REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 669 OF 2004

THURI BURTON KAMAU …….....PLAINTIFF/RESPONDENT

-VERSUS-

THOMAS N. NGUGI T/A MIIRI BOOKSHOP……DEFENDANT/APPLICANT

RULING

The defendant's application by Chamber Summons dated 11th January, 2005 and filed on 12th January, 2005 was brought under Order XXXIX, rule (1), (2) of the Civil Procedure Rules and S.3A of the Civil Procedure Act (Cap. 21). The application carries one substantive prayer:

> **"THAT the plaintiff, his agents and/or servants be restrained by a temporary injunction from demolishing, damaging, alienating or otherwise interfering with the quiet possession by the defendant of the portion of Block 9/1073, Thika Municipality commonly referred to as Miiri Bookshop measuring approximately 280 sq. ft until this suit and Tribunal Case No. 30 of 2003 are determined**."

As grounds it is stated that the plaintiff is reconstructing the shop neighbouring the defendant/applicant's shop, and intentionally damaging the defendant/applicant's shop. If is asserted that the said action by the plaintiff/respondent has interfered with the defendant's business and the defendant's quiet possession of his premises. It is stated that continued interference by the plaintiff/respondent, with the defendant's shop will lead to its collapse and to closure of the defendant's business.

The defendant, *Thomas Ngarachu Ngugi*, on 11th January, 2005 swore an affidavit depones that on *15th October, 2004* the plaintiff/respondent had been granted a temporary injunction restraining the defendant/applicant from demolishing, reconstructing, damaging, alienating, removing, subletting or disposing of the portion of Block 9/1073 commonly referred to as Miiri Bookshop, until the suit herein is fully determined on merits.

It is deponed that from 1st January, 2005 the respondent had been reconstructing a shop adjoining the applicant's; and in the process, the shared wall, ceiling and roof had been damaged. The said damage has had the effect of disrupting the applicant's business. The applicant avers that the respondent's action is motivated by malice, and is meant to force him out of the business even before the determination of this suit and other related suits pending before the Tribunal. The applicant avers that he is still legally in occupation of the premises and entitled to quiet possession of the same.

Following the filing of a replying affidavit on 18th January, 2005 by the plaintiff/respondent, the applicant filed a further affidavit in which he avers that the instant application is quite different from his earlier one which led to a ruling against him on 15th October, 2004. He avers that in the earlier application he had

been seeking an injunction to compel the respondent herein to reconnect the water supply to the suit bookshop. The order issued on 15th October, 2004 (based on the plaintiff's application) had restrained the defendant/applicant from demolishing, damaging or alienating the suit bookshop, damaging or alienating the suit bookshop, pending the hearing and determination of the suit herein and of the Business Premises Rent Tribunal Case No. 30 of 2003. The deponent avers that the court's order of 15th October, 2004 did not allow the plaintiff to demolish the suit bookshop.

The deponent avers that he has not sub-let any part of the suit bookshop. He avers that whereas in the Subordinate Court decision in Thika CMCC Misc. No. 2 of 2004 the plaintiff/respondent had been given 10 days within which to repair the property which includes the suit bookshop, the plaintiff has used the opportunity to engage in "a massive construction instead of repairs". The defendant applicant believes to be true the advice received from his advocate, "**that if the plaintiff wants to carry out some developments and/or construction on the property, he is legally required to follow the due process of law in terminating my tenancy in accordance with the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301)".**

On the first occasion of hearing, on 25th April, 2005 the defendant/applicant was represented by *Mr. Kimondo,* while the plaintiff/respondent was represented by *Mr. Kahuthu*.

