



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

Civil Case 694 of 2006

**DAVID NJUGUNA NGOTHO.....
PLAINTIFF**

VERSUS

**FLORENCE WANJIRU MUTHEE1ST
DEFENDANT**

**GATHUGU GATHOGO.....2ND
DEFENDANT**

**MURAGURI GIICHI.....3RD
DEFENDANT**

**RODHA KAMBI.....4TH
DEFENDANT**

**CHARLES GATHIMA NJUGUNA.....5TH
DEFENDANT**

RULING

The plaintiff by this Chamber Summons brought under the provisions of Order XXXIX Rule 1, 2, 2A and 9 of the Civil procedure Rules and Sections 3A and 63 (c) of the Civil procedure Act seeks orders that an injunction be issued to restrain the defendants by themselves, their servants agents or otherwise howsoever from evicting or in any manner whatsoever interfering with the plaintiffs occupation possession and or quiet enjoyment of shop No.3 LR NO. 209/136/18 Kiriti Building Nairobi pending the hearing and determination of this suit or until further orders of this court and that the costs be provided for.

The application is based on the grounds:- that by an indenture of lease dated 1st May 2001 made between the defendants on the one part and the plaintiff on the other part, the defendants leased Shop No. 3 L.R NO. 209/136/18 Kiriti Building Nairobi to the plaintiff for a period of 5 years and 1 month commencing 1st May 2001 for an agreed monthly rent of Shs.19,000/; that it was a term of the indenture of lease that on expiry of the term thereby created, the defendant shall grant the plaintiff a lease for a further term of 5 years and 3 months at a rent and on terms to be agreed upon between the defendant and the plaintiff; that the plaintiff took possession of the shop on 1st May 2001 and has been in occupation thereto for the purposes of his business of selling cereals, food staffs and other farm produce; that the

plaintiffs lease expired on 1st May 2006 and prior to the expiry of the lease the plaintiff requested the defendants to grant him a lease for a further 5 years 3 months as stipulated in the Indenture of Lease; that in breach of the terms of Indenture of Lease:-

(i) The defendants have failed, refused, and or neglected to grant the plaintiff a lease of the shop for a further term of 5 years 3 months.

(ii) The defendants have required the plaintiff to vacate the shop by 30th June 2006; that the defendants have threatened that on or after 30th June 2006, they will evict the plaintiff from the shop and take possession thereof; that the plaintiff has invested funds, labour, skills and personal resources in the business carried on in the shop and if he is evicted therefrom he shall suffer irreparable loss and damage; that the plaintiff has a prima facie case with a probability of success; that the plaintiff shall suffer irreparable loss and damage unless the orders sought are granted; that the plaintiff is ready and willing to pay to the defendants or into court the monthly rent for the shop as and when it falls due and that the plaintiff is also if required willing to give an undertaking on damages.

The application is also supported by an affidavit sworn by the plaintiff in which he avers on similar facts as those contained on the grounds.

The application is opposed by the defendants who have filed a replying affidavit sworn by Charles Njuguna the 5th defendant on behalf of the other defendants in which he avers that the plaintiff had leased the suit premises for a term of 5 years and 3 months which term expired on 30th May 2006 and therefore he has no option but to give vacant possession.

Both the plaintiff and the defendants rely on the terms the said lease signed on 1st May 2001 to support his case.

The plaintiff relies on Clause 4(b) of the lease which provides thus:

“4 “b” On expiry of the term hereby created, the lessor shall grant the lessee a lease for a further term of 5 years and 3 months at a rent and on terms to be agreed upon between the lessor and the lessee.”

While the defendant rely on Clause 4 (c) which provides thus:

“4 (c) Either party can terminate this lease by giving the other 3 months notice.”

On the 1st February 2006 the plaintiff wrote the defendant requesting for renewal of lease.

The letter read as follows:

Gathugu Gathogo & Others

P.O. Box 52300

NAIROBI.

Dear Sir/Madam,

REF: RENEWAL OF LEASE FOR SHOP NO.3

I would wish to request you to renew for me the lease for the above named shop whose expiry date is due on 30th April 2006. Due to the prevailing economic hardship I would also request you to consider if possible to continue with the current monthly rent of Shs.19,000/=.

And the defendants on 28th February 2006 wrote the plaintiff notifying him of their unwillingness to

grant the plaintiff a further term. It read as follows:-

David Njuguna Ngotho

P.O. Box 23699

NAIROBI.

Dear Sir,

RE: L.R. NO. 209/136/18

TERMINATION OF LEASE

Do refer to the item hereabove and to term 4(b) of the Indenture of Lease between ourselves and yourself.

The lessors, not desirous of granting any further term in the lease do hereby give notice that the said lease shall stand determined on the 30th June 2006 together with any and all interests granted with and/or appurtenant thereto, or arising/created thereunder.

The premises shall be delivered to the lessors in vacant possession on the said date.

Make further reference to terms 2 (f) and 2(v) of the said agreement take the necessary steps to abide thereby.

Yours faithfully

James G. Njuguna

For the Lessors

When the plaintiff received the above notice, he filed this suit seeking orders that an order of specific performance directing the defendants to grant to the plaintiff a lease of shop No.3 L.R. 209/136/18 Kiriti Building Nairobi for a further term of 5 years 3 months at a rent and on terms to be agreed upon between the plaintiff and the defendants. The plaint was accompanied by this Chamber Summons seeking injunctive orders until this suit is heard and determined.

The law as to the principles under which such order can be issued are well settled in the well known case of *GIELLA VS. CASSMAN BROWN & CO. LTD* 1973 EA 358 which are that an applicant seeking a prohibitive injunction needs to establish that he has a prima facie case with a probability of success and he also needs to show that if the orders are not granted then he stands to suffer irreparable loss or damage. If the court is however in doubt, on the foregoing then it will decide the matter on the balance of convenience.

The plaintiff says he has a prima facie case with a probability of success and in saying so he relies on Clause 4 (b) of the Indenture of the Lease entered between the plaintiff and the defendants on 1st May 2001 which provides as follows:-

“On expiry of the term hereby created, the Lessors shall grant the Lessee a lease for a further term of 5 years 3 months at a rent and on terms to be agreed upon between the lessors and the lessee”

With due respect to counsel, this clause amounts to a future promise and is conditional i.e. the promise depended at a rent and terms to be agreed upon between the plaintiff and the defendants. And to confirm this, when the plaintiff himself wrote the defendants to request for the renewal of the lease, he required to be allowed due to the prevailing economic hardship to continue paying the current rent of

Shs.19,000/=.

I do not see the possibility of the plaintiff being granted the orders sought due to uncertainty of the terms of the agreement. If specific performance is granted it would be with other issues unresolved i.e. at what rent will the plaintiff take possession of the defendant's premises and on what terms. This would amount to the court rewriting the contract for the parties if it attempts to decide on the issue of rent and terms of the lease.

Specific performance is an equitable remedy and the court has a discretion whether to grant it or not and it will not be ordered if the agreement is uncertain in any material respect or if it involves hardship.

Specific performance cannot be granted in the absence of a valid legal contract.

For the reasons given the applicant's application fails and the same is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 2nd day of October, 2006.

J.L.A. OSIEMO

JUDGE