**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT MOMBASA**

**Civil Case 96 of 2002**

**Ndungu Boro…….....…..…….APPELLANT**

**Versus**

**Peter K. Njuguna & Another……RESPONDENT**

**RULING**

October 14,2002 Onyancha J delivered the following ruling.

The application before me is dated 24.2.2001 and is brought by the Chamber Summons by the plaintiff who seeks for both Mandatory and Prohibitive injunctions against the Defendants or their agents and servants. The applicant/plaintiff is the Tenant and the Respondent Defendant is the Landlord.

The facts under which this case and application are brought are as follows. The respondent appears to have purchased the plot known as Mombasa/Block XVII/ 734 which is a developed plot with business and residential premises to rent. The former proprietor leased part of the premises to the tenant/ Applicant herein. Sometimes in December 1999 the applicant among other tenants received notices to the effect that the larger property had been purchased by the Respondent and that they were to pay their future rents to the Estate Agent who served the notices. The applicant paid his rent to the Agent for about six months to about May, 2000 when Agent refused to accept any such rent on the ground that the Landlord wanted every tenant to quit or accept to pay higher rents. The applicants states that although he got information that other tenants had been served with quit notice, he himself was not served with any in relation to the business of selling electronic items which he was conducting in the premises.

On 21.2.200-1 the Landlord/Defendant through a Court Bailiff and being protected by the Police from Makupa Police Station, descended on the tenants who they evicted from the suit premises. These included both the residential premises and business ones, when the court Bailiff sought to know by what authority the Bailiff was evicting the tenant. The court Bailiff immediately showed him an eviction order originating under HCCC. No. 299 of 2000. The applicant /Plaintiff's name, however was found not to be included although the names of other tenants were included. That he pointed that fact out to the police and the Bailiff but upon serious urging from the Defendant's wife, the Bailiff broke into Applicant's premises and evicted the applicant, throwing out all the business stock-in-trade including new items as well as customer fridge, cookers and others which had been delivered to him for repairs. In the process they damaged many items both his and those of the customers. But surprisingly, the applicant claims, his business neighbour was not touched. The business and personal items removed from the premises were left outside the premises on the verandah where they stay until now. That many of them were damaged when being forcefully hauled out and others have been damaged by the wear and tear resulting from the whether, most of them beyond possible future use. That throughout the eviction process the Applicant tried to protest and even tried to stop them, but he was threatened by the Landlord's agents with bodily

harm. As a result he could not prevent the eviction. That after the said event, the applicant decided to hire security to protect the goods and that he continues to do so to date. That the applicant seeks a mandatory injunction to compel the Defendant to restore the applicant back into his business premises on plot No. Mombasa /Block XVII/734 and prohibitive injunctions to restrain the Defendant with his agents and servants from evicting the plaintiff from the premises or interfering howsoever with the tenancy or he premises in any way, or demolishing or in any other way transferring with the business structures of the plaintiff in the said premises.

The Defendant on the other hand deponed by himself and through his wife and an employee, that the applicant had been properly among other tenants, served with a tenancy terminating notice. That the applicant was known to be persistently defaulting in his rent payment as a consequence of which the Defendant levied a distress. He also deponed that on 18.4.2000 the Defendant's advocate served the Applicant with a terminating statutory tenancy notice herein marked as exhibit "MN-4", and that the applicant failed to heed it but continued with illegal occupation of the premises. That he also failed to refer the issue to the Business Premises Rent Tribunal as required by law thus showing that he had accepted the contents of the notice. The Defendant's admitted that the Applicant was evicted from the suit premises but on a valid eviction order although his name was not in the eviction warrant and there and that therefore the eviction which was carried out by the Court Bailiff and Police Officers was by accident although lawful. He added that he did not contribute to he illegal eviction which he claims was conducted independently by the Bailiff and the Police. That even so the Plaintiff/Applicant was trespasser after being served with a valid terminating notice as aforesaid. The defendant also averred that the eviction in effect was lawfully done by the Bailiff and Police but that he had nothing to do with it as a result of which no grounds good enough have been adduced by the applicant to warrant the issuance of a mandatory or Prohibitory injunctions.

