REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT 59 OF 02

HARVEY'S BAR & RESTAURANT LTD ……..…… PLAINTIFF

VERSUS

FERNANDO VISCHI ……..…… RESPONDENT

R U L I N G

The Plaint filed in the entire case is seeking Judgment against the Defendant for:

"(a) THAT this Honourable court to issue an order

of permanent injunction reinstating the

Plaintiff to the suit premises and release of

the attached goods, loss and general

damages,

(b) Costs of the suit and interest at court rates."

It is upon that Plaint that this application dated 26th September 2002 is based. The Application is seeking mainly two orders which are encompassed in prayers 2 and 3. These are first an order that the Defendant by himself, servants and or agents herein be ordered to reinstate the Plaintiff/Applicant in the suit premises pending the hearing and determination of this suit and secondly that the Defendant be ordered to release the goods that were removed and taken away by themselves respectively. There is also a prayer seeking that the costs of the application be provided for.

The grounds for the same Application are three and these are that there is no lawful order to have the Plaintiff thrown out of the suit business premises on Plot No.5788 Malindi; that the Respondent FERNANDO VISCHI has no locus standi over the suit premises and lastly that the Plaintiff shall suffer irreparably if the orders sought are not granted as he has no other premises to move to. The application is supported by a short supporting Affidavit which on the main states that the Applicant is suing on behalf of George Garry Savory, a Director of the applicant Company Harvey's Bar & Restaurant Ltd.; that the same Harvey's Bar & Restaurant Ltd was operating business of Bar and Restaurant known as Green Mango Restaurant on Plot No. 5788 Malindi; that there is a lease agreement signed between the Harvey's Bar & Restaurant Ltd and Bruse Safari Limited; that on 28th August 2001, the Respondent, in company of District Officer 1 Malindi, together with K. Luganje, advocate carried out wrongful eviction and

attachment of Plaintiff/Applicant's good from the suit premises; that the Respondent is a total stranger to the deponent of the Affidavit and he is not a Director of Bruse Safari Limited nor Director of Harvey's Bar & Restaurant Ltd and therefore should not be allowed to carry out any business or legal transaction in the suit premises; that the court order was served upon the Applicant regarding the suit business premises and he was not served with any eviction order. Lastly he maintained that the said eviction and attachment was illegal and unlawful as the three people who carried it out were not official brokers.

The Respondent opposed the application and filed Affidavit in Reply sworn by himself. In that Affidavit the Respondent's stand was that he admitted that there was a lease agreement entered into between the Plaintiff and Bruse Safaris Limited for leasing of the suit premises. The premises was to be leased for a period of 5 years. However, the Plaintiff breached the terms of the said agreement by failing to pay the monthly rent for a period of 13 months and the Plaintiff also failed to undertake repairs to the suit premises. The Defendant stated further that on 16.7. 2001 he was appointed agent and was authorised to repossess the suit premises and take necessary action to recover the arrears of rent for and in the name of Bruse Safaris Ltd. He visited the premises and found it in a dilapidated condition. He went to suit premises on 28th August 2001 and found one Japheth Chengo Karisa, the Manager of the Plaintiff's business who told him that the Business had not been in operation for 13 months as the Director of the Plaintiff's company one George Garry Savory was in jail in Britain and that he (Manager) had no money to pay the rent arrears. As he could not let the said premises continue to deteriorate, he took the inventory of the Applicant's property in the hotel and locked them up in one of the rooms inside the suit premises to enable the owner to carry out the repairs to the premises. The same inventory was taken in the presence of the Manager of the Applicant's company, District Officer 1, Mr. Mutindika, and a Malindi lawyer one K. Lughanje. He then continued to carry out repairs which cost him KSh.500,000/-. The Respondent maintains that as the Applicant's property is still locked up in the premises, it has not been thrown out of the suit premises; that the Plaintiff did not proceed against the owner of the suit premises till 26th September 2002 after the repairs were complete; that the Plaintiff has sued a wrong party as it knows that the Defendant is agent of a disclosed principal;

that he was entitled to re-enter the suit premises and retake possession of the same premises in accordance with term 3(c) of the lease agreement as under the said term the lease determined on 28th August 2002 and lastly that the Applicant has not been operating the business in the suit premises for a period of over 2 years now and so does not stand to suffer any damage whatsoever if the orders sought are not granted.