The defendant's main complaint, as presented by learned counsel, is that the plaintiff is being disdainful of the defendant's business interests at the Miiri Bookshop (the suit bookshop), which measures 280 sq. ft and is a portion of the plaintiff's larger property, Block 9/1073/Thika Municipality. Disdainful because, under the guise of repairs in accordance with the requirements of the municipal health authorities, and in accordance with the orders of the Subordinate Court in Thika CMCC Misc. No. 2 of 2004, the plaintiff has "embarked upon a major construction" with operational impacts upon the structural integrity of the suit shop. It is clearly apprehended that the plaintiff's upcoming reconstruction, by its enormous size and by its comprehensive design, must be intended to swallow up the suit shop. It seems that the direct cause of the dispute is that the parties are working to different purpose: the plaintiff is seeking to put in place a large modern building which presumably would take up most of his land, the said Block 9/1073/Thika Municipality, whereas the defendant who has an agreement under which he enjoys a lease, wants to proceed with his relatively small-sale affair, the bookshop. No doubts at all, the first line of conflict resolution would have been accommodation through a consent; but the parties each seeks to vindicate his position – and so this Court must determine it as a matter of legal rights and duties.

Learned counsel, *Mr. Kimondo* stated that the defendant's tenancy over the suit shop is a controlled tenancy – therefore, a tenancy whose incidents are regulated within the framework of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301). Within the framework of that statute there is already Business Premises Rent Tribunal Case No. 30 of 2003 pending; and the legal question raised by the defendant is: is it permissible that the plaintiff should undermine the suit bookshop as a going business, by violating the walls and roof securing the same, in the name of repairs required by public health authorities, and when what is intended is wholesale reconstruction of the property? *Mr. Kimondo* submitted that the plaintiff had failed to comply with the terms of the Landlord and tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301), and so he should be subjected to restraining orders. In the words of learned counsel: "**The respondent is hiding behind the proposed repairs to evict the applicant, so as to carry out a major reconstruction**". Counsel drew the Court's attention to the annexures to the applicant's further affidavit : (i) Annex "TNN-A" shows a rusted gable, corrugated-sheet root covering the suit shop, in the fore-ground, the larger area in the back carrying an ambitious new construction within a structure of metal-and-concrete columns; (ii) Annex "TNN – B" shows the rusty roof of the suit bookshop, with the cover sheets immediately in the foreground missing – thus clearly leaving the shop open to harsh forces of the weather; (iii) Annex "TNN – C" shows the upper slab (newly up-coming building, separated by partly broken walls from the rusty gable roof of the suit bookshop which occupies the foreground; (iv) Annex "TNN – D" shows the untidy entrance to the front door of the suit bookshop, with evidence of on-going constructions in the surrounding area; (v) Annex "TNN – E" shows the large new construction coming up, with metal – and – concrete columns, built-up stone and concrete, and timber troughs for the construction of more beams; (vi) Annex "TNN – F" shows a fissured wall in the suit bookshop; (vii) Annex "TNN – G" shows a fissured wall and gaping

wall-holes in the suit bookshop; (viii) Annex "TNN – H" shows points of structural dislocation in the suit-bookshop-eaves, at meeting-points with the new construction, with its metal-cum-concrete beams.

The foregoing pictorial annexures may also be seen in the light of the plaintiff's further replying affidavit of 8th March, 2005. The deponent avers: **"… there has not been any order of the Court to stop me from repairing/constructing on the premises but rather an order from the Principal Magistrate's Court at Thika compelling me to renovate the suit premises which is an old premises and all amenities have to be put in place. To renovate, there must be an approved plan and which I submitted to the Municipal Council of Thika**". The said plan, entitled "proposed Commercial Development on L.R. No. THIKA MUNICIPALITY/BLOCK 9/1073 leaves no doubt that the plaintiff intends to replace the old buildings with a major new construction as shown on the block plan. He has provided a Location Plan; a Block Plan; a Ground Floor Plan; a First Floor Plan; a Second and Third Floor Plan; a Fourth Floor Pan; a Main Entrance Elevation; a Y-Y Section; an X – X Section.

Such ambitious re-development plans, *Mr. Kimondo* submitted, were not consistent with the notion of repairs, and they could only be interpreted as works the design of which will lead to the eviction of the defendant. Learned counsel submitted that the Court order relied on by the plaintiff, "**did not authorize the plaintiff to evict or interfere with the defendant's peaceable possession". According to *Mr. Kimondo*, the plaintiff is "hiding under municipal by-laws so as to commit an illegality – that of evicting the applicant**".