I have carefully considered the facts, the legal arguments and legal authorities submitted from both sides. There is no doubt that the applicant was evicted from the suit premises on 21.2.2001. it is also clear that before the eviction was embarked on, the warrant of eviction carried by the Court Bailiff was checked and it was realized to all the parties present that the Applicant's name was not included. The Defendant then argues that it was a mistake done y the Bailiff to evict the Applicant. I have considered this position but finds it not acceptable. I however accept the explanation averred by the Applicant that it was the Defendant's wife who brought the eviction to happen when the urged the Bailiff and the Police to evict the Applicant, even if his name was not in the eviction warrant. The Defendant in averring that it was done without his instruction, is admitting that it was mistakenly done.

On the other hand the Defendant justified the eviction by relying on the fact that she served the Applicant with a notice terminating the tenancy after which the latter become a trespasser. This effects in asserts that the Defendant was entitled in law to evict the Applicant. I have considered this argument also. The Applicant denied that he actually received the notice terminating his tenancy. But it is my view that he possibly received the notice marked "MN-4" and dated 7th April 2000.there is adequate evidence that it was not served upon the Application until 18.4.2000 as admitted by the replying Affidavit of Mrs . Margret Njuguna, the wife of the defendant. this means that the notice to terminate was from 18.4.2000 to 30.4.2000, a period of 12 days. It is not in dispute that the Applicant neither responded to it nor made a reference to the Business Premises Rent Tribunal. The defendant accordingly argued that in ignoring to file a reference to the tribunal, the Applicant had accepted its terms and that therefore he was not a lawful tenant in the suit premises after the notice took effect on 1.5 .2000. the notice in question was supposed to have been given in accordance with S.4 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, Cap.301.Section4(4) status thus:-

*"No tenancy notice shall take effect until such date not less than two months after the receipt thereof by the receiving party, as shall be specified therein.……"*

it means therefore that a lawful or valid has among other conditions, got to be of no less than two months. The one given by the Defendant herein was only of 12 days long. It is on the record that the applicant did not take in steps in response. He neither wrote back to the Defendant to protest about the unlawfulness of the notice nor did he reference the matter to the relevant Tribunal to challenge the

validity thereof. The first question then is whether or not the Defendant's notice to terminate the tenancy was valid and therefore effective to bring the tenancy to an end.

It is clear from the quoted section above that a valid terminating notice must not be shorter than two months. There is no dispute than the notice given by the Defendant herein was only 12 days long. It there was not valid notice according to S. 4(4) aforesaid. It was without question invalid and in my view, void. If I am correct in this, and I think I am, I would also go further to say that a notice which is void is also in law a nullity. The notice herein was therefore not only bad for being null and void but it was incurable bad. It was automatically null and void without more ado although it is sometimes convenient to have the court declare it to be so. As stated in the case of MACFOY –V- UNITED AFRICA CO.LTD., [1961] 3 All E.R. 1169at Pg.1172, such proceedings or such notice as the case my be are considered as follows:-

*"……..…..And every proceedings which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to say there. It will collapse.……..…"*

in my view the above principle which has been applied in our jurisdiction quite often and in particular in the case of OMEGA ENTERPRISES (KENYA) LTD –VS-K.T.D.C & OTHERS, Civil Appeal No. Appeal No. 59 of 993 (U R) and is law here also, applies in this case without doubt. No proceedings such ass those taken against the plaintiff evicting him can be valid when the notice upon which they are based is void or incurably bad as described. Under these circumstances, was the Applicant obliged to respond to an incurably bad notice by referring the same to the relevant Tribunal or even writing back to the Defendant to point out the invalidity? I would state would state without hesitation that he had no such legal obligation. He was therefore acting within the law when he failed to refer the issue to the tribunal. The end result therefore is that the Defendant drove the Applicant out of the business premises unlawfully. He had no lawful excuse to do so and cannot hang on an unlawful excuse to deliberately break the law by forcefully evicting the tenant/applicant.

