REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL SUIT NO. 36 OF 2003

GABBIANO LIMITED …… PLAINTIFF

- Versus -

SABAKI INVESTMENTS …….. DEFENDANTS

R U L I N G

By a lease (the lease) dated the 12th May 2003 entered into between the plaintiff and the defendant the defendant leased to the plaintiff two shops and an empty space in the premises known as GALANA CENTRE erected on plot No. 586 Malindi Town (the Premises) for a term of five years and six months from the 12th May 2003 at the rent of Ksh. 100,000/= per month. The plaintiff took possession immediately and started running therein a tourist class hotel or restaurant. The plaintiff having failed to pay rent from inception on - 20thNovember 2003 - the defendant through M/s Mwambao Kenya Auctioneers proclaimed the plaintiff's moveable property to distrain for arrears of rent of Sh. 700,000/=. The plaintiff then, contemporaneously with the filing of this suit applied for injunction and on 3rd December 2003 obtained a temporary order of injunction restraining the defendants its servants and or agents from proceeding with the distress until the application is heard inter-partes. This ruling is on the inter-parte hearing of that application.

The plaintiff, in an affidavit sworn by its director, one Giancarlo Bottini, in support of its application claimed that soon after signing the lease and taking possession of the premises it discovered that it had been duped on the rent payable and that the defendant had misrepresented to it that the business in the leased premises was going to be profitable which turned out not to be the case. The plaintiff also contends that by virtue of clause (a) of the lease read together with section 2(1)(ii) of Landlord and Tenant Shops, Hotels and Catering Establishments) Act Chapter 301 of the Laws of Kenya (the Act) its relationship with the defendant is one of a controlled tenancy governed by the provisions of the Act. Clause (a) of the lease reads:-

> **"The Lessor shall grant and the Lesee shall accept a lease of the said premises for a term of five years and six months, beginning 12th May 2003, it can be tacitly renewed for the same duration, unless cancellation to be communicated in writing by any parties herein at last six months before the expiry date or those expiry dates which may subsequently result**".

Section 2 of the Act defines inter alia what a controlled tenancy means. It reads:-

> **"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) ……**
>
> **(b) which has been reduced in writing and which:-**
>
> > **(i) is for a period not exceeding five years; or**
> >
> > **(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or**

(iii) ……..”

Mr. Mouko for the plaintiff argued that the words **“unless cancellation be communicated in writing by any parties herein at least six months before the expiry” in the lease constitute “provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof”** and therefore makes the relationship between the parties one of a controlled tenancy. That being the case, Mr. Mouko further argued that the levy of distress by the defendant without leave of the Business Premises Rent Tribunal (the Tribunal) is illegal and should be injuncted. He said the plaintiff has given to the defendant notice of its desire to have the standard rent assessed by the Tribunal.

The defendant can have none of those arguments. It has filed a defence and a replying affidavit and strongly opposes this application. Annexed to the replying affidavit of one Renato Marini, a director of the defendant, are copies of the lease between the parties herein duly registered on 11th December 2003 and a previous one with Omni Mega Limited as the Lessee and the defendant as the Lessor of the same premises. The defendant has averred in paragraph 5 of the defence that one Valerio Bucciarelli who was (and may still be) a director of the said Omni Mega Limited, the previous lessee of the premises, is also a director of the plaintiff company and has signed both the previous lease and the current one. The plaintiff therefore, argued Mr. Ochieng for the defendant, required no lectures on the profitability or otherwise of the business to be carried on in the premises. The issue of any representations, leave alone misrepresentations, by the defendant did not arise. The plaintiff could not also be cheated on rent as the previous tenant was paying Ksh. 110,000/= per month. The defendant has therefore vehemently denied misrepresenting anything to the plaintiff or promising to review the rent as claimed by the plaintiff.

I have perused the pleadings filed by the parties. I have also considered the submissions by both counsel for the parties. It is not in dispute that the plaintiff has not paid even a penny to the defendant by way of rent. It filed this case when the defendant distrained for arrears of rent. In my view the plaintiff has completely misapprehended the provisions of clause (a) of the lease. The words or expression “**unless cancellation to be communicated in writing by any parties herein at last (least) six months before the expiry date”** in clause (a) clearly relate to the renewal of the lease. My understanding of clause (a) of the lease read as a whole is this. The term of the lease is five years and six months from 12th May 2003. The lease is renewable for a further similar term unless either party gives to the other notice in writing at least six months before expiry of its intention not to renew. The lease is a home made document and one which obviously cannot be described as a model lease. But clause (a) of it cannot be given the interpretation the plaintiff contends it should be given. I therefore reject Mr. Mouko’s contention that the quoted words or expression is “**provision terminating the lease other than for breach of covenant within five years from the commencement of the lease”**. That being my view I further reject the plaintiff’s claim that the relationship between the parties is one of a controlled tenancy. The relationship is one of a lease for a term of five years and six months. It does not therefore fall and is not governed by the provisions of the Act. S**ee Bachelor’s Bakery Ltd. Vs Westlands Securities Ltd. [1982] KLR 366**. The issue of leave of the Tribunal to levy distress does not therefore fall for consideration.

In the circumstances the plaintiff has not made out a case for grant of injunction and I accordingly dismiss its application dated the 3rd December 2003 with costs to the defendant.

Dated this 14th day of January 2004.

D.K. Maraga

Ag. JUDGE