



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 149 OF 2014

SAID MAJID SAID PLAINTIFF

V E R S U S

JAMES TITUS KISIA DEFENDANT

RULING

1. The Plaintiff's Notice of Motion dated 27th November 2014 is for consideration in this Ruling.
2. Plaintiff by that Notice of Motion seeks the following prayers-
 - **THAT a temporary injunction to issue against the Defendant by himself, his servants or agents or any one authorized by him or claiming under him from in any manner or otherwise howsoever subjecting the Plaintiff his servants or agents to any annoyance or harassment with the intention thereby of inducing or compelling the Plaintiff to vacate the demised suit premises or any part thereof and/or in any manner to occasion the frustration or termination of the tenancies enjoyed by the Plaintiff over the demised suit premises pending the hearing and final determination of this application.**
 - **THAT a temporary injunction to issue against the Defendant by himself, his servants or agents or any one authorized by him or claiming under him from in any manner or otherwise whatsoever demanding for and/or collecting any rental from the Plaintiff in respect of the months running from October, 2013, when the demised suit premises were rendered unfit for occupation and use until such a date that the Plaintiff shall be reinstated in the possession of the demised suit premises pending the hearing and final determination of the suit filed herein.**
 - **THAT a mandatory injunction to issue against the Defendant by himself, his servants or agents or any one authorized by him or claiming under him directing the Defendant to forthwith and unconditionally reinstate the Plaintiff in the possession of the demised suit premises pending the hearing and final determination of the suit filed herein.**

The application is opposed by the Defendant.

BACKGROUND

3. It is not denied that the Plaintiff and Defendant have a landlord tenant relationship. The Defendant is the registered owner of Plot No. Mombasa/Block XVII/450 along Jomo Kenyatta Street, within the Mombasa County. Plaintiff was granted a 6 year lease over what the parties

describe as Shop No. 1 on that property. That term of lease was from 1st December 2010 (herein after called the “**first lease**”). The Plaintiff was also granted another term of lease over what the parties describe as Shop No. 2. That lease was for a term of 6 years from 1st May 2013. (hereinafter called the ‘**second lease**’). The relationship between the parties became sour after the lease for Shop No. 2 was executed. Parties are not in agreement of what led to that state of affairs.

4. Before going into each party’s explanation of what led to that falling out it is important to state that the Defendant landlord filed a suit on 8th August 2013 before this Court against the Plaintiff tenant being Mombasa **HCCC No. 98 of 2013**. In that suit the landlord pleaded that the tenant was in breach of the second lease in that the tenant was carrying out renovations on Shop No. 2 which renovations were defacing and destroying the premises. The landlord in that suit prayed for the following prayers-
 - **A permanent injunction against the Defendant restraining him, his servants, workmen or anyone claiming through the Defendant from carrying on with any alterations, renovations, maiming and or demolitions of the suit premises being the shop leased to him by the Plaintiff.**
 - **An order directing the Defendant to deliver vacant possession of the suit premises being the shop leased to the Defendant by the Plaintiff and for an order of eviction directed against the Defendant to be evicted and removed from the suit premises.**
 - **The sum of Kshs. 543,200/- in damages being the estimated cost or repairs to restore the premises to its original state and for general and exemplary damages for breach of the lease agreement.**

That suit has not yet been heard, it is still pending before Court.

THE FALLING OUT

5. According to the tenant the landlord in filing Mombasa **HCCC No. 98 of 2013** was laying a background to dispossess him of the two shops. Plaintiff’s learned Counsel Mr. Nyongesa submitted that the landlord’s action led to the illegal eviction of the tenant over the two shops. The action that he referred to was that the landlord commenced illegal construction over the suit property whereby he added extra floors at the top of the building thereof. The tenant annexed to his Supporting Affidavit dated 27th November 2014 photographs and the pertinent one is marked ‘SMS 3(a)’. That photograph clearly shows construction taking place adding two extra floors on the top of an existing building. The landlord in his Replying Affidavit did not deny the authenticity of that photograph and nor did he deny having undertaken such a construction.
6. According to the tenant the consequences of that construction of the two extra floors led the Mombasa County Government to condemn the whole building and made an order for all tenants of that building, which from the photograph seems to have been 4 storey building, to vacate. The tenant had this to say in his affidavit-
 - **THAT following the subsequent unprocedural and/or unauthorized commencement of extension of additional floors to the demised building without the necessary approvals from the County Government of Mombasa the demised building was condemned as being unfit for occupation and use and I was thereby denied access to and barred from using the demised suit premises. I annex hereto and mark as “SMS-3(a), (b), (c) & (d)”, respectively, photographs attesting to the additional construction works, the Enforcement Notice dated 30th September, 2013 served upon the Defendant and I by the Director Town Planning & Architecture of the Mombasa County Government, the Notice dated 18th September, 2013 served upon the Defendant by the Chief Building Inspector of the Mombasa County Government and the Summons requiring attendance and Charge Sheet in Criminal Case No. M 4930 of 2013 at the County Court, Mombasa to attest to the foregoing facts as to the**

demised suit premises being rendered unfit for occupation and use.

