



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO.142 OF 2018**

**SINAI VISION LIMITED.....1ST PLAINTIFF**

**DAVID G MURAI**

**T/A DAGAT INVESTMENT.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NAIROBI COUNTY GOVERNMENT.....1<sup>ST</sup> DEFENDANT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The Plaintiff herein filed application dated 9<sup>th</sup> April 2018 seeking the following orders

1. Spent.
2. An order of injunction to restrain the Defendants by themselves, their servants, employees, or any other person claiming under them from closing, entering, occupying or leasing/granting to any other person the right to run and occupy toilet Nos. MMI and MM3 Muthurwa market pending hearing and determination of this suit.
3. Costs of the application be in the cause.

The applicant raised the following grounds:-

- That the Plaintiffs have a legal contract with the 1<sup>st</sup> Defendant to run and manage public toilets Nos. MM1 and MM2 Muthurwa market until the said contract is terminated legally.
- That the Defendants attempted to evict the Plaintiffs and hand over its management to other persons without following due process
- That the applicants have a *prima facie* case with high probability of success and the balance of convenience tilts on the applicants.
- That the orders sought should be granted *ex-debito justitiae* to enforce the rule of law in the country.

In response the 1<sup>st</sup> Defendant filed a replying affidavit sworn on 17<sup>th</sup> April 2018 by Lawrence Mwangi an official at the 1<sup>st</sup> Defendant's the Natural and Environment Resources Department. He averred that contrary to the Plaintiff's allegation, the 1<sup>st</sup> Defendant was informed that the toilets had been taken over by goons prompting the 2<sup>nd</sup> Defendant to forcefully take over the toilets as the situation was becoming acrimonious.

He further averred that the Plaintiff's contract expired on 9<sup>th</sup> April 2018 and despite Plaintiff application for renewal the 1<sup>st</sup> Defendant has not been delirious in renewing. He stated that upon receipt of renewal of contract the department usually issues the operator of the toilet with a new contract for execution and in the absence of express renewal of the contract the same is deemed extinguished by operation of time.

He further averred that the keys to the toilets are not in the hands of the 1<sup>st</sup> Defendant and the Plaintiffs had the right to enjoy the right of

toilets up to 9<sup>th</sup> April 2018 and that Plaintiff had to pay rent for April 2018 and that the contract did not provide for payment of rent *pro-rata* rather payment in advance full rent of Kshs. 15,000. He added that payment for the month of April was not demanded but willfully paid by the Plaintiffs to county Revenue collection account which Environment department has no control over; that in the absence of express renewal of contract, the contract extinguished; that the dispute arose on 30<sup>th</sup> March 2018 and Plaintiff came to Court on 9<sup>th</sup> April 2018 the same day the contract was expiring; the rent payment was on 7<sup>th</sup> April 2018.

He stated that the orders sought are a backdoor fashion to extend the contract. He stated that closure by alleged goon has not been condoned by the 1<sup>st</sup> Defendant. That the public are inconvenienced by the closure thus balance of convenience tilts to the 1<sup>st</sup> Defendant and no prejudice will be occasioned to the applicants if the application is dismissed.

### **Oral submissions by Counsels**

#### **Submissions by Plaintiff**

Counsel for the applicants restated the grounds for the application and averments in the Supporting Affidavit as captured above. He submitted that around December 2017, the Plaintiffs reminded the 1<sup>st</sup> Defendant that the contract was about to expire. Plaintiffs the Defendant to act in terms of clause 5(2) of the contract which required the 1<sup>st</sup> Defendant to notify the Plaintiffs in writing, in not less than 3 months of such expiry, to relinquish the management of the toilets or renewal of terms. He submitted that towards the end of March, the toilets were invaded by unknown persons; that the invasion was brought to the attention of the 1<sup>st</sup> Defendant and also to the police because of security nature. He submitted that the police never did anything and the 2<sup>nd</sup> Defendant took over the situation and closed the toilets as the situation was threatening to be out of control. He submitted that the 1<sup>st</sup> Defendant failed to normalize the situation as expected. He further submitted that on 22<sup>nd</sup> February 2018.

Counsel for Plaintiff further submitted that the Defendant issued the Plaintiffs with business permit limited to specific toilets to expire in December 2018. He argued that the Plaintiff paid rent of 30,000 which was received by 1<sup>st</sup> Defendant as late as 5<sup>th</sup> April 2018 and by virtue of the 1<sup>st</sup> Defendant having accepted rent, the Plaintiffs are deemed to have been holding over the premises; and that they should be estopped from taking advantage of their inaction; that the 1<sup>st</sup> should not rely on the contract as it has failed to act on it. He asked, "If the 1<sup>st</sup> Defendant did not wish to renew [\[h1\]](#) that contract, why did it issue a permit?"

