



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 1078 OF 2003**

AMIR SULEIMAN ..... PLAINTIFF/APPLICANT

VERSUS

AMBOSELI RESORT LIMITED ..... DEFENDANT/RESPONDENT

**RULING**

1. The Application, the prayers and the Depositions

The plaintiff's application by Chamber Summons, dated and filed on 22<sup>nd</sup> October, 2003 was brought under Order XXXIX rules 1,2,3 and 4 of the Civil Procedure Rules; Sections 3 and 3A of the Civil Procedure Act (Cap. 21); Sections 120 and 121 of the Evidence Act (Cap. 80); and the Interpretation and General Provisions Act (Cap. 2).

The main prayers in the application were:

(a) THAT, orders of injunction do issue to restrain the defendant and/or its employees and/or agents and/or assigns and/or anybody whosoever from evicting and/or obstructing and/or inhibiting and/or interfering with the plaintiff together with his employees in their status as lessees, and in the conduct of their business at the sub-leased shop referred to and designated as "Ol-Tukai Gift Shop", together with the sub-leased accommodation and premises, save in so far as regards the rights it has as landlords pending the hearing and determination of the application;

(b) THAT, in the alternative and without prejudice to any of the prayers sought, the status quo obtaining be preserved pending the full hearing and determination of the case.

The grounds in support of the application are as follows. By a letter dated 16<sup>th</sup> October, 2003 the defendant has given the plaintiff two days' notice to remove his items from the suit shop, remove his staff, and give vacant possession. The supposition of the notice given is that the plaintiff is a trespasser; when in fact the plaintiff is a licensed sub-lessee with the express and implied knowledge and authority of the defendant. The defendant has by conduct shown awareness that the plaintiff has a seven-year lease with effect from 1<sup>st</sup> January, 2002. There are, in any event, objections to so short a notice, as the plaintiff has invested some 8 million shillings in the suit shop. The plaintiff is not in default in respect any sub-tenancy terms. If the plaintiff is evicted, he will suffer loss on a scale so large as to be beyond compensation by an award of damages.

In the supporting affidavit of the plaintiff, it is stated that, at all material times especially as at November, 2001 the suit shop, at Amboseli National Park in Kajiado District, was in the possession and control of Wildlife Lodges Limited, which had been in occupation thereof for some 6 years. The plaintiff had

negotiated with Wildlife Lodges Ltd and particularly with its managing director, for use of the shop and the residential premises. Following discussions, a letter of offer dated 14<sup>th</sup> November, 2001 and issued by Block Hotels acting together with Wildlife Lodges Ltd was availed to the plaintiff. This letter reflected the terms of the sub-tenancy and granted a 7-year sub-tenancy lease, with effect from 1<sup>st</sup> January, 2002; it also acknowledged the receipt of full rent for 7 years on or about June, 2003 the defendant by mutual agreement between it on one side, and Wildlife Lodges Ltd and Block Hotels on the other, took over the business of Wildlife Lodges Ltd. The sub-leased premises is housed in the Lodge thus taken over. The sub-lessee was given no notice of the take-over by the defendant, and so he did not know the terms of the takeover. The defendant, by letter dated 16<sup>th</sup> October, 2003 held themselves out as registered proprietors of the suit property. The defendant claimed that the plaintiff's sub-lease had been given without authority. The defendant stated that the plaintiff would be deemed to be a trespasser; but the plaintiff considers himself a licensed tenant and in this regard, relies on the letter of offer made to him, dated 14<sup>th</sup> November, 2001. He avers:

“The defendant expressly and impliedly through its employees, agents, representatives, including one of its principals, *Mr. Harban Singh*, by means of visits to the Ol-Tukai Lodge where the sub-leased premises is situated, conversations and conduct, noted, acknowledged, acquiesced and approved of my sub-tenancy since 1<sup>st</sup> January, 2002 when the sub-tenancy took effect”.

The plaintiff further deposes:

“The defendant expressly and impliedly by its takeover of the Ol-Tukai Lodge has since June, 2003 noted, acknowledged, acquiesced and approved of my sub-tenancy without objection, let, hindrance, contest or question.”

The plaintiff avers that he had no knowledge of any want of capacity to sub-let on the part of Block Hotels and Wildlife Lodges Ltd; and at the same time the defendant had noted, acknowledged, acquiesced and approved the sub-tenancy.

