



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT MOMBASA

Civil Suit 101 of 2005

AUGUSTUS MULI trading as FUN & JAY COMPANY &

NYALI HIGH SCHOOL PLAINTIFFS

VERSUS

CHEMUSIAN COMPANY LIMITED &

REGENT MANAGEMENT LIMITED.....DEFENDANTS

Coram: Before Hon. Justice Mwera

Otieno for Gikandi for the Applicant/Plaintiff

Omondi for the 2 Respondents/Defendants

Court clerk – Kazungu

RULING

The plaintiff, trading as Fun & Joy Company, sued the 2 defendants (a principal and its agent!) on 2-6-05 on account of their tenant/landlord relationship over a parcel of land known as PLOT 1188/1/MN NYATI ROAD, NYALI MOMBASA. At the same time the plaintiff filed a chamber summons under O. 39 rr. 1, 2, 3 Civil Procedure Rules and S. 3A Civil Procedure Act seeking orders, inter alia to restrain the defendants from interfering with his operations on the said plot and that they should immediately remove the guards they had placed on the subject premises and thus allow the plaintiff access thereto as a lawful tenant.

The grounds on which this application is based include a claim that the plaintiff enjoyed a controlled tenancy and that he could thus only be evicted from the premises only with the authority of the Business Premises Rent Tribunal (BPRT) under Cap 301. That if the defendants sought to terminate the said tenancy, they would only do so by serving a statutory notice sanctioned under that Cap 301 and that the school in the premises had students some of them due to sit for the end of year examinations. And thus they ought not be disturbed. The plaintiff swore an affidavit in support of the application, appending annexures.

Mr. Gikandi told the court that as per the letter of offer dated 5-12-03 the 1st defendant offered the subject property (with buildings thereon) to the plaintiff at Sh.60,000/- p.m. for 5 years w.e.f. 1-1-04. That the letter which was addressed to the plaintiff:

Fun & Joy Company

(Nyali High School/Music School

P.O. Box 41327

MOMBASA

was signed by both parties. That although the tenancy was for residential use of the premises, the 1st defendant through its agent, the 2nd defendant did change the user to incorporate running of a school as per the letter of 30/3/04. That thereafter the plaintiff got approval from the minister of education (by letter of 22-11-04) plus such registration documents as were required pursuant to the letter of 30/3/04. It was claimed but not denied that copies of these documents were given to the defendants. So students were admitted, enrolled and paid fees, all which constituted the plaintiff using the premises to render services for money or money's worth under Cap. 301. That he paid all the rents including June 2005 and so he could not be thrown out of the premises by the 3 month notice of a letter of termination dated 24-9-04 which the 2nd defendant served on him. That under Cap 301 termination of a tenancy is done on a statutory form (not by an ordinary letter as the 2nd defendant served) and the termination ought to be sanctioned by the Business Premises Rent Tribunal (usually in cases where the tenant has filed a reference to oppose the move) The court was told that with all the above an injunction should issue as prayed until the suit herein is finally determined.

Mr. Omondi relying on the replying affidavit sworn by the 2nd defendant on its own behalf an on behalf of the 1st Defendant (its principal), maintained that the notice to terminate was in accordance with the said letter of offer which provided for 3 months and that in fact the 1st defendant had even enlarged the notice time with 6 more months. That this notice did not have to be in accord with what is required between a landlord and tenant under Cap.301 because the tenancy here did not fall under that Act. That all the time the house was to be used for residential purposes and there had been no change of user as under the Physical Planning Act, where the exercise to effect the change of user cannot be done by the landlord and tenant on their own. Thus, so Mr. Omondi continued, the plaintiff was not entitled to the reliefs sought. That he had been told on 17-2-04 either to return the premises to its original use as residential or relinquish them.

From the foregoing, it must be noted that this court has not reproduced specific provisions of law of Cap. 301 or the definitions therein on things like controlled tenancy, shop, termination notice etc or the provisions of law under the Physical Planning Act e.g. on the zoning matters and change of user. The reason is that both the tenant (the plaintiff) on one side and the landlord (1st defendant and its agent (the 2nd defendant) on the other, seem to have been operating on a rather careless and loose basis.

Careless because even as the letter of offer specifically stated that the premises could be used for residential purposes, on the 30/3/04 the 2nd defendant on behalf of the 1st defendant wrote to the plaintiff on issues including:

“We would also like to have in our custody:

- 1) Approval letter from Ministry of Education for the school.
- 2) -----.

These conditions will form part and parcel of the lease agreement.”

By that the plaintiff, without seeking for a formal change of user as this court believes the law requires, went ahead to register Nyali High School, to admit and enroll students and assume that the landlord had validly changed user of the rented premises from residential to a school. In fact with the above the court did not find merit in Mr. Omondi's demand that the plaintiff had to prove that he had a school running on the premises.

Loose in their transactions because there seems to have been no attempt to check what all that was assumed would lead to. There even aspects of inconsistencies that could lead one to assume that parties were not being honest to each other particularly the defendants. One moment they want the plaintiff out because his activities are contravening zoning procedures (see letter dated 17-2-04) only to say later on 24-9-04 that the plaintiff must vacate because the landlord wants the premises for its own use!

From the position above this court is not satisfied that a prima facie case has been made out. The plaintiff has not shown that by operation of Cap 301 he is a protected tenant or that there was a proper change of user of the premises unless one simply assumes that by being required to get a letter of approval from the Ministry of Education, the change of user was effected. This court is not about to so assume. It had great difficulty to accept Mr. Gikandi's argument in that direction. On the other hand the landlord appears to be far from forthright in its dealings with the plaintiff. Why did it have to give two different reasons why it wanted the plaintiff out? And why now say that the premises were not meant for a school when it required the plaintiff to get ministry approval? So much as an injunction would not issue, it can be said that the defendants also seem to be misleading or even oppressing their tenant.

In these not so clear circumstances the court was obliged to consider the fate of the children in Nyali High School. One can say that they are no party to this suit but what would one do with them in the cat-and-mouse game of their school (tenant) and the landlord? They have paid fees, they are expecting to be in school all the year and some are preparing for examinations.

With all that in mind this court is obliged to order that the plaintiff shall not be evicted from the subject premises until the end of the school year. But he should pay rents etc.

Orders accordingly. Each party to bear its own costs.

Delivered on 30th June 2005.

J.W. MWERA

JUDGE