On the basis that the suit bookshop is subject to a controlled tenancy, learned counsel submitted that by S. 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301), no termination of tenancy could be effected without due notice; and no alterations to the terms of tenancy could be effected except in accordance with the provisions of the Act. By s.492) of the said Act, notice to terminate was to be given by the landlord; and the landlord, by s.4(5) of the same Act, was required to give reasons for proposed termination of tenancy. The landlord could not terminate a controlled tenancy without recourse to the Business Premises Rent Tribunal. So long as the tribunal case remained pending, learned counsel submitted, neither party could alter the terms of tenancy.

Learned counsel cited the Court of Appeal decision in **Kamau Mucuha v. The Ripples Ltd,** Civil Application No. Nai. 186 of 1992 in the support of the proposition that a landlord who, outside the framework of the law, forces a tenant out, will be subjected to mandatory orders and cannot enjoy the *status quo* which he has created unlawfully. Such, it was submitted, is exactly the position herein, as the defendant was already out of the suit premises having been forced out by the plaintiff hiding behind the Municipal Council directives.

Learned counsel urged that the plaintiff's action was not in accordance with the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) act (Cap. 301), nor with any order of the Court. The defendant had, it was submitted, proved a prima facie case against the plaintiff, and, in the terms of the principles in *Giella v. Cassman Brown*, the balance of convenience stood in the defendant's favour.

When he entered upon his reply on 27th July, 2005 *Mr. Kahuthu* for the plaintiff/respondent stated he would rely on his grounds of objection and on his client's replying affidavits. To this, *Mr. Kimondo* objected straightaway; because under Order L, rule 16 a party was required to elect between the grounds of opposition and the replying affidavit – and the two could not be resorted to at the same time. Since this is an issue which I have seen come up many times in Court, I found it necessary to give directions as follows:

> **"*Mr. Kimondo* is technically right, even though it is the general practice for advocates to file *both*.**
>
> **"Since *Mr. Kimondo* has raised the point, I will strike out the grounds of opposition. This does not prejudice the plaintiff, since points of law can be raised any time."**

Learned counsel, *Mr. Kahuthu* submitted that under Order XXXIX an order of injunction was not available to the defendant because he had not filed a counterclaim. There ought to be either *a plaint* or a *counterclaim*, as a basis for an application for injunction – it was submitted. In the circumstances, *Mr. Kahuthu* submitted that the Court lacked jurisdiction to entertain the defendant's application. On this point I gave a ruling as follows:

> "**There are two important points about submissions questioning the jurisdiction of the High Court:**
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> (i) It should never be lightly said that the High Court lacks jurisdiction. By s. 60 of the Constitution, this is the one Court that [hears all disputes], [a Court] up to which each and every aggrieved person must look, for redress. If it has no jurisdiction, then it is possible that no other recourse would be available to an aggrieved person – unless Parliament has specifically created such recourse in a different manner.
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> (ii) Jurisdiction is a fundamental concept governing the operation of all judicial or quasi-judicial bodies. A Court or tribunal lacking jurisdiction must not proceed; because it will not be making a legal decision if it has no jurisdiction.
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> **"Learned counsel for the defendant, Mr. Kimondo has urged that the jurisdictional point ought to have come as a preliminary objection, and that it cannot be introduced so suddenly and so belatedly.**
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> **"It is true, I believe, that the plaintiff has not raised any preliminary objection – which would suggest that he had no jurisdictional complaint at the beginning. Therefore, the legal points now being raised – including the jurisdictional point – are only grounds of opposition to be presented as general points of law.**
>
> "**In that case it is entirely proper that the Court should hear all those points presented by counsel – leading to a determination of the whole application on the merits."**

Continuing with his submission, learned counsel drew the Court's attention to orders made, in an application by the plaintiff by Chamber Summons dated 22nd June, 2004. One of the orders made in that matter, and dated 15th October, 2004 thus read:

> **"The defendant, its servants or agents are hereby restrained by a temporary injunction from altering, demolishing, alienating, removing, sub-letting or disposing of the portion of Block 9/1073, Thika Municipality…. until Tribunal Case No. 30 of 2003, Nairobi in the Business Premises Rent Tribunal is determined on its merits".**

Learned counsel contended that the defendant had failed to comply with those orders and so was in contempt, and so he should not seek injunctive relief in Court.

