REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 973 OF 2004

REUBEN GITONGA M'MUGAMBI…..…….PLAINTIFF/APPLICANT

VERSUS

KENYATTA NATIONAL HOSPITAL…... DEFENDANT/RESPONDENT

RULING

A. PRELIMINARY MATTERS

The Plaintiff's application by Chamber Summons dated 16th September and filed on 17th September, 2004 was brought under Order XXXIX, rules 1 and 2(a) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21). The Applicant's prayers were:

(i) that, the Defendant/Respondent be compelled to re-open the business premises of the Applicant;

(ii) that, the Defendant be restrained from closing and/or interfering with the Plaintiff's business premises;

(iii) that, costs be provided for in the cause.

Grounds stated in support of the application are as follows:

(a) that, the Applicant has suffered and continues to suffer irreparable loss and damage;

(b) that, the application ought to be granted as a matter of right;

(c) that, the Business Premises Rent Tribunal is not able to provide tenant protection at the moment, as it lacks a chairperson;

(d) that, the Applicant is a protected tenant and is entitled to a statutory notice before being denied access to the business premises.

Evidence in support of the application is set out in the supporting affidavit of ***Reuben Gitonga M'Mugambi***, the Applicant. He depones that he has been a tenant in the premises known as Kenyatta National Hospital Police Post Canteen, where he has been conducting restaurant and bar business and paying monthly rental to the Kenya Police Department. He avers that on 26th July, 2004 the Defendant closed his business premises on health grounds and prescribed conditions which he was to fulfil before the premises could be re-opened; and he complied with those conditions, and the premises were re-opened on 4th August, 2004. On 18th August, 2004 the Kenya Police Department surrendered the suit

premises to the Defendant, with effect ***from 31st August, 2004;*** and the Defendant became the new landlord, with effect from ***1st September, 2004***. The deponent averred that, on or about 15th September, 2004 the Defendant, without any notice, locked up the suit premises with all his property inside. He thereafter filed Business Premises Rent Tribunal Case No. 360 of 2004; but hearing has not taken place because the Tribunal lacks a chairperson. The deponent, who does not know when a chairperson of the Tribunal will be appointed, pleads that all his property will go to waste and occasion him irreparable loss and damage; and so he prays that the Court do order the Defendant to open up the suit premises, and also do restrain the Defendant by a permanent injunction from closing the suit premises, or in any way interfering with the running, enjoyment and user of the suit premises until the matter is determined by the Tribunal or by this Court.

The Defendant responded by filing a notice of preliminary objection dated 24th September, 2004, and the replying affidavit of ***Dr. F.M. Musau,*** the Defendant's director, on 28th September, 2004.

In her affidavit, ***Dr. Musau*** avers that the Applicant has never been the Defendant's tenant. She avers that the Applicant's business had been closed down by the Public Health Department, which is autonomous in its operations and carries out its functions under the Public Health Act (Cap. 242). The deponent avers that, when the business premises were handed back to the Defendant by the Office of the President (under which the Police service falls), the Applicant never bothered to enter into a tenancy agreement with the hospital management but instead continued to operate without authority "until his removal". She depones further that the Applicant did know that the suit premises had reverted back to the Defendant, and since he had no agreement with the Defendant, he was subject to eviction at any time, and indeed he had already been requested to vacate by 30th August, 2004.

Submissions by counsel were made on 29th September and 1st November, 2004 on which occasions the Plaintiff/Applicant was represented by ***Mr. Mwirigi,*** while the Defendant/Respondent was represented by ***Mr. Nzuki Mwinzi.***

Mr. Mwinzi, who had just served his client's notice of preliminary objection dated 24th September, 2004 agreed to the points of law raised being canvassed during the submissions on the application.

B. AFFIDAVITS

Mr. Mwirigi sought the striking out of the replying affidavit sworn by ***Dr. Florence Musau,*** for its failure to comply with the requirement of Section 35(1) of the Advocates Act (Cap. 16), that it should state who has drawn it up. Counsel relied on this Court's decision in ***Barclays Bank of Kenya Ltd. v. Dr. Sollomon Otieno Orero***, HCCC No. 1736 of 2001. The relevant paragraph in the ruling of the Honourable ***Mr. Justice Njagi,*** in that matter, may be set out:

> **"Mr. Kajwang submitted that these authorities *[Miben (K) Ltd v. Mark Wangai Muchemi t/a Border Services Station and Others,* High Court, Kisumu Civil Case No. 234 of 2001; *Jovenna East Africa Ltd v. Sylvester Onyango & Others,* Milimani HCCC No. 1086 of 2002] are only persuasive and urged the Court to follow in the footsteps of Justice Ringera who has said elsewhere that the omission to endorse a document in terms of s. 35(1) is a mere irregularity. My worry with that view is: when does an irregularity graduate from an irregularity? Where would one draw the dividing line between an irregularity as envisaged in O.XVIII rule 7 of the Civil Procedure Rules and a blatant breach of a statutory provision? In an appropriate case, one would not hesitate to invoke the soothing effects of … O.XVIII rule 7. But when an 'irregularity' touches upon the breach of express statutory provisions one has to be careful. If the treatment of such breaches as mere irregularities becomes common practice, then it will be difficult to state the law with certainty and finality.**
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> **"For the above reasons, I am constrained to uphold the preliminary objection and strike out the Defendant's application dated 30th October, 2003 with costs to the Plaintiff."**

Learned counsel, ***Mr. Mwinzi*** felt hard done by, with the foregoing preliminary objection, and he prayed that the Court's *discretion* be applied to save his application as filed. He prayed that his application and its supporting documents be judged *on content*, which he remarked, had not been questioned - rather than on form. While acknowledging that by Section 34 of the Advocates Act (Cap.16) unqualified persons are disqualified from drawing legal documents, his client's application and the various documents in its framework were drawn by him and in his name. ***Mr. Mwinzi*** argued that Section 35 of the Act made no reference to *replying affidavits*; but this point was not much canvassed, and I doubt that learned counsel was sufficiently clear on the point. I have no doubts in my mind that a reference in statute law to *affidavits* would have to be in respect of all affidavits, be they supporting affidavits, further affidavits, supplementary affidavits, replying affidavits, further replying affidavits, etc.

The more purposive point was the plea that by virtue of O.XVIII, rule 7 the impugned replying affidavit might be *cured* and allowed to be

used as factual basis for the Defendant's case in this matter.

It is now *clear that this point about affidavits bearing shortfalls will need ultimately to be settled by the Court of Appeal*, as different judges of the High Court have taken different approaches. I had for my part to clear this preliminary point and to give directions on the mode of disposal of the matter on the cause list. My ruling was as follows:

> **"*Mr. Mwirigi* has sought the striking out of the Respondent's replying affidavit for not showing the name of the person who drew it, as required by sections 34 and 35 of the Advocates Act (Cap.16).**
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> **"If that prayer is allowed, the hearing could still proceed, as *Mr. Mwinzi* has not abandoned all the grounds in his Grounds of Opposition. *Mr. Mwirigi* relies on the authority of *Barclays Bank v. Orero,* HCCC No. 1736 of 2001.**
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> **"But *Mr. Mwinzi* invokes Order XVIII, rule 7 which confers upon the Court a *discretion to excuse irregularity in terms of form,* in affidavits.**
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> **"It is apparent that some decisions of this Court take a position of strict construction, and would strike out any affidavit which fails to stand up, from the standpoint of procedural regularity. There are also decisions that would employ the *discretion* provided for, and allow a formally defective affidavit to be used.**
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> ***"In the fullness of time the Judiciary might arrive at one agreed position in this matter.***
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> **"I will construe this state of uncertainty *in favour of proper hearing for the issues now placed before me* – as I think only such a hearing leads to a just outcome. I will overrule the objection by counsel for the Applicant, and allow Mr. Nzuki Mwinzi to prosecute his response to the application on the basis of both his client's replying affidavit and his surviving Grounds of Opposition as previously filed."**

C. IS IT PROPER TO GRANT MANDATORY INJUNCTION AT

THE INTERLOCUTORY STAGE?

On that basis, ***Mr. Mwirigi*** proceeded to present the prayers in the Plaintiff's application. He submitted that the Plaintiff had been, at the suit premises, *always a protected tenant* and this fact is recognised by the Defendant. For this proposition, he cited paragraph 8 of the replying affidavit of ***Dr. Florence Musau***:

That, I am … advised by my advocate on record, which advice I verily believe to be true, that matters between landlord and tenant are the sole preserve of the Business Premises Rent Tribunal and as such the High Court cannot assume jurisdiction over this matter."