- **THAT upon the condemnation of the demised building that was supervised by the Governor of Mombasa County Government scaffold and hoarding was put around the demised building by the Defendant that restricted and completely kept me away from the demised suit premises.**
- **THAT it is a material term and/or condition of the tenancy agreements subsisting between the Plaintiff and the Defendant that in the event of the demised suit premises and/or any portion thereof being rendered unfit for occupation and use I shall reserve and/or withhold the payment of the rentals payable for such period that the demised premises shall remain unfit for use until the demised suit premises shall again be rendered fit for my occupation and use thereof.**
- **THAT in pursuant to the foregoing material term and/or condition of the tenancy agreements I withheld and/or reserved the payment of the rentals payable for the demised suit premises with effect from the month of October, 2013 and I was to resume the payments upon the completion of the construction and/or at the instance of my resuming the possession of the demised suit premises for ordinary business operations.**
7. Before the building was condemned, the tenant's shops No. 1 and No. 2 were on the ground floor. The tenant deponed that he was using the two shops as booking office for public passengers transport under the name **"DreamLine Liner."**
8. The tenant then deponed to what he terms as illegal eviction as follows-
- **THAT I was surprised sometimes on or about the 15th day of November, 2014 when the scaffold and/or hoarding put around the demised building was removed to learn that the Defendant had surreptitiously offered the demised suit premises to 2 separate bus companies to operate booking offices and thereby to my grave prejudice purported to terminate the controlled tenancies I enjoy over the demised suit premises. I annex hereto and mark as "SMS-5" photographs to attest to the taking over of possession of the demised premises by the third parties.**
- **THAT upon following up the matter with the Defendant he surprisingly purported to wish to enter into new lease agreements with me for alternative and/or available demised premises at the back of the demised building on the ground and he completely refused to let me re-enter the demised suit premises now under the possession of third parties whom have understandably paid substantial amount in good will and pay more amount in rentals for the demised suit premises.**
9. According to tenant the precursor to the alleged illegal eviction by the landlord was, as he deponed in his affidavit that-
- **THAT I am aware of the fact that subsequent to the execution of the Lease for the second tenement there were various third parties that were interested in the demised suit premises whom made offers to the Defendant of willingness to pay more amount in good will and for the monthly rental sums than I had paid and was paying and that prompted the Defendant to attempt to renegotiate the terms of the Leases with me and of which I completely declined to his utter frustration.**
10. On the fall out the landlord through his learned Counsel Mr. Munyiithia argued that the tenant within the month of August 2013 began to alter, demolish, maiming, renovating and destroying and or defacing the suit property without the written consent of the landlord. Because of that action by tenant that the tenant was arrested and arraigned before a Court. That the tenant had failed, in carrying out his renovation to obtain the Mombasa Country Governments authority. That the Mombasa County Government ordered the landlord to board up the suit building but that

the tenant pulled down the iron sheets used to board up on 18th November 2013. That pulling down was the subject of complaint before the Police.

11. The landlord deponed that he was legally obligated to renovate the property as per the law in view of the tenants actions of illegal renovation. To that end he engaged an Architect and Engineer who prepared architectural and structural drawings respectively. In this regard the landlord further deponed as follows-

- **THAT the entire works I undertook to renovate the suit property was as a consequence of the illegal demolition by the Plaintiff. It is therefore hypocritical for the Plaintiff to allege that he had been prevented from accessing the suit property as a consequence of which he was entitled to withhold rent. We urge the Court to find that the Plaintiff is bound to bear the consequences of his illegal actions by paying the rent accrued during the period of renovation.**

12. The landlord deponed that the lease over shop No. 2 was terminated through his then lawyers letter dated 29th July 2013 which is as follows-

“Our Ref: MN/GEN/2013

Your Ref: TBA

Date: 29/07/2013

SAID MAJID

MOMBASA

Dear Sir,

RE: DEMAND FOR KSHS. 5,000,000/- IN DAMAGES OWED TO JAMES TITUS KISIA & NOTIFICATION OF ENTRY AND POSSESSION OF THE PREMISES

We act for JAMES TITUS KISIA our client who has instructed us to write to and address you as hereunder.

