REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1109 OF 2002

PETER OKOKO & ANOTHER ….....……. PLAINTIFF

VERSUS

THE KENYA LOCAL GOVERNMENT OFFICERS SUPERANNUATION

FUND & ANOR…….....…..…… DEFENDANT

RULING

The Chamber Summons dated 26. 06. 2002 was taken out by the Tenants of some Business Premises on LR No. 209/10828 otherwise known as Lang'ata shopping centre which is owned by the 1st Defendant (herein-after "the Landlord"). The tenants seek a Prohibitory Injunction to restrain the Landlord from carrying away and advertising for sale their goods which were taken away by the Landlord on 20. 06. 2002. They seek a Mandatory Injunction for return of the goods lying with the 2nd defendant pending hearing of the main suit.

The tenants came before this court on 02. 07. 2002 asserting that they were protected tenants under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya. They were protected because they had been the tenants on the same premises since 1995 up to 30. 10. 2001 when their written lease with the Landlord expired. It was not renewed but they continued to occupy the premises as periodic tenants.

There is already a determination by the Business Tribunal that the Premises are a controlled tenancy within the meaning of the Act. The Ruling was made on 14. 6. 2002 on a Reference filed by the tenants in BPRT Case No. 88/2002 filed in April, 2002. It was filed for determination of standard rent upon a complaint that the Landlord had increased rent unlawfully and threatened to evict the tenants.

A preliminary objection was then made that the Tribunal lacked jurisdiction in the matter as there was no controlled tenancy but the objection was overruled, the Tribunal holding that there was no written lease, and therefore the tenancy was periodic from month to month. No Appeal appears to have been filed against that and therefore Mr. Opiyo, Learned Counsel for the Tenants submits that it was necessary to seek leave of the tribunal before levy of distress.

Learned Counsel for the Landlord Mrs. Mbabu, however argued that the finding made by the Tribunal did not matter since it did not restrain the Landlord form levying distress. At any rate the Landlord has the right, whatever the nature of the tenancy, to levy distress for rental arrears. The Distress for Rent Act Cap 293 in section 3 allowed the Landlord to do that. For as long as it was not disputed that the tenants were in arrears there was nothing to stop the levy of distress. And in this case there were arrears of Shs.552,834.40 as at 30th June, 2002 which the tenants acknowledged and have not disputed even in this application. Instead there was a proposal to pay the arrears which has not been honoured.

Mrs. Mbabu further submitted that the tenants were guilty of non-disclosure of material facts when they appeared exparte and obtained a temporary injunction. They not only failed to disclose the fact that they were indeed in arrears of rent, but also the fact that they had executed a written lease for a period of 6 years form 1. 11. 2001, on 12. 3. 2002. A further non-disclosure was an earlier suit filed as CMCC No. 2482/2002 seeking the same remedies which was withdrawn on 19. 06. 2002 subject to payment of costs to the landlord which costs had not been paid.

Finally Mrs. Mbabu submitted that there was no irreparable loss which the tenants would suffer as none is pleaded. I think the approach in resolving those submissions and determining whether the two prayers should issue are the well established principles in Giella vs Cassman Brown & Co. Ltd. (1973) E. A. 358 for a prohibitory Injunction. A determination firstly that the Applicant has established a prima facie case with a probability of success and secondly, even if he has done so, that he will suffer loss that is incapable of recompense in damages. If I am in doubt I will consider the matter on a balance of convenience. For a mandatory injunction different principles apply requiring the establishment of special circumstances. The backbone of the tenants case here, their cause of action, is a finding made by the tribunal that the premises were a controlled tenancy. On that finding is hinged the legal submission that the distress for rent, which took place before that decision was made, was a nullity as it was contrary to the law and should be reversed. The decision however was made as a preliminary point of raised by the landlord. The Tribunal matter is still pending hearing and determination.

On the face of it, it is only a complaint filed under Section 12 (4) of Cap. 301. It is not the kind of Reference envisaged under Section 4, 6 or 12 (1) of the Act where a tenant seeks, as in this case, re-assessment of rent or determination of standard rent amongst other substantive matters. Section 12(4) which is invoked before the Tribunal, envisages complaints of a minor nature which the Tribunal can investigate and a hearing may even not be necessary. Such view was expressed by Madan J. (as he then was) in Choitram vs Mystery Modelo Hair Salon (1972) EA 525. I am skeptical about the propriety of the proceedings before the Tribunal, which view shakes the very basis of the tenants case before this court. I am not at liberty to make conclusive findings of fact at this stage and I therefore express my doubts on the first principle in the Giella Case.

As for irreparable loss I need only point out that there is no denial that the tenants were in arrears of rent whatever the amount. They appear to have made the application exparte and obtained a temporary injunction without disclosing that fact and the fact that they had offered to pay by instalments. A court of equity would deprive them of any advantage obtained on that basis. It matters not that the court would have arrived at the same conclusion the non-disclosure not-withstanding. The distrained goods have been itemized and are capable of valuation.

They are not beyond monetary compensation. The landlord invoked the Distress for Rent Act in levying the distress. Whether they were right or wrong in such procedure, the Act itself provides a remedy in Section 8 which is monetary. The tenants indeed pray for damages in their plaint and there is no averment that the Landlord is incapable of paying any damages. I think therefore that the second limp of Giella Case is not surmounted. As I am in no doubt about it, I need not consider the third principle. I see no special circumstances either to warrant the grant of a mandatory injunction.

In the result the application is dismissed with costs.

Dated this 31st day of July, 2002.

P. N. WAKI
JUDGE