



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 61 of 2005**

**SOUTH COAST FITNESS & SPORTS CENTRE ..... PLAINTIFF**

**- Versus -**

**ONJIKO'S SUPERMARKET LIMITED ..... DEFENDANT**

**Coram: Before Hon. Justice Mwera**

**Mr. Otieno for Applicant/Plaintiff**

**Mr. Balala for Respondent/Defendant**

**Court clerk – Kazungu**

**R U L I N G**

On 17/3/2005 the plaintiff, the landlord of the defendant company on PLOT NO. 26C DIANI BEACH ROAD sought a temporary as well as a mandatory injunction under order 39 rules 1, 2, 9 Civil Procedure Rules and section 3A Civil Procedure Act, couched in the following manner:

“2. That the defendant ... be restrained by way of injunction from undertaking any repairs on the demised premises located on plot No. 26C Diani Beach Road or in any other manner interfering in the state of the demised premises.

3. That a mandatory injunction do issue against the defendant compelling it to remove the bar counter erected in (sic) the suit premises to enable expansion of the parking area or lot.”

Grounds were set out in the application which was supported by an affidavit sworn by the proprietor of the landlord firm. An ex-parte injunction issued on the very day and the application was served for hearing inter partes. A replying affidavit by the defendant's director was filed and served including a deposition.

“3. That ... the application filed is fatally defective and should be struck out as it is brought by way of motion (sic) in claiming a mandatory injunction and also the plaintiff seeks to interfere with our statutory rights under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap. 301 without following the procedure under the Act and our advocate will raise a preliminary objection at the hearing of the same.”

When the application came up for hearing inter partes, Mr. Balala took up the point immediately

reproduced above and urged this court that his client is a protected tenant because no written agreement governs it with the plaintiff regarding tenancy in issue. That in the past the plaintiff, well aware of the controlled tenancy, served the tenant with two notices e.g the one dated 10/3/2003 intending to terminate under Cap 301 and another of 10/6/2004. Both these notices were noted and so Mr. Balala told the court that that being so the only venue the plaintiff has to do anything affecting the rights enjoyed by the defendant on the subject premises, is to move through the Business Premises Rent Tribunal (BPRT) and section 4 (2) (2) of Cap 301 was invoked. That all the time the plaintiff knew that that was the proper venue but it came to this court on the pretext that there has not been a chairman at the Business Premises Rent Tribunal for a long time.

Mr. Otieno who did not seem to have much material with which to counter Mr. Balala's argument, told the court that the plaintiff only desired that the defendant demolish a bar counter it had put up on the premises to enable the landlord to improve the terrace there and expand the parking lot. That the parties agreed that the defendant would put up the bar counter and remove it as and when the landlord notified it. Otherwise Mr. Otieno agreed with the points of law as put forth in the preliminary objection.

The short reaction to the preliminary point here is that it is upheld. The tenancy between the two is controlled. The prayers by the plaintiff in the plaint as well as the chamber summons dated 16/3/2005 are such that they will interfere with the defendant's enjoyment of the demised part of the complex. Both sides are agreed that the law on this is clear (Cap 301) and its administration falls under Business Premises Rent Tribunal. Accordingly their disputes should be directed there from the beginning.

The plaintiff who well knew that did not go to the Business Premises Rent Tribunal because he was advised:

"4. .... that if the defendant was a protected tenant, which is denied, then at the time of filing this suit the tribunal had not sat for a long time as there was no chairman and the only court which had jurisdiction is this Honourable Court."

(see the plaintiff's supplementary affidavit sworn on 17/8/2005).

That may have been so but by the Constitution which gives this court unlimited civil and criminal jurisdiction, it also gave birth to Cap 301 and Parliament in its wisdom mandated the Business Premises Rent Tribunal to administer that Act. May that delineation of judicial functions be always respected.

In sum and after upholding the preliminary objection the present proceedings are in the wrong judicial forum and are thrown out with costs.

Orders delivered on 2/11/2005.

J.W. MWERA

JUDGE