I have to note that the plaintiff's affidavit has fallen into the error of purporting to speak the advocate's language of submission. Deponents making affidavits have no business doing such a thing; because the affidavit is the evidentiary basis of an application which itself claims to rest on legal grounds. Therefore the substance of an affidavit should be placing before the Court the factual evidence to validate such legal arguments as will be articulated in the advocate's submissions in Court.

On 27<sup>th</sup> October, 2003 the defendant filed grounds of opposition; and on the same day the defendant filed a replying affidavit, sworn by *Mandip Singh Amrit*, a director of “Amboseli Wildlife Resort Limited” (which, apparently, would have been the correct description of the defendant).

The deponent avers that the defendant was at all material times the registered proprietor as lessee from Ol Kejuado County Council, of the leasehold interest for the term of 33 years from 3<sup>rd</sup> March, 1994 in the land comprised in title No. KAJIADO/AMBOSELI/5, title No. KAJIADO/AMBOSELI/6 and title No. KAJIADO/AMBOSELI/8. The defendant, by lease dated 20<sup>th</sup> May, 1996 had leased the said premises with the buildings and improvements thereon, together with the land known as OL TUKAI LODGE, to a company known as *Wildlife Lodges Limited* for a term of 10 years from 1<sup>st</sup> April, 1996. Wildlife Lodges Ltd then requested the defendant to accept a surrender of the lease; and there was an agreement for the surrender of the lease dated 31<sup>st</sup> May, 2003 – and the defendant on 31<sup>st</sup> May, 2003 accepted surrender, and took possession of OL TUKAI LODGE. The deponent avers that it had been a term of the said lease from the defendant to WILDLIFE LODGES LTD that WILDLIFE LODGES LTD shall not transfer, assign, sub-let or in any way part with possession of the demised premises without prior written consent of the lessor. It is averred that Wildlife Lodges Ltd never applied for nor obtained the requisite consent from the defendant to let any part of OL TUKAI LODGE. It is averred that Wildlife Lodges Ltd was not entitled to grant the plaintiff a lease or a license for any part of OL TUKAI LODGE for the period of seven years form 1<sup>st</sup> January, 2002, as its lease from the defendant was for a term of 10 years with effect

from 1<sup>st</sup> April, 1996 and thus the residue of the unexpired term of the said lease was less than seven years.

The replying affidavit, in a number of paragraphs, contains contentious matter which properly belongs to the stage of submission by counsel.

## 2. Submissions for the Applicant

Learned counsel, *Mr. Kemboi*, for the plaintiff/applicant submitted that when Wildlife Lodges Ltd and Block Hotels Ltd, who had been in control of Ol Tukai Lodge offered to lease the shop to the plaintiff, they could only have done so in one of two capacities – as *principal* (so that they were landlords) or as *agent*. It was contended, on the basis of the evidence, that Wildlife Lodges Ltd had been acting with the blessings of the defendant – because one of the agents of the defendant, *Mr. Harban Singh*, made visits to the plaintiff’s premises and clearly noticed, or ought to have noticed that the plaintiff was a sub-tenant. On this account, counsel argued, Wildlife Lodges Ltd was held out by the defendants as having authority to grant lease to the plaintiff – and hence *estoppel* comes in to operate against the defendant resiling from its word.

For the proposition that the actions of *Harban Singh* bound the defendant, counsel made submissions on the concepts of *actual authority* and *apparent authority*, and cited in aid the classic work *Gower’s Principles of Modern Company Law*, 6<sup>th</sup> ed (by Paul A. Davies and D.D Prentice) at p.221:

- “(i) A principal is bound by the transactions on his behalf of his agents or servants if the latter acted within either
  - (a) the actual scope of the authority conferred upon them by their principal prior to the transaction or by subsequent ratifications; or
  - (b) the apparent (or ostensible) scope of their authority.
- (ii) .....

Counsel submitted that *Harban Singh* who is a director of the defendant, by his actions, held out the actions of Wildlife Lodges Ltd to be both lawful and legitimate. *Harban Singh* is said to have failed at the earliest opportunity, to bring to the plaintiff’s notice the alleged want of authority to give a good title to the plaintiff. *Mr. Kemboi*, on the principle that a company can only act through natural persons, submitted that the defendant had acted through *Harban Singh* whose recorded actions are not controverted and who, therefore, did indeed bind the defendant in the contract regarding the suit premises.

