the Defendant, clearly, has failed to comply with the mandatory provisions of Section 4.(2), (4) and (5) of the Act and is not, therefore, at all assisted in this regard by the decision in Auto Engineering Ltd. v M Gonella & Co. Ltd. [1978] KLR 248 cited by its learned counsel. I am also of the view that the Plaintiff has made out a *prima facie* case with a probability of success and as the Tribunal established under the Act has no jurisdiction to grant the relief sought by the Plaintiff in this Application as was held by the Court of Appeal in Narshidas & Company Ltd. v Nyali Air Conditioning and Refrigeration Services Ltd. (Civil Appeal No. 205 of 1995 (unreported)), I reject and dismiss the Defendant's Preliminary Objection dated and filed on the 2<sup>nd</sup> March 2006.

Consequently, I allow the Chamber Summons application dated and filed on the 21<sup>st</sup> February 2006 and do hereby grant orders in terms of prayer No. 2 thereof with costs to the Plaintiff.

Orders accordingly.

Dated and delivered at Nairobi this Twenty-fourth      day of March, 2006.

P. Kihara Kariuki

Judge