It is to be noted that if there was breach of the Court's order as alleged, then the plaintiff would have proved the Court in contempt proceedings. That was not done, and so, I think, it is improper for the plaintiff to raise that particular point. The question whether or not the defendant committed any of the prohibited acts, is a contentious one which can only be resolved at the trial of the main suit. Does the plaintiff want it resolved? The suit belongs to the plaintiff; so why is he not following up on prosecution and full trial, for the purpose of determining that question?

Just as the orders of 15th October, 2004 envisage that the defendant was to await the conclusion of the Business Premises Rent Tribunal proceedings in Tribunal Case No. 30 of 2003, so would it be the position with the *plaintiff*. *Plaintiff* and *defendant* had a legal duty to await the outcome of the Tribunal case; I would not accept the suggestion that only the defendant was required, by the orders of this Court, to be subject to the pending tribunal decision. Therefore if the plaintiff took any action in relation to the tenancy without the directions of the Business Premises Rent Tribunal, the same would be unlawful. *Mr.*

Kahuthu submitted: "**Now interlocutory relief is being sought; but he has not abided by the [15th October, 2004] ruling." This contention, for the reason already stated, is premature; the plaintiff must also be shown to have acted on the basis that the Tribunal's decision was still pending. *Mr. Kahuthu,* indeed, did recognize this point when he remarked**"

> **"The parties were to await the outcome of the matter before the Tribunal. The issues now raised [by the defendant/applicant] can be raised in the Business Premises Rent Tribunal."**

Learned counsel contested his counterpart's statement as not based on the affidavit evidence – that the defendant had been forced out of the suit premises. *Mr. Kahuthu* said: "**The applicant has never been evicted". But he then went on to say: "The applicant has sought no order of reinstatement; he has not been reinstated**." I take this to mean that the defendant is no longer using the suit bookshop. I also would consider that the plaintiff acknowledges that the defendant *could* be reinstated in the suit premises; indeed, counsel urges that the defendant should apply for reinstatement.

What's the meaning of all this? I think counsel for the plaintiff is not being frank. Why should he state that the applicant "has never been evicted", and then urge that the defendant should apply for re-instatement; and that this matter can be considered at the Business Premises Rent Tribunal? Indeed counsel goes further to contend: "**The plaintiff cannot be stopped from developing his own property….".**

It must mean that, notwithstanding the pendency of the dispute at the Tribunal, the plaintiff decided to proceed to "develop his own property". It means, I think, that the plaintiff in "developing his own property", did not regard himself as constrained in the conduct of building operations, whether or not the defendant was negatively affected. This inference is quite consistent with the drawings and diagrams annexed to the affidavits – which I have already attempted to interpret. It is obvious that the plaintiff long ago took the decision to proceed with a commercial proposition, in the development of his larger plot, Thika Municipality/Block 9/1073, and he would not be solicitous of the more incidental landlord-and-tenant interests in which the defendant was a beneficiary. He executed his construction robustly without regard to the safely of the suit bookshop, and this forced out the defendant. The plaintiff, moreover, paid no heed to the aspect of the Court order of 15th October, 2004 which called for compliance with the determinations of the Business Premises Rent Tribunal.

Had it been the defendant showing such non-compliance with the orders of 15th October, 2004, I have no doubts this would have amounted to contempt of Court – since those orders were made against the defendant. Although those orders were not made against the plaintiff, they still expressed the main principle for the resolution of conflict between the parties – complying with the Tribunal's determination. Since that position was obviously known to *both* parties, it follows that a party who fails to comply will not be protected by *equity*.