When the Defendant took over the premises and closed the same on 15th September, 2004 the Plaintiff lodged the matter with the said Business Premises Rent Tribunal, under reference number 360 of 2004; but this matter is still pending because the Tribunal lacks the capacity at the moment to hear and determine business premises-related disputes. Counsel stated that the Plaintiff had had in these circumstances to come before the High Court, in search of justice. The Plaintiff came to the High Court to invoke its inherent powers under Section 3A of the Civil Procedure Act (Cap.21), *for the purpose of stopping a wrong from happening*; specifically the object was to stop the Respondent from interfering with the Plaintiff's business pending the hearing on the merits which will take place before the Business Premises Rent Tribunal. And the relief sought is a *mandatory injunction at this interlocutory stage*. The prayer, counsel submitted, was not unprecedented; it had happened in ***Belle Maison Limited v. Yaya Towers Ltd***., HCCC No. 2225 of 1992.

In the ***Belle Maison*** case the material aspects are set out in the ruling of Mr. Justice Bosire (as he then was):

> **"[In] *Adonia v. Mutekanga* [1970] E.A. 429 the Court of Appeal held that where no specific provision exists under which a party may move the Court for a remedy, the party concerned may come to Court under ….[section 3A of the Civil Procedure Act] and seek relief. So that to my mind Courts in this country have been proceeding, or so I think, on the basis of inherent jurisdiction to grant the remedy of a mandatory injunction at [the] interlocutory stage. So on the issue of jurisdiction, I say, this Court has the jurisdiction to grant a mandatory injunction at an interlocutory stage.**
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> **"As was stated in [*The Despina Pontiko* [1975] E.A. 38] it is a jurisdiction which must be exercised only in special circumstances. Special circumstances, however, depend on the facts and circumstances of each case and the good sense of the trial judge."**

Within the principles stated in the ***Belle Maison*** case, learned counsel ***Mr. Mwirigi*** attempted to show that the grief to which the Plaintiff came at the hands of the Defendant, justified the making of orders of a mandatory kind, requiring the Defendant to open up the Plaintiff's shop which to-date contains perishables which are otherwise destined to be lost, with irreparable damage to the Plaintiff. Counsel is concerned that the Defendant has made references to the Plaintiff as an illegal tenant; and the Defendant avers that the illegal tenancy automatically occurred upon the Defendant taking over the suit premises in respect of which the Plaintiff had consistently paid rent to the Police Department (in the Office of the President). It is not anywhere contended that the Plaintiff had not been *a lawful tenant of the Police Department*. So if he had been a lawful tenant, then the position of the Defendant must be that illegality fell upon the tenancy automatically, *the moment the Police handed over the suit premises to the Defendant*. There is no deposition on the record to show if the *handing-over process to the Defendant had at any stage involved consensual arrangements to make any provisions regarding the status of the tenancy.*

Although ***Mr. Mwirigi*** endeavoured to make submissions on the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301) and the protections this accords tenants such as the Plaintiff, I think this would be a matter of substance to be dealt with by the Business Premises Rent Tribunal when it will be able to give a hearing.

D. DID TENANCY PASS FROM ONE LANDLORD TO ANOTHER?

Learned counsel, ***Mr. Mwinzi*** submitted that there was no privity of contract between the Plaintiff and the Defendant, and accordingly the Plaintiff could not continue to occupy the Defendant's property. He also submitted that this Court had no jurisdiction to hear the matter, as the Plaintiff's plight fell squarely within the ambit of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap.301). He stated that the suit premises had been handed over by the Kenya Police to the Defendant when the contract between the two expired, and that there was no relationship between the Defendant and the Plaintiff. Counsel stated that the Plaintiff had been served with notice to vacate the suit premises; and that *repossession followed the said notice*. He stated that the notice had been issued by the Police Department

and not by the Defendant, and that the Plaintiff ought at that stage to have sought a new contractual arrangement with the Defendant.

Mr. Nzuki Mwinzi, I think, quite improperly, with respect, went beyond the pleadings or depositions and contended that the effect of the orders sought would be that the Court would be "supervising the violation of the provisions of the Exchequer and Audit Act (Cap. 412), insofar as that Act carries procurement rules which regulate tendering in respect of facilities such as the suit premises. Such a claim appears not to have been ventilated at any stage, either in the Defendant's documentations on file, or in any dealings at all which took place between the parties.

It becomes quite clear that this is a matter that *must go on to full trial,* when the Defendant raises issues that appear to be fundamental, yet they figure nowhere in the pleadings. Of course, to suddenly begin to raise issues in Court which are not part of the depositions, is a glaring abuse of Court process – and much more so when these new issues *come through counsel* as they did in this case. In giving my ruling, I have a duty to disregard such new claims, for they merely *embarrass the proper determination of the issues in dispute at this interlocutory stage*.