*Mr. Kemboi* disputed the legal significance of the point in the replying affidavit of *Mandip Singh Amrit* of 27<sup>th</sup> October, 2003 at paragraph 7, that Wildlife Lodges Ltd never obtained the requisite consent from the defendant to sublet or to grant a lease. The averment by *Mandip Singh Amrit* is to the effect that the plaintiff could never have been a tenant, because Wildlife Lodges Ltd. was not the landlord, but it was a mere tenant; and if they needed to sublet, then they ought to have obtained *consent* from the defendant. The defendants are contesting the relationship of Wildlife Lodges Ltd and the plaintiff as a relationship of landlord and tenant.

Counsel’s submissions on this point rely on the authority of *Halsbury’s Laws of England*, 3<sup>rd</sup> ed 91956) Vo. 15, page 247 where the operation of estoppel between landlord and tenant is considered:

**“The relationship of landlord and tenant maybe brought into being even though the landlord has no title to the land of which he has purported to create a tenancy. If a landlord who has no title to do so, grants a lease under seal, the tenant, being a party to the deed, is estopped from disputing his lessor’s title. The doctrine of estoppel between landlord and tenant is not, however, confined to leases by deed”.**

It is further stated on page 247:

**“The doctrine of estoppel which operates between landlord and tenant applies to tenancies from year to year, at will, or on sufferance, as well as to leases for years; and anyone holding under a tenant, or defending as landlord in an action of ejectment, is bound by it.”**

On the basis of that principle, counsel submitted that “Wildlife Lodges Ltd can grant a tenancy, and a valid one, even if it has no title to the property.” In this regard, *Mr. Kemboi* submitted, the fact of obtaining consent by Wildlife Lodges Ltd from the defendant simply did not arise, given that Wildlife Lodges Ltd., had made the representation in writing that they were the landlord. With such a representation, it was unnecessary for the plaintiff to seek to know that any consent by the defendant had been given. In the words of learned counsel, “it matters not that the person purporting to be the landlord was not a landlord. Once he purported to create a tenancy, the law would presume that tenancy had been created”. In the circumstances, if the plaintiff were to claim want of title by Wildlife Lodges Ltd., he would be precluded from contesting the landlord’s title. And if the plaintiff is precluded because he did enter into the agreement, then it means estoppel cuts both ways; and the effect is that there exists a legal relationship, and the parties are bound to the lease contract. Counsel submitted that this was a relationship between the plaintiff and Wildlife Lodges Ltd to which the defendant was privy. But the defendant then entered into its own agreement with Wildlife Lodges Ltd, on 31<sup>st</sup> May, 2003 for the surrender of lease – and by virtue of the said agreement the defendants took over control on 31<sup>st</sup> May, 2003; yet only much later on 16<sup>th</sup> October, 2003 did the defendant now claim that the plaintiff was in illegal occupation of the suit premises. It was counsel’s submission that the defendants could not be believed when they asserted that they were not party to the agreement between the plaintiff and Wildlife Lodges Ltd. They wait for four-and-a-half months before claiming that the plaintiff was a trespasser!

Counsel highlighted, in the replying affidavit of *Mandip Singh Amrit*, the content of annexure MSA 1 (contract of lease between the defendant and Wildlife Lodges Ltd registered on 27<sup>th</sup> November, 1996), paragraph 1 (ff) which reads:

**“[The lessee shall] not transfer assign sublet or part in any way with the possession of the demised premises or any part thereof without the prior written consent of the lessor which consent will not be unreasonably withheld.....”**

Counsel submitted, I think quite correctly, that the lease between the defendant and Wildlife Lodges Ltd *did indeed give* Wildlife Lodges Ltd the power to sublet the premises or part thereof; and that if Wildlife Lodges Ltd were not landlords, then the said clause 1 (ff) did expressly give them authority to sublet. However, counsel stated, the applicant had not been aware of that relationship between the defendant and Wildlife Lodges Ltd; but if there had been such awareness, there could not have been any doubts that Wildlife Lodges Ltd were either landlords and principals, or agents of the landlords. In these circumstances, counsel submitted, it was not now available to the defendant to escape the consequences of its own conduct and that of Wildlife Lodges Ltd which had prejudiced the plaintiff.