The position of the plaintiff herein, therefore, must be judged strictly in accordance with the law – the obligations attached to the landlord-tenant relationship. The plaintiff's position is: "The plaintiff cannot be stopped from developing his own property". Yes, indeed. But when he develops his own property and injures the defendant who is protected by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301), then this Court *can* restrain the plaintiff's conduct; and it would be right in law for the Court to restrain the plaintiff's conduct even if in the end, the Tribunal were to decide in favour of the plaintiff. The plaintiff does not want to wait for the Tribunal to decide in his favour. He takes a commercial decision, seeks no consent by the defendant, creates physical and operational conditions that force out the defendant. He is exercising the right to develop his own property! There is a minimum price which, under the law, the plaintiff must pay: he must pay for any injuries which in consequence, the defendant suffers. Yet it is the plaintiff who has a suit against the defendant, and, no doubt, he would want to control the pace of prosecution of that suit. This could lead to an abuse, unless the defendant had a counterclaim to serve as a basis for monitoring the progress of the suit. Whether or not the defendant has suffered injuries to be redressed, will essentially be determined firstly at the Business Premises Rent Tribunal, and secondly at the hearing of the main suit.

Learned counsel, *Mr. Kahuthu* submitted that the instant matter should only come before this Court by way of appeal, from the Business Premises Rent Tribunal. I am in agreement that the merits of the dispute should first be resolved within the framework of Tribunal Case No. 30 of 2003. For that reason, I would be reluctant to grant a *mandatory injunction*, since such an injunction touches on the very issues of merit which the Tribunal should determine in the first place.

Mr. Kahuthu stated that the plaintiff's development plan for **L.R No. THIKA MUNICIPALITY/BLOCK 9/1073** covered a total size of 0.0335 ha, out of which the suit bookshop comprised only 280 sq. ft. He considered the area of interest to the applicant to be so small that he can even be compensated in damages.

The amended defence filed on 25th January, 2005 had no counterclaim; so counsel reckoned that the only redress the defendant would be seeking is reinstatement. Without a counterclaim, the defendant is not seeking compensation for any injury against the plaintiff; and for this reason, counsel urged, the defendant has no basis for seeking injunctive orders under Order XXXIX. Counsel submitted, further, that if the defendant had had a claim against the plaintiff, his injury would have been the subject of compensation in damages; and so this was not a fit case for injunctive relief.

In his rejoinder, learned counsel *Mr. Kimondo* submitted that it was proper for the defendant to seek relief under the umbrella of the suit which had been filed by the plaintiff; that since the plaintiff had submitted to the jurisdiction of the Court by filing suit, the defendant could also come before the same Court and seek interim relief. This, of course, did not address the claim made for the plaintiff that, without a counterclaim it was not tenable in law that the defendant should seek injunctive relief – a claim for which no authority was cited.

Order XXXIX, rule 1 thus provides:

> **"Where in any suit it is proved by affidavit or otherwise –**
>
> **(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**
>
> **(b) …….**
>
> **The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders."**

From the above provision it is quite clear that a defendant who has no claim in the form of a counterclaim, would not in all situations be debarred from seeking injunctive relief under Order XXXIX. Indeed, there is no express rule placing any bar in the way of such a claim by the defendant. It is only that generally parties who will be seeking injunctive relief do have some major interest which has been pleaded as a claim against the other party.

In the instant matter I have indicated that I cannot grant the defendant a *mandatory* injunction, because mandatory injunctions are intimately linked to substantive issues of rights and duties, and in this case such substantive questions will be for determination in the first place by the Business Premises Rent Tribunal in Tribunal Case No. 30 of 2003. Since the substantive question lies in the jurisdiction of that Tribunal, this Court must at this stage, limit itself to procedural matters, and to a purely facilitative role.

Since I have determined on the evidence that the defendants have left the suit bookshop already, it is inappropriate to grant the remedy of injunction. The question whether the plaintiff must put the defendant back into possession is to be determined by the Business Premises Rent Tribunal in Tribunal Case No. 30 of 2003; and at the appropriate time an application may be made to this Court.

I would not, in the circumstances, allow the defendant's prayers by Chamber Summons of 11th January, 2005.

Costs in the cause.

DATED at DELIVERED at NAIROBI this 25th day of November, 2005.

J.B OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk : Mwangi

For the defendant/applicant : Mr. Kimondo, instructed by M/s Kimondo Mubea & Co. Advocates

For the plaintiff/respondent : Mr. Kahuthu, instructed by M/s Kahuthu & Kahuthu Advocates.