Mr. Mwirigi, proceeding from his earlier submission which was not controverted, that the tenancy in question is a controlled tenancy, submitted that the plea made for the Defendant, based on statutes such as the Exchequer and Audit Act (Cap. 412), is in vain *because the existing contract had not been lawfully terminated.*

Counsel submitted, I believe quite correctly, that the restaurant services rendered by the Plaintiff had been quite well known to the Defendant over some considerable period of time, and the fact that the provision of such services was based on an agreement was also well known to the Defendant. The contract between the Plaintiff and the Police Department was still running; and the Police Department were operating as agents of the Defendant who, counsel submitted, thus could not denounce ongoing contracts unilaterally.

E. IS THERE A CASE FOR INTERIM HIGH COURT RELIEF PENDING

HEARING BEFORE LOWER TRIBUNAL?

In my assessment, it has emerged that the Plaintiff has genuine

business premises – related grievances that must be resolved by the Courts and tribunals of this land. Those grievances are against Kenyatta National Hospital, the Defendant. The Defendant had let its premises, I believe, so that it may be used as business premises, to the Kenya Police, a department in the Office of the President. The Plaintiff did, as is common cause, hold a valid tenancy, indeed a protected tenancy, with the Kenya Police, over the suit premises which is the property of an independent, parastatal corporation which may sue and be sued in its own corporate name. Although it is claimed in a letter from the Police Department to the Director of Kenyatta National Hospital, dated 18th August, 2004 *that the contract with the Plaintiff had expired,* this is disputed – and hence it must be proved during the full trial. It is the same letter that claims to be advising the contractor, namely the Plaintiff, to vacate the suit premises. This appears strange, where there had been a negotiated contract setting out the detailed terms of canteen operations. As a matter of law, and in particular the law of contract, it is not possible for me to take the said letter of 18th August, 2004 at face value.

The moment the Plaintiff placed his complaint before the Business Premises Rent Tribunal, there came about a contentious question, a ***lis***, a juridically significant matter which would determine the rights and obligations of the parties one way or the other. *The moment disputed issues are thus joined, it ceases, as a matter of law, to be open to a landlord to unilaterally evict or shut out the tenant, as the tenant's grievances are thereby rendered absolutely nugatory – and that is contrary to the letter and the spirit of the law.*

The circumstances in which the Defendant has shut down the Plaintiff's business smack of the sort of high-handedness that has the effect of *corrupting the proper functioning of the legal process*. It has not

been disputed that the Plaintiff's wares are simply locked up in the suit premises, and the Plaintiff given his marching orders. That would be illegal, firstly because the *Plaintiff has constitutional rights to his property, and nobody is allowed to, in effect, confiscate his property*. Secondly*, the Plaintiff's legitimate economic activities, which ultimately link up to property rights, are subject only – in general terms – to the laws of contract*. But in this case he complains that the Defendant is in breach of the very basis of exercise of *rights which have accrued from contractual arrangements.* The Plaintiff contends that he was entitled to proper notices, in accordance with the existing arrangements, in relation to his continued conduct of business – but he was denied these. He also complains that his perishable goods are locked up - a fact destined to cause him a great amount of loss. He has also placed his matter before the Business Premises Rent Tribunal, which could very well accord him the relief he seeks.

All these are compelling circumstances which dictate that the High Court, in exercise of its unlimited jurisdiction when parties have a grievance, shall provide interlocutory relief. I am convinced that this matter is properly before the Court. And I will make the following Orders:

> 1. The Defendant shall forthwith, and in any event within 21 days of the date hereof, ***re-open the suit premises to the Plaintiff and shall keep it open pending either the making of a suitable arrangement between the parties or the hearing and determination of Business Premises Rent Tribunal Case No. 360 of 2004 whichever one is accomplished first in time.***
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> 2. The third prayer in the Plaintiff's application of 16th September, 2004 "THAT the Defendant be restrained from closing and/or interfering with the Plaintiff's business premises," is granted subject to the terms of the first order herein.
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> 3. The costs of this application shall be in the cause.

DATED and DELIVERED at Nairobi this 4th day of February, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Mwirigi, instructed by M/s. Mwirigi & M'Inoti & Co. Advocates

For the Defendant/Respondent: Mr. Nzuki Mwinzi, instructed by M/s Nzuki Mwinzi Advocates.