As this application is for injunctive relief, counsel had to relate the relevant facts to the governing principles, which are clearly stated in the well known case, *Giella v. Cassman Brown* [1973] E.A. 358. Firstly, *is there a prima facie case with the probability of success?* Counsel answered in the affirmative. The plaintiff had been invited into a tenancy arrangement. He duly met his obligations, including paying rent covering 7 years in advance. He took possession on the basis of a tenancy relationship – though the merits of that relationship as a legal proposition must be established only after the examination process in full trial. He remained in possession long past a mutual arrangement for lease-surrender between the defendant and Wildlife Lodges Ltd – to which arrangement the plaintiff was not a party. For the four-and-a-half months following the said lease-surrender by Wildlife Lodges Ltd, *is there not an acquiescence by the defendant which, in equity, should be held to disentitle the defendant to deny the plaintiff?*

*Mr. Kemboi* cited the well known decision of the Court of Appeal, *Gusii Mwalimu Investment Co. Ltd and others v. Mwalimu Hotel Kisii Ltd*, Civil Appeal No.160 of 1995, in support of his plea for an

injunction favouring the plaintiff as a person in the position of a tenant. The relevant passage occurs in the judgment of Shah, J.A:

**“A Court of law cannot allow such [a] state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession, the landlord has to obtain an order of a competent Court or a statutory tribunal (as appropriate) to obtain..... Possession”.**

The second question regarding the scope for injunctive relief, which counsel addressed, was: *would damages be adequate compensation to the plaintiff?* He answered this in the negative. The reason is the nature of the curio and gifts shop, highly dependent on local and international tourist clientele, and on the steadiness of delivery which brings goodwill. The plaintiff in his present physical location, enjoys a strategic base which is not obtainable elsewhere. The many customers who visit Ol Tukai Lodge and partake of the plaintiff's merchandise, have only that shop as their point of reference. The plaintiff would suffer irreparable loss if he were evicted as the defendant has threatened to do.

Counsel addressed the question of loss to the defendant if the plaintiff remained on the suit premises. He submitted that the only possible loss the defendant could suffer, was in respect of rent- something that could be jolly well quantified.

Thirdly, counsel considered the question of *balance of convenience*, as between the parties. He submitted that this tilts in favour of the plaintiff. He noted in this regard that the defendant had, for some considerable time, co-existed with the plaintiff without any prejudice falling upon the defendant, and without any complaint from the defendant. The balance of convenience must in these circumstances, lie on the side of the plaintiff continuing to operate his shop pending the resolution of the merits of the case during full trial.

### 3. Submissions for the Respondent

Learned counsel, *Mr. Omar Amin*, for the respondent made submissions based on his grounds of opposition of 27<sup>th</sup> October, 2003. He doubted that the applicant had a prima facie case with a probability of success; that the applicant had shown any irreparable harm that he would suffer if injunctive relief was not granted; that the applicant had come before the Court with clean hands so as to deserve equity.

Counsel adverted to the terms of clause 1(ff) of the lease between the defendant and Wildlife Lodges Ltd., registered on 27<sup>th</sup> November, 1996. He stated that Wildlife Lodges Ltd has not applied to the defendant for consent, and did not obtain consent before leasing in their turn to the plaintiff.

What is the legal import of such failure by Wildlife Lodges Ltd., to obtain consent? Counsel focused his attention on section 48 of the Registered Land Act (Cap. 300), which bears the marginal note “Lessor's consent to dealing with lease”. It reads in part as follows:

**“Upon the registration of a lease containing an agreement, express or implied, by the lessee that he will not transfer, sub-let, charge or part with possession of the land leased or any part thereof without the written consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the consent of the lessor, verified in accordance with section 110, has been produced to the Registrar.....”.**

This provision, counsel submitted, is an important one in so far as it supports the position of the landlord, so that his property cannot be alienated illegally. In further support of the defendant's position, counsel quoted clause 1(j) of the 1996 lease agreement which stated that the tenant (Wildlife Lodges Ltd) was not to hold itself out to be an agent or employee of the lessor in any way and to display on such part of the demised premises as the lessor may require a sign approved by the lessor containing the words “OL TUKAI LODGE” (or such other name as agreed”).

The respondent's case was stated as, that Wildlife Lodges Ltd., had been subject to restrictive covenants

which disallowed a sub-letting contract between it and the plaintiff, and that such restrictive covenants were set out in public documents and so ought to have been taken notice of by the plaintiff and if the plaintiff failed so to do it so failed at its absolute peril in legal terms. Thus *Mr. Amin* went on to cite the obligations flowing from section 31 of the Registered Land Act (Cap. 300). That section provides.