There is a second aspect of eviction which is clearly unsupportable. Apparently the Defendant obtained a valid eviction order to remove the several tenants in the relevant suit premises. The name of the Applicant was not included, meaning that the Applicant had not been joined as a Defendant in HCCC No. 299 OF 2000 under which the eviction warrant was issued. The applicant apparently pointed this fact out to the Court Bailiff and the O.C.S. Makupa Police Station. However, from the records before me, the wife of the Defendant urged the two all the same to evict the Applicant too, which they proceeded to do. I hold that neither the Defendant's neither the Defendant nor his agents had lawful authority to evict the Applicant under the above circumstances. In doing so the Defendant and/or his agent took the law into their own hands in deliberately throwing the Applicant out of the premises. This was in my view a merciless way of terminating the Applicant's tenancy and this court will not hesitate to make any reasonable and /or lawful orders to, as much as possible, rectify the wrong as well as give notice to the Defendant and those to in the position of Defendant, that they must observe the law while in process of terminating tenancies. As a result of the unlawful actions of the Defendant, this court accepts from the prima facie evidence on the record that the Applicant suffered irreparable damage and loss. The goods of the Applicant and those of his customers while damaged while being thrown out to the verandah where also they have been damage too the Applicant at the correct time. In the meantime he sought for orders of Mandatory Injunction to issue against the Defendant to compel him to restore the Applicant/Plaintiff back into the business premises on Plot No. Mombasa/Block XVII/734. the issue to consider now is whether the applicant is under the above circumstances, entitled to the Mandatory injunction.

The principles under which a mandatory injunction is granted are now settled in our jurisdiction. In the English case of Locabail International Finance –v- Agro-export and Others, {1986] All E.R 901 at pg. 901 it was stated: -

*"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and a summary act which could be easily remedied or where the Defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the*

*trial it would appear that the injunction had rightly been granted, that being different and a higher standard than was required for a prohibitory injunction."*

The Court of Appeal applied this principle recently in the Civil Appeal No. 332 of 2000 between Kenya Breweries Ltd and Another –v- Washington O. Okeyo. It is clear therefore that a mandatory injunction can be granted on an interlocutory application as well as at the full hearing. But the case has to be unusually strong and clears before the court can grant., especially at the interlocutory stage. The court will not grant a mandatory injunction if the damages caused by the unlawful acts of the Defendant is trivial or if the granting of it will inflict on the Defendant a disproportionate detriment than the benefit it would confer upon the Application/Plaintiff. The basic concept is that of producing a "fair result" and this will involve the exercise of this court's discretion in coming to the conclusion at the interlocutory stage that the granting of it is right. To apply the above principle however, this court has first to consider whether or not the principles in the famous **Giella** case have also been met in this case. The application has to show that he has in his favour, a prima facie case with reasonable chances of success or that if the injunction is not granted in his favour he will suffer irreparable loss that may not be compensable by damages and finally, if these two issues are not in favour, nevertheless, considering all the circumstances of the case, the balance of convenience tilts in his favour.

I have considered the material me carefully. The Plaintiff/ Applicant's claim is that the Defendant without lawful cause or authority under any law and in full disregard of the law governing the relationship of the landlord and tenant, highhandedly evicted the plaintiff from the suit premises. In doing so he damaged a lot of plaintiff's stock –in-trade in the shop and customer's goods said to be of substantial value. The Defendant's defence is just that he was entitled to do so because he served the plaintiff with a notice to terminate the tenancy and that by the time he drove the plaintiff out, the latter was a trespasser. Alternatively the plaintiff was evicted by mistake done by the Court Bailiff and that such mistake should not be imputed to him, the Defendant. Having however, concluded on a prima facie basis that the terminating notice was a nullity and the Court Bailiff's action, as concerns the plaintiff, was unlawful, the Defendant's defence evaporates into thin air. I accordingly have no difficulty in concluding that the plaintiff' s case has reasonable chances of success. I also further find that if the plaintiff is not granted the injunction he seeks, he is likely to suffer more than serious loss and damage in view of the fact that he will have lost the business he was carrying on together with the good will thereon and these may not be easily assessed in damages. And finally, considering the circumstances of this case, I am of the view that it will be more convenient for the Applicant to get back the premises which, from the material before the court, is still empty. Upon the above evidence, I declare that the Applicant is entitled to the prohibitory injunctions sought.