#### **Submissions by 1<sup>st</sup> Defendant's Advocate**

In response, Counsel for the 1<sup>st</sup> Defendant submitted that **clause 5 (1)** provided that the contract may be renewed by the parties and that **paragraph 12** of Plaintiffs Supporting Affidavit confirm that parties explored that option by meeting with the person in charge of environment department in January 2018; further, paragraph 2 of the contract shows that it was a continuation of a previous contract. She submitted that clause 5 (3) provide for renewal in express written consent and that the clause is coached in mandatory terms.

Counsel further submitted that, it is a requirement for business permit to be issued yearly and Plaintiffs' permit was issued on 22<sup>nd</sup> February and that he had to have a permit to operate up to 9<sup>th</sup> April 2018.

On payment of rent, she restated averments in the replying affidavit to the effect that payments were made to revenue collection account which the Environment department had no control over it. He submitted that the amount can be refunded to the Plaintiffs. She submitted that the contract the Plaintiff seeks to rely on was express on period and if order sought herein is granted, it will extend the contract which has already expired; and it will set a bad precedent. She concluded that closure of the toilet is at the detriment of the people of Nairobi and prayed for the application to be dismissed.

### **ISSUE FOR DETERMINATION**

#### **Whether Plaintiff has demonstrated prerequisites for grand of injunction.**

Conditions for grant of injunctions have been set out in the case of **GIELLA VS CASSMAN BROWN & CO.LTD (1973) EA.358** as follows:-

1. Applicant to demonstrate a *prima facie* case with probability of success
2. Unless injunction is not granted applicant will suffer irreparable damage to be harm which will not be adequately compensated by damages

**And if in doubt** will Court will decide on a balance of convenience

I will consider public interest which has been brought out in this case.

#### ***Prima facie case***

The Plaintiff has alleged inaction on part of the 1<sup>st</sup> Defendant in respect of renewal or extinguishing of the contract as required by clause 5(2). The Plaintiffs contention is that the 1<sup>st</sup> Defendants inaction and should be interpreted to mean that the 1<sup>st</sup> Defendant intended to renew

the contract and the Plaintiffs were holding over.

**Has Plaintiff established a *prima facie* case?**

My view is that for the Court to arrive at a finding as to whether the Plaintiff has established *prima facie* case, pleadings should out-rightly/ clearly show/demonstrate that the Plaintiff has a claim. The Court will look at the pleadings, documents filed and averments in affidavits filed to be able to reach a conclusion that a *prima facie* case has been established. Absence of *prima facie* case imply a situation where it is out rightly clear that there is no claim and application should be dismissed together with the entire suit without giving parties an opportunity to adduce evidence.

Upon considering arguments from both sides in the instant case and perusing pleadings herein, I am of the view that the Court will be required to determine the effect of failure by 1<sup>st</sup> to expressly decline to renew the contract in the event that the applicant would wish to pursue this suit beyond this application.as to whether the *prima facie* has case has probability of success, I would not want to comment at this stage of the trial. My view is that it would be enough for Plaintiff to demonstrate that there are issues that need to be tried. The trial Court will arrive at an informed decision after according all the parties opportunity to be heard.

**Whether the applicants are likely to suffer irreparable harm which cannot be remedied by award of monetary damages**

There is no dispute that the applicants were aware that their contract was to last for 2 years; expiry date being 9<sup>th</sup> April 2018; it is not disputed that no express written consent was executed to extend the contract as provided in the contract. Supporting Affidavit confirmed that the Plaintiff engaged the 1<sup>st</sup> Defendant on renewal before 9<sup>th</sup> April 2018. The circumstances herein were such that the applicant had indication to prepare for nonrenewal of the contract. The occurrence did not catch them by surprise. On payment of rent 1<sup>st</sup> Defendant’s official has indicated that environment department had no control of payment to revenue collection ACC account; there is no indication that the 1<sup>st</sup> Defendant demanded payment nor were they notified that rent was to be deposited in the Revenue account. In respect of issuance of business permit for year 2018, the Plaintiff could not have operated without a permit between January and 9<sup>th</sup> April 2018; Counsel for the 1<sup>st</sup> Defendant has indicated that rent can be refunded.

From the foregoing I am of the view that the applicants have not demonstrated that damages will not be adequate remedy in the event that the Court will find in their favour after trial.

**Public interest**

There is no dispute that the toilets are now closed. The 1<sup>st</sup> Defendant is required to ensure toilets are open for use by members of the public. The dispute herein has caused the closure of toilets since 4<sup>th</sup> April 2018.it is common knowledge that Muthurwa is a busy market in Nairobi. I agree with Counsel for the 1<sup>st</sup> Defendant that closure of the toilets will occasion inconvenience to members of public who must be exerting pressure on 1<sup>st</sup> Defendant service to the public is not interrupted. Balance of convenience tilts on the 1<sup>st</sup> Defendant.

From the foregoing I see no merit in the application herein and do dismiss it with costs to the 1<sup>st</sup> Respondent.

**Dated and Delivered at Nairobi this 11<sup>th</sup> day of May, 2018**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

.....COURT ASSISTANT

..... COUNSEL FOR PLAINTIFFS/APPLICANTS

..... COUNSEL FOR DEFENDANTS/RESPONDENTS

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