The above were the salient facts of this application. It would appear from the above that the Respondent, who is admittedly an agent of the Applicant's Landlord, pursuant to a note dated 16th July 2001 authorising him to repossess the premises and to take necessary action to vacate the property owned by Bruse Safaris and rented to Green Mango Restaurant due to non-payment of rent, simply marched into the demised premises on 28.8.2001 and stopped the Applicant from carrying out business in the same premises by removing the Applicant's property, and putting them into one room and locking out the applicant. This is the position even if one goes by the averments in the Respondent's affidavit. In fact the note he has exhibited is clear. It instructs him to repossess the premises and to evict the tenant. Paragraphs 7 and 8 of the Respondent's Affidavit is also clear on what did happen. The Respondent claims that he did so because of three reasons. First, he did so because there was rent arrears unpaid for 13 months amounting to KSh.650,000/-. Secondly he did so because the house was in complete disrepair and lastly he did so pursuant to Clause 3(c) of the Lease agreement which allows the lessor to re-enter the leased premises and determine the lease if there is rent in arrears of 21 days or if the tenant commits any breach of the tenancy.

In law, what the Respondent did in this case is wrong, and it is sad to note that a Senior Government Official namely the District Officer 1 and an advocate of the High Court of Kenya witnessed the same illegality. Even where rent is in arrears, the premises is in poor state of disrepair and the lease says the landlord could re-renter the premises as was the case here, still the law is clear that such re-entry must only proceed according to the law i.e. the landlord must obtain an order from the court or from the Tribunal (as the case may be) in order to effect eviction. The Landlord cannot be allowed to resort to the laws of the jungle by merely walking onto the premises and evicting a tenant. In my mind it matters not that the goods were locked up in one of the rooms in the premises so long as the tenant was not allowed

full access to the suit premises and to the said goods and was not allowed to freely carry out his business in the same premises, he was in the same position as a tenant evicted from the suit premises as the suffering the two would experience is the same. In the case of GUSII MWALIMU INVESTMENT COMPANY LTD & 2 OTHERS VS. MWALIMU HOTEL KISII LTD. Civil Appeal No.160 of 1995 , Shah J.A. stated as follows: "To obtain possession by carrying illegal distress is per se wrong. ------ if what the Landlord did in this case is allowed to happen we will reach a situation where the Landlord will simply walk into the demised premises exercising his right of re - entry and obtaining possession extra - judiciary. A Court of Law cannot allow such state of affairs whereby the law of the jungle takes over . It is a trite law that unless the tenant consents or agrees to give possession, the Landlord has to obtain all orders from a competent court or Statutory tribunal (as appropriate) to obtain an order for possession."

That is the law. It did to a large extent re-echo what Shield's J. (as he then was) had stated in the case of Cafeteria & Tin Tin Restaurant vs. P.B.M. Moninec Ltd H.C.C.C. o. 2812 of 1987 . He stated as follows:

"It is obviously proper in a civilised society for dispute such as the disput e between parties in this case to be settled by the court rather than by a trial by battle."

Thus the law is clear that even if the tenant had rent arrears due and was not repairing the premises, and even if the landlord had Clause 3(c) of the lease to his advantage, still in order to effect re-entry, it needed to go to a court of law, or tribunal, obtain the necessary orders for eviction and then execute the same instead of just marching into the premises and carrying out eviction without any court or tribunal order. What happened here was law of the Jungle and should have been prevented by the District Officer 1 and the learned advocate who on the contrary supported it and witnessed it. The Applicant has now come for orders to have it reinstated.. It has come in person and is not represented by an advocate. I note that the Plaint is seeking a judgment for an order of "permanent" injunction reinstating the Plaintiff to the suit premises, release of the attached goods, loss and general damages. This is a rather confused prayer. It was drafted by a person not versed in law and it will need amendments but what I understand it to mean when it uses the word "permanent injunction reinstating plaintiff to the suit premises" is that it is seeking as is clear in the application mandatory injunction. The Application is clear on that. There is also the question of whether or not the agent should have been sued in place of the Landlord. The law is clear, that where the Principal is a disclosed Principal the agent should not be sued. This is the general principle in law. Here however, the letter appointing the Defendant as agent was not copied to the Applicant so that the Applicant may very well be right when it say in its Manager's