Our client is the registered proprietor of Plot Number MOMBASA/BLOCK/450/XVII/17 situated within the Republic of Kenya.

That you entered into a lease Agreement with our client in which he afforded you, being the lessee, a portion being a shop in the property to use subject to terms and conditions set out in the Agreement. All particulars of which are well within your knowledge and information.

That you breached the said Agreement by carrying out demolition and renovations on the said property without our client's written consent therefore causing him damage of an estimated value of Kshs. 5,000,000/-. All particulars of which are well within your knowledge and information.

Having breached the said Agreement our client hereby notifies you that the lease agreement stands terminated and you should vacate from premises immediately. Take further note that pursuant to the said lease our client has entered into the said premises and taken possession of the same.

Our instructions therefore are to demand, which we hereby do, that you immediately vacate from our client's premises and remove your belongings and that you immediately pay of the sum of Kshs. 5,000,000/- being damages occasioned to our client due to the said demolition.

TAKE FURTHER NOTICE THAT if you do not comply with the demand in the next twenty one (21) days from the date hereof, we have firm instructions to commence proceedings against you at your peril as to costs and consequent expenses.

Yours faithfully,

MULWA NDUYA & CO. ADVOCATES.”

ISSUES

13. There are three issues that present themselves for consideration as follows-

- a. **Does this Court in view of the existence of Mombasa HCC 98 of 2013 have jurisdiction to hear this case or the Notice of Motion under consideration?**
- b. **Does this Court have jurisdiction to hear this case in view of the tenant's allegation that he is a protected tenant as provided by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301?**
- c. **Is the tenant entitled to the prayers sought in the Notice of Motion under consideration?**

14. The first issue above arises from the Landlord's Preliminary Objection dated 15th December 2014 as follows-

1. **That this Court does not have jurisdiction pursuant to Section 6 of the Civil Procedure Act given the existence of HCCC NO. 98 of 2013 which;-**
 - a. **Is between the same parties**
 - b. **Deals with the same issue**

- c. Deals with the same facts
- d. Is filed before the same Court
- e. Is still existing and yet to be heard and determined.

2. As a consequence of item (1) above, this suit should be stayed.

15. Before dwelling into the substance of the above objection I believe the use of the word jurisdiction, as far as Section 6 of the Civil Procedure Act Cap 21 is concerned, is really a misnomer. I say so because Section 6 only deals with staying of a suit which relates to an issue which is directly or substantially in issue in a previous suit between the same parties. To better understand I will reproduce Section 6 as follows-

“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed.”

So the order that a party would get if they successfully invoke Section 6 is stay of proceedings. On the other hand the end result of successfully raising an objection based on lack of jurisdiction is more than staying a suit. I quote from the often quoted case on issue of jurisdiction, that is the case of LILIAN ‘S’ [1989]KLR 1 where the Court stated-

“Jurisdiction is everything. Without it, a Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The Supreme Court in CONSTITUTIONAL APPLICATION NO. 2 OF 2011 stated-

“... a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”

It follows that where the Court lacks jurisdiction to hear a matter such a matter cannot be heard by such a Court.

16. I will therefore proceed to assume that the Landlord sought stay of this suit and not a determination that it lacks jurisdiction to hear it.

17. In support of the Preliminary Objection Learned Counsel for the Landlord submitted that this suit and Mombasa HCCC 98 of 2013 deal with the lease over Shop No. 2. That in this suit the tenant alleged breach of the terms of the lease by the landlord and in Mombasa HCCC No. 98 of 2013 the Landlord alleged breach of the terms of the lease by the tenant. The Landlord’s Learned Counsel posed a question. That if the Court on hearing Mbsa HCCC No. 98 of 2013 did grant vacant possession to the Landlord of the tenant’s premises would this Court deal with the tenants prayer in this suit where the tenant seeks a declaration that he is a protected tenant as provided under Cap 301 or how would the Court deal with the tenant prayer in this case seeking injunctive orders to restrain the landlord from letting the two shops leased to the tenant. The Landlord submitted that the tenant should have made the claim contained in this suit as a Counterclaim in Mbsa HCCC No. 98 of 2013. That this is moreso since most of the documents which the parties shall rely upon in this case are the same documents that shall be relied upon in Mbsa HCCC No. 98 of 2013.