**“Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge and subsisting at the time of acquisition”.**

Of the contractual nature of the agreement entered into between the plaintiff and Wildlife Lodges, Ltd, counsel had doubts whether there truly was a lease made between those parties. The relevant documents are annexed to the supporting affidavit sworn by the plaintiff on 22<sup>nd</sup> October, 2004. The first of these documents is a letter of offer addressed to the plaintiff, signed by *Mr. G. Cohen*, Managing Director of Block Hotels and dated 14<sup>th</sup> November, 2001. It is this letter that carries all the terms of the agreement, and shows Wildlife Lodges Ltd. as the landlord; the plaintiff as the tenant; the duration (seven years); the commencement date and the rent. Such a document, counsel contended, could not be a lease. He recalled that section 2 of the Registered Land Act (Cap. 300) defined a lease as a grant with or without exclusive possession and includes a sub-lease but does not include an agreement for a lease.

Counsel submitted that the alleged agreement between the plaintiff and Wildlife Lodges Ltd., was not even a controlled tenancy under the Shops, Hotels and Catering Establishments Act (Cap. 301). Since the said agreement is reduced into writing but is for a term longer than five years, counsel submitted it could very well be a contract but would not be a controlled tenancy. In that event, counsel submitted, the contract would only be valid inter partes but would be of no avail to the plaintiff, as against the rights of third parties such as the defendant. The existence of any such contract, counsel submitted, could not affect the proprietorship of the defendant and was not binding upon the defendant. To have any impacts on the defendant’s rights, it was submitted, a lease should have been duly registered.

As regards the plaintiff’s reliance on the doctrine of estoppel, counsel submitted that estoppel is a shield and not a sword, and so cannot itself be a cause of action to be relied upon by the plaintiff. It was counsel’s contention that it was unacceptable that the plaintiff should endeavor to rely on estoppel: because he was illegally occupying the suit premises in breach of the provisions of the Registered Land Act (Cap.300),and was seeking to benefit from an illegal arrangement through invocation of equitable remedies. Counsel returned to the passage cited by counsel for the plaintiff, in *Halsbury’s Laws of England*, 3<sup>rd</sup> ed (1956), Vol.15, page247, on estoppel as between lessor and lessee. He noted the point made in that passage that the lease be made under seal. Since this element is lacking in the present matter, counsel submitted, the tenant was estopped from disputing the defendant’s title.

*Mr. Amin* would see no significance in the fact that the plaintiff was in the suit premises for some four-and-a-half months following the surrender to the defendant of the lease by Wildlife Lodges Ltd; because that time-period does not carry any legal principle that would confer any rights upon the defendant.

Counsel contested the claim made for the plaintiff, that he presumed Wildlife Lodges Ltd were the agents of the defendant. So long as the land in question was registered land, there was no question of an agent acting for a principal, and this fact being beyond notice; because the register is there to show all transactions. Therefore, submitted counsel, the plaintiff must have known there was somebody other than Wildlife Lodges Ltd who had title – and that person was the defendant. Should it be claimed that there had been a misrepresentation from Wildlife Lodges Ltd, then, counsel contended, the plaintiff’s cause of action must lie with Wildlife Lodges Ltd.

Counsel contended that the claim by the plaintiff that he had been ignorant of the proprietorship rights of the defendant, in relation to the suit premises, was a claim in bad faith and a concealment of a material fact. Quite obviously, this submission is arrived at by a process of derivation from the bare fact that the land in question is registered land and the registers in the Lands Office are public documents. I think the more logical position would be that, however imprudent it could have been for the plaintiff not to be acquainted with the state of the land register, it was perfectly possible that he was not, as a matter of fact.

The very existence of this possibility would be a pointer to the fact that some issues emerge in this application which can only be resolved through full trial.

Counsel's position that the law on proprietary rights entirely favoured the defendant, led him to the submission that the plaintiff lacks a cause of action, and therefore he had no prima facie case with a high probability of success as perceived in *Giella v Cassman Brown*. In support of this argument, counsel cited the Court of Appeal decision in *Bachelor's Bakery Ltd v. Westlands Securities Ltd* [1982] KLR 367. The relevant passage is found in the judgment of Law, J.A. (p.370):

**“In my view Mr. Gautama’s submissions are correct and must prevail. It is clear to me that the Landlord and Tenant Act does not have the effect of assuming jurisdiction over tenancies created by an agreement in writing by which the parties have contracted for a term exceeding five years. That is precisely the position here. The parties, by an agreement in writing contracted for a term exceeding five years. This agreement was a contract to the contrary, within the meaning of the opening words of section 106 of the Transfer of Property Act..... Such an agreement is valid inter partes even in the absence of registration, although it gives no protection against the rights of third parties.....”**

Counsel contested the claim of there being a cause of action by adverting to the plaintiff's prayers – one of these seeking an injunction, and the other seeking a declaration that the plaintiff is not a trespasser. Counsel submitted that the prayer is so framed in the negative because the plaintiff lacks a cause of action, or does not know what cause of action to urge. The proper prayer, *Mr. Amin* submitted, should have been for a declaration that the plaintiff is either a lessee or a sub-lessee or a tenant. Where a claim is made in the negative, counsel argued, it becomes instead a *defence*.