Affidavit at paragraph 6 that the Respondent was a total stranger to him. In any case the letter appointing the Respondent to carry out certain actions Exh. FV 1 does not authorise him to lock up Plaintiff's properties in a room in that house and does not tell him to carry out whatever was necessary to have the tenant vacate the suit premises by ignoring the legal procedures necessary to effect the same. All it says is that he (Respondent) was to take "any necessary action to vacate the property owned by Bruce Safaris". Such necessary action clearly must have included legal procedures of procuring the necessary order from the courts of law or Tribunal. This act of matching onto the premises and effecting re-entry and locking up the goods could very well have been of his own making and he cannot be seen to hide under the law and say the Principal whom he never disclosed to the Plaintiff is the one who should have been sued for his illegal acts. Mr. Shujaa, the learned counsel for the Respondent says Respondents agency was only limited to recovering rent and that Defendant has not been evicted. First that goes against the note Exh. FVI which does not mention rent and secondly as I have stated above, the tenant was for all practical purposes evicted and its properties attached in that he was not allowed to do business in the suit premises and had no access to the properties at all. It could not pursue its business in the premises as it was taken over and was being repaired without any prior notice to him at all. Mr. Shujaa also says and it is in the affidavit of the Respondent that the applicant will not suffer loss as he has not taken up this matter for over a year. I do agree the Applicant should have come to court immediately this action took place. However, I cannot ignore the fact in the Affidavit that Plaintiff's Managing Director was at all time reported to be in jail out of this country. I cannot also ignore the fact that renovations were proceeding during that time and so even if reinstatement orders were sought and obtained earlier it would have been practically difficult to effectively resume tenancy in the premises. I do observe that there is no allegation that the suit premises is occupied as of now. It is apparently empty. Further breach of the law cannot be

cured by a party's indolence. In the light of all the above, the Applicant is seeking two remedies.

That it be reinstated back to the premises and that its goods be released to it. It is in those two prayers seeking mandatory injunctions. What does the law say on the issue or non issue of mandatory injunctions? Under what circumstances would a mandatory injunction be issued? In the case of LOCABALL INTERNATIONAL FINANCE LTD. VS. AGRO EXPORT AND OTHERS otherwise knows as the Sea Hauk Case (1986)1 All E.R. 901 it was stated at page 906 as follows:

"A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once or whe re the injunction was directed at a simple and summary act which can be easily remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assura nce, that at the trial, it would appear that the injunction had rightly been granted that being the difference and higher standard than was required for prohibitory injunction."

And in the case of Kamau Mucuka vs. Ripples Ltd Court of Appeal Civil Applica tion No. NAI 186 of 1992 , Cockar J.A. (as he then was) had this to say after quoting the Locaball's case:

"A mandatory injunction can be granted in an interlocutory application as well as at hearing ----- - if the Defendant attempted to steal a match on th e Plaintiff ---- a mandatory injunction will be granted in an interlocutory application.

A party as far as possible ought not be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act."

And in the case of MALINDI AIR SERVICES AND ANOTHER VS. ABDINOOR HASSAN , Kenya Court of Appeal Civil Application No. NAI 202 of 1998, the Hon. Judges of the Court of Appeal stated: "A mandatory injunction at an interlocutory stage is rarely granted, only when the Plaintiff's case is clear and incontrovertible"

In my humble opinion I would adopt what Bosire J, (as he then was) said in the case of Bella Maison Limited vs. Yaya Tours Ltd HCCC No.2225 of 1992. He said in that case as follows: "The position in law as I understan d it is that a person who shows he is entitled to a mandatory injunction must not be compelled to take damages in lieu. ------- Nor must a wrongdoer be permitted to benefit however remotely from his wrong doing more so where the wrong is blatant or where the act of wrongdoer is contrary to law. In case where conduct of the Defendant is contrary to law, the court has no discretion. By shutting its eyes to the act the court will in effect be indirectly sanctioning

As I have stated above, the Respondent's actions here ignored the laws of the land and bordered on jungle law. No court can shut its eyes to such blatantly unlawful acts. This application succeeds. The Applicant is to be reinstated into the suit premises with immediate effect and its properties are to be released to it immediately. Applicant will have the costs of this application. Orders accordingly.

Dated and delivered at Mombasa this 7th Day of November 2002.

J.W. ONYANGO OTIENO

JUDGE