Having come to this conclusions, I now revert to the issue as to whether the Applicant has proven a case which would attract a mandatory injunction. In my view the Defendant's conduct as a landlord was despicable. It is on the record that his intention was to remove all the tenants with a view of leasing the same premises to new tenants who would pay more, otherwise he demanded higher rents. He used unnecessary force and violence to do the eviction, well knowing that he was in fact committing an offence in doing so in so far as the plaintiff was concerned considering the fact that the plaintiff was not in the list of the tenant's to be evicted. Landlords cannot break the law outrageously as the Defendant did and he left to walk away scot-free. If that were allowed to happen, we can expect flood of case such this one. The damage done by the Defendant herein, in my view, cannot be considered trivial, the damage that would result in the business circles if such action were ignored, would be colossal, I am persuaded that the plaintiff's case is strong and clear. It is my further view that the court's right discretion to correct the wrong done in this case should be summarily exercised at once and without further delay.

Before making final orders in the manner I have indicated above, I have to deal with the Defendant's allegation that the plaintiff did not have clean hands since he was in arrears of rent and that he did not make a full disclosure of this to the court that gave him interim injunctions. I am in agreement with the Defendant's argument that if the court decides that the plaintiff failed to make full disclosure at the interim stage, he would be denied the reliefs of injunction at the latter stages during inter-partes stage when full revelation id made. I am of the opinion however, that the plaintiff did not fail to make full disclosure. If he had been in arrears of rents, the Defendant took lawful measure to rectify the situation

when he levied distress. Failure to disclose distress did not prejudice his case. Further, there are many cases where distress is levied but tenancy continues thereafter.

Another issue raised by the Defendant is that the Plaintiff failed to come to court under S. 3A which alone donates jurisdiction to this court but purported to come under Order 39 which cannot donate the jurisdiction. I agree also that Order 39 of the Civil Procedure Rules is incapable of donating the jurisdiction under which this court may grant a mandatory injunction. I also agree that it is only section S. 3A of the Civil Procedure Rules that donates such jurisdiction and that the Plaintiff failed to quote it in his application to tap its jurisdiction in the prosecution of his application. It is my view and I so hold, however, that failure to quote the section in the application was a mere irregularity which the plaintiff realised and attempted to rectify by quoting Order 50 Rule 12 which provides that no objection shall be made and no application shall be refused merely by reason of failure to comply with the rule requiring that the order, rule or statutory provision under which any application is made must ordinarily be stated. I therefore find that no prejudice or injustice resulted to the Defendant due to the Applicant's failure above-mentioned.

The upshot is that the Plaintiff's application succeeds and I make the orders following: -

ORDERS

1. A mandatory injunction be and is hereby issued directing the Defendant, with immediate effect, to return the plaintiff back into his business premises occupied by him on Plot No. Mombasa/Block XVII/734 as was, before eviction on the 21.2.2001.

2. A prohibitive injunction be and is hereby issued to restrain the Defendant from the premises occupied by Plaintiff or interfering howsoever with his quite enjoyment of his tenancy until this suit is heard and determined.

3. A prohibitive injunction be and is hereby issued restraining the plaintiff from demolishing or in any way interfering with the structure encompassing the section of the premises rented by the plaintiff until this suit is heard and determined.

4. Costs of this application are to the plaintiff/applicant and may be assessed or agreed upon before the main suit is heard and determined.

**Dated and delivered at Mombasa on the 14th day of October, 2002.**

Onyancha J

October 14, 2002