



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 128 of 2005

JOYCELENE LEAH NYAMBURA t/a RIBBIN HAIR SALOON PLAINTIFF

- Versus -

SUCHAM INVESTMENT LTD t/a TIWI BEACH RESORT DEFENDANT

Coram: Before Hon. Justice Mwera

Kariuki for Applicant

Yalwala for Respondent

Court clerk – Kazungu

R U L I N G

The plaintiff seeks orders under Order 39 rules 1, 2 Civil Procedure Rules and section 3A Civil Procedure Act to injunct her landlord, the defendant, on plot No. 1342, 1343/12 KWALE from evicting her or interfering with her quiet possession and enjoyment of the same.

Mr. Kariuki told the court that the plaintiff was a protected tenant in the terms of section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301), the Act, and so she cannot be expected to pay the new rent proposed by the defendant or vacate the premises without following the procedures and requirements under the Act. That to vary the rent or to get the plaintiff to vacate the premises amounted to variation of terms of tenancy and that that can only be done by the sanction of the Business Premises Rent Tribunal (BPRT). That no such sanction, or due notices served, preceded the defendant's letter of 26/05/2005 requiring the payment of rent @ Sh. 35,000/= w.e.f. 1/2/2005 (see the proposed lease agreement annexed here as D) as opposed to what the plaintiff has paid all along at Sh. 1,500/= p.m. or vacate the premises.

Mr. Yalwala told the court that the tenancy between the plaintiff and the defendant was for a fixed term – 9 months w.e.f. 4/12/2003 ending on 4/9/2004. It was extended to 4/1/2005. That because the Act does not exclude tenancy contracts where parties agree on fixed terms, when by effluxion the time agreed ended on 4/1/2005, the plaintiff remained on the premises as a tenant at sufferance and in the light of section 111 (a) TPA she could be told to leave at any time and without notice. That from 4/1/2005 the defendant did not receive any rents from the plaintiff and thus properly required her to vacate. Mr. Yalwala however admitted that the plaintiff had actually paid rents on 4/11/2004 – during the subsistence

of the written tenancy contract up to and including June 2005. There was no assertion that it had been refunded. Yet on 26/05/2005 the defendant wanted the plaintiff to vacate the premises for not paying the said new rents by signing a new tenancy agreement.

In the light of section 2 of the Act, this court is of the view that the plaintiff was/is a protected tenant.

“2.(1) For the purposes of this Act, except where the context otherwise requires –

“controlled tenancy” means a tenancy of a shop, hotel or catering establishment –

- (a) which has not been reduced into writing; or
- (b) which has been reduced into writing and which
- (i) is for a period not exceeding five years; or”

The tenancy between the two litigants here was in writing up to 4/01/2005. That was less than 5 years w.e.f. 4/12/2003. When it expired on 4/01/2005 not only had the defendant accepted rents up to June 2005 but the plaintiff remained in occupation on a tenancy that was not reduced into writing. If the defendant desired to change any term affecting that tenancy, it could only do so as per section 4 (2) of the Act. Here the defendant intended to revise the rent to Sh. 35,000/=.

Mr. Yalwala alluded to the plaintiff being a tenant at sufferance under section 111 TPA but the court was not shown evidence as to what law the subject premises are registered under – RTA or RLA.

The defendant was said to have desired to have the premises so that it could carry out various repairs, so the letter of 26/05/2005 also says. But, surely, then what was the genuine basis of this letter? The plaintiff to vacate because her tenancy had run its time and she had not signed a new agreement or because the defendant desired to carry out repairs on the building?. In the event of repairs then the defendant had to resort to section 7 (f) of the Act.

In sum the plaintiff came to the right forum, this court, to seek injunction orders since the landlord who is bound by the Act was acting outside it and the BPRT created under that Act has no power to issue injunctions.

Prayer 2 granted. To remain in force until this suit is determined or further orders issue.

Costs to the plaintiff.

Delivered on 1/12/2005.

J.W. MWERA

JUDGE