18. The tenant in opposing the Preliminary Objection submitted that Section 6 only dealt with cases where the issue in one suit is directly and substantially in issue in a previous suit. That whereas in Mbsa 98 of 2013 the Landlord sought issues relating to reconstruction of demised premises that the present suit was inviting the Court to find that the tenant was illegally evicted.

19. Further that the tenant could raise a Counterclaim in **Mbsa HCCC No. 98 of 2013**, because when his Defence was filed in that case the landlord had not effected the alleged illegal eviction.

COURT'S DETERMINATION OF FIRST ISSUE

20. What the Landlord's objection on this issue related to is the rule against sub judice. The Black Laws Dictionary defines *sub judice* as a matter "**before the Court or Judge for determination.**" For the Court to determine if a suit is caught by the sub judice Rule it ought to consider what was stated in the case **THIBA MIN. – HYDRO CO. LTD –Vs- JOSHAT KARU NDWIGA [2013]eKLR** as follows-

"It is not the form in which the suit is framed that determines whether it is *sub judice*. Rather it is substance of the suit"

21. What is the substance of this suit as compared to **Mbsa HCCC No. 98 of 2013**? As rightly submitted by the tenant **Mbsa HCCC No. 98 of 2013** relates to the Landlord's claim that the tenant has breached the lease of Shop No. 2 in carrying out alleged unauthorized renovation and the landlord prayed for an order for eviction of the tenant. In this suit the tenant alleges he was illegally evicted out of both shops No. 1 and No. 2. The tenant prays in this suit for declaration he is a protected tenant as provided by Cap 301, seeks for both restrictive and mandatory injunction against the Landlord to restrain him from dealing with those shops and seeks for the landlord to restore the tenant in those shops respectively. So there you have it, the substance of the suits are not the same. In my opinion this suit does not go foul against Section 6.

22. What I understand Section 6 to provide for is a scenario where the subsequent suit is substantially similar to the previous one and to allow the subsequent suit to proceed would be tantamount to dealing with the same issue, twice over, in different suits. In this present scenario, if the landlord's suit is heard while this suit is stayed, as sought by the landlord, the tenant would be without remedy on the issues of whether he is a protected tenant, whether the landlord should be restrained from letting the two shops and whether mandatory injunction should be granted an order restoring the tenant back to possession.

23. Accordingly in respect to the first issue I find for the tenant. It follows that Limb No. 1 (a) to (e) and 2 of the Preliminary Objection dated 15th December 2014 are dismissed with costs to the Plaintiff tenant.

24. The second issue is raised in the third limb of the Landlords' Preliminary Objection dated 15th December 2014 as follows-

"By the pleadings of the Plaintiff, the subject matter falls under the jurisdiction of the BPRT. In the absence of a reference pending before the BPRT this Court has no jurisdiction at the first instance to hear this suit."

25. The tenant relied on the following cases in opposition to the above limb of objection-

i. **PATRICK B. MAKARI –Vs- MRS. DORIS OLOUCH ABIERO (2004)eKLR**

where the Court held-

"Having perused through the pleadings and the application before this Court. I find that the Plaintiff's claim before the High Court is for an injunction, a remedy that only the High Court can grant, and one that he cannot seek before the BPRT. Accordingly, this suit is properly before this Court."

ii. **MOMBASA GAS SUPPLIES LTD –Vs- THE REGISTERED TRUSTEES NATIONAL UNION OF KENYA MUSLIM CIVIL APPEAL NO. 258 OF 2003** where the Learned Judges

of Court of Appeal held-

“Further, we note that the Plaintiff filed by the Appellant was seeking, as we have reproduced above, a declaration and an injunction. The Tribunal has no jurisdiction to entertain such a claim. That being so, we think that it was not an abuse of the Court process when the Appellant sought the intervention of the superior Court to protect it against any further notice seeking what it felt was rent far in excess of what it maintained was agreed between the parties.”

26. I believe the above decisions sufficiently deal with that limb of the landlord's objection. The tenant was entitled to approach this Court, rather than the Business Premises Rent Tribunal, because such a Tribunal has no jurisdiction to entertain the tenant's prayers for declaration and injunction.

27. The second issue as captured in paragraph 3 of the Landlord's objection dated 15th December 2014 fails and is dismissed with costs to the Plaintiff tenant.

28. I shall now deal with the third issue identified above, that is, whether the Plaintiff / tenant is entitled to prayers sought in the Notice of Motion. To recap, that Notice of Motion is for prayers to restrain the landlord