Counsel then considered the question whether there will be irreparable harm for the plaintiff if an injunction is not granted; and he noted that, within the same application documents, claims are being made for two different figures – Kshs.15 million, and also Kshs. 8 million. The indication of such figures, albeit contradictory figures, counsel contended, gives the impression that the accounts can be taken without delay, and appropriate compensation figures ascertained. The claim thus becomes a direct pecuniary claim readily met by a payment of damages.

On the test of balance of convenience, counsel submitted that the Court cannot find that illegal actions on the part of the plaintiff can be so read as to place on his side the balance of convenience. In support of this argument, counsel cited the English case, *The King v. The General Commissioners for the purpose of the Income Tax Acts for the District of Kensington, ex parte Princes Edmond de Polignac* [1917] 1 K.B. 485, at p. 505 (Lord Cozens – Hardy, M.R):

**“..... upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the utmost degree of good faith, ‘uberrima fides’. In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material it is a fraud.... So here, if the party applying for a special injunction, abstains from stating facts which the Court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the Court to grant. I think, therefore, that the injunction must fall to the ground”.**

Counsel contended that the plaintiff's supporting affidavit had not revealed everything, and so this is another case in which the injunction “must fall to the ground”.

*Mr. Amin* doubted the application to this matter of the Court of Appeal decision in *Gusii Mwalimu Investment Co. Ltd and others v. Mwalimu Hotel Kisii Ltd*, Civil Appeal No. 160 of 1995. He submitted that in that case, there had truly been a lease between two parties; the appellant was the tenant, whereas the respondent was the lessor. In the present matter, counsel contended, no lease existed, so that there was no relationship of landlord and tenant.

Counsel also attempted to distinguish other cases appearing on the plaintiff's list of authorities. In one of these, *Hughes v. The Metropolitan Railway Company*(1877) 36 L.T.R. 632, at p.634 (Lord Cairns, LC) the following passage which I will return to later, appears:

**“It was not argued at your Lordships’ bar, and it could not be argued, that there was any right, or any practice, of a Court of equity to give relief in cases of this kind by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all Courts of Equity proceed if parties who have entered into definite and distinct terms involving certain legal results, certain penalties, or legal forfeiture, afterwards by their own act, or with their own consent, *enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties*”.**

Learned counsel, *Mr. Amin* considered that the foregoing passage had little relevance to the instant matter, as it related to a normal lease, and was concerned with tenant – landlord relationship.

Learned counsel also made remarks about another case in the plaintiff's bundle, *Films Rover International Ltd and others v.Cannon Film Sales Ltd* [1986] 3 ALL E.R. 772, at pp 780 – 781 (Hoffmann, J):

**“The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the ‘wrong’ decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.”**

The principle set out in the *Films Rover International* case is in my view, most germane to the instant matter, even though learned counsel considered it to be entirely English and “wholly irrelevant”. In counsel's view, *Giella v. Cassman Brown* answers to all local needs so far as applications for injunctions are concerned.

#### 4. Applicant's Submissions in Response

*Mr. Katwa* for the applicant stated as the immediate basis of the application for injunctive relief, the communication from the defendant's advocate addressed to him and dated 16<sup>th</sup> October, 2003. This letter thus demands:

**“You are in illegal occupation of the Gift Shop at Ol Tukai Lodge. Our client's former tenant, Wildlife Lodges Ltd., had no legal right to let the property to you.**

**“Our client demands that you hand over vacant possession of the shop to its Lodge Manager forthwith and refrain from continuing your trespass on the premises.**

**“To allow you to vacate and hand over possession in an orderly way, our client will betaking possession at 12 noon on 24<sup>th</sup> October,2003”.**

Relying on the principle stated in the *Gusii Mwalimu Investment Co.* case, learned counsel pleaded thus:

**“Even if for a moment we were trespassers, the [defendant] must acknowledge that we are there. They must come to Court and obtain a Court order authorizing our eviction”.**

*Mr. Katwa* submitted that the defendant ought to have moved the Court, before instructing its lawyer to write to the plaintiff the letter of 16<sup>th</sup> October, 2003 aforementioned. Counsel contended that the plaintiff's rights to be on the suit premises are so substantial, and so transcendent over the limited claims in the instant application, that the defendant in equitable conscience should have comported itself to the necessity of a motion in Court, before issuing threats of eviction.

Counsel relied on the High Court ruling in *Belle Maison Ltd v. Yaya Towers Ltd*, Civil Case No. 2225 of 1992 to support the submission that a tenant with a colour of right to be in possession, even when his position technically becomes that of a trespasser, cannot be evicted unilaterally by the landlord, without recourse to legal procedures in Court. The basic facts in that case appear in the following passage in the ruling of the *Honourable Mr. Justice Bosire* (as he then was):

**“The basic facts are not in dispute. The tenant/applicant was in arrears with rent payment. It was distrained for rent on 21<sup>st</sup> April 1992. It paid the rent due on 22<sup>nd</sup> April, 1992. On the same day, however, the landlord made a forcible re-entry and repossessed the suit premises and on the same day put in a new tenant. The lease of the plaintiff had not expired. It was not determined according to law, according to the evidence before me (see s.111 of the Transfer of Property Act)”.**

The learned Judge went on to order:

**“Prima facie, the defendant's conduct was contrary to the law; it was illegal inasmuch as the evidence before me does not show compliance with the provisions of S.111(g) of the Transfer of Property Act. A mandatory interlocutory injunction ought and must be invoked to aid the law. It offends public policy to flagrantly disobey the law, if it can be shown that such is the case. On the evidence before me it is clear that the applicant was evicted in total disregard of the clear provisions of the law. This is therefore a case in which a mandatory injunction must issue to protect the rights of the applicant”.**

On the question whether the applicant's claim would be doomed only for the reason that he had not acted on the basis of records in the Land Registry, in respect of the relationship between Wildlife Lodges Ltd and the defendant, *Mr. Katwa* submitted that Wildlife Lodges had been the ones managing the suit premises when the plaintiff commenced his business, and section 39 of the Registered Land Act (Cap. 300) did allow a person dealing with a proprietor for valuable consideration, to make certain transactions without having to look at the Land Office records.

Counsel maintained that the plaintiff had definite causes of action, contrary to the contention of counsel for the defendant; and such causes of action were founded on the *right not to be evicted*; the *right not to be deprived of his property*; and the *right to earn a livelihood*. Counsel submitted that if the plaintiff was not granted injunctive relief, then he would be deprived of his property; his goods would be detained in the suit premises; his business would come to an end; the injury would be irreparable. Counsel averred that the defendant had always known that the plaintiff was on the suit premises, and the balance of convenience favoured the maintenance of this status quo.

## 5. Final Analysis and Orders

The foregoing consideration of the pleadings and depositions, and the review of submissions and authorities, will form the basis for my final orders. I will begin this analysis by noting and restating certain factual matters that are significant in the endeavour to determine the issues in contention. Such factual matters may be set out in point form as follows:

(a) For some six years up to about the end of 2001 the suit shop had been run by Wildlife Lodges Ltd who had a properly executed and registered lease with the defendants.

(b) Negotiations between the plaintiff and the managing director of Wildlife Lodges Ltd., led to an arrangement between the two under which, from November, 2001 the plaintiffs took possession of

the suit shop on what purported to be a 7-year lease, and the plaintiff paid the full rent in advance.

(c) When the said sub-lease took effect, the main lease between Wildlife Lodges Ltd., and the defendant was due to expire in less than seven years; but no objections were raised on this ground and, indeed, a director of the defendant, *Mr. Harban Singh* was one of those most instrumental in facilitating the arrangement for the plaintiff to take possession of the suit shop.

(d) It is reasonable to conclude that the defendant very well knew that the plaintiff was running the suit shop under an arrangement that purported to be a sub-lease.

(e) When Wildlife Lodges Ltd. surrendered their lease to the defendant in May, 2003 they obviously knew, and it is to be deduced that the defendant also did know, that the plaintiff was in possession of the suit shop.

(f) The defendant appears not to have been uncomfortable with the plaintiff's possession of the suit shop until some four-to-five months later, when it became quite evident that the defendant now intended to overlook the acknowledged *factual status quo* and to scrutinize and canvass legal shortcomings in the plaintiff's occupancy, raising these as *valid* justifications for the plaintiff to leave or be evicted.

Against that fact-scenario, I will now consider points of legal significance.

The defendant's case has been legalistic in every sense. The point has been raised that the plaintiff's basis of occupancy of the suit shop was nondescript, in legal terms, and that there was no impeccable, registered lease to validate it. Counsel for the defendant has insisted that the plaintiff could not very well enter into a purported sub-lease arrangement with a tenant, Wildlife Lodges Ltd., without first checking the land register to establish that there were no restrictive covenants registered against dealings with the defendant's landed property. The defendant maintains that the plaintiff's occupancy of the suit shop was illegal and amounted to a trespass.

It is quite clear to me that, if all the Court looked at was the technical legal objections of the defendant, then the applicant's case would not have much of a chance and his prayers would have had to be dismissed. But it is equally clear to me that the several legal objections raised by the defendant do not sit in a vacuum, in terms of the relations of the parties. The plaintiff has averred that all along during his occupancy of the suit shop, the defendant *has noted, acknowledged, acquiesced in, and approved the* alleged sub-tenancy; and that on the strength of that status quo of business relations, the plaintiff has over the years set up what appears to be a large and successful business on the suit premises dealing with curios and gifts – items intimately linked with the tourist industry. That fact is nowhere disputed; and neither is it denied that the plaintiff's trade is a unique and sensitive one which, as at now, has a substantial goodwill that is greatly endangered if the plaintiff should be evicted.

In law, in these circumstances, new rights may have emerged which ought, as a vital question of ends of justice, to be litigated and determined by the best method of the judicial system. That method is the *full trial*, with examination of witnesses, taken through examination-in-chief, cross-examination and re-examination. At the end of that process the question of rights and liabilities will be determined with finality, and a new status quo in relations amongst the parties will have been put in place. I have to state that it is the business of this Court, so far as possible, to secure that any transitional motions before me do not render nugatory that ultimate end of justice.

I have greatly benefited from the pertinent and trenchant authorities brought to my attention by counsel, and an important principle in one of these, *Films Rover International Ltd and others v. Cannon Film Sales Ltd* [1986] 3 ALL E.R.772 may be recalled here.

Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in *Giella v. Cassman Brown*, in 1973, cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel on that point, for the law has always kept

growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffmann in the English case of *Films Rover International*, made this point regarding the grant of injunctive relief ([1986] 3 ALL E.R.772, atpp.780 – 781):

**“A fundamental principle is....that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’.....”**

Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in *Giella v. Cassman Brown*, the court has had to consider the following questions before granting injunctive relief: (i) *is there a prima facie case with a probability of success?* (ii) *does the applicant stand to suffer irreparable harm, if relief is denied?* (iii) *on which side does the balance of convenience lie?* Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the *lower rather than the higher risk* of injustice.

In the present application, as has, I think, emerged clearly from my analysis, the fundamental questions of rights and liabilities, of the type raised sharply enough by counsel for the defendant, can only be decided during *full trial*. So in principle, it is my duty to lay the ground for the full hearing. If granting the applicant’s prayers will support motion towards full hearing, then I should grant those prayers. I am unable to say at this point in time that the applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. I am quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, I believe the balance of convenience lies in favour of the applicant rather than the respondent. Lastly there would be a much larger risk of injustice if I found in favour of the defendant, than if I determined this application I favour of the applicant.

In these circumstances, I consider it just and equitable to make the following orders:

(a) An order of injunction shall issue to restrain the defendant and/or its employees, agents and/or assigns and/or anybody whosoever acting under the defendant’s authority from evicting and/or obstructing and/or inhibiting and/or interfering with the plaintiff together with the plaintiff’s employees at their business at the shop referred to as “OL – TUKAI GIFT SHOP”, together with the said shops previously-agreed appurtenant accommodation and premises, pending the hearing and determination of the main suit.

(b) The plaintiff/applicant shall move expeditiously and in any event, within 30 days of the date hereof, to secure a date for the hearing of the suit, which date shall be given on the basis of priority; and failing to do which the defendant/respondent will be at liberty to file an appropriate application.

(c) The costs of this application shall be in the cause.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of November, 2004.**

**J.B. OJWANG**

**AG. JUDGE**

**Coram : Ojwang, Ag., J**

**Court Clerk – Mwangi**

**For the plaintiff/applicant : Mr. Katwa, Mr. Kemboi,**

**instructed by M/s Katwa & Co. Advocates.**

**For the defendant/respondent : Mr. Omar**

**Amin, instructed to M/s Omar K. Amin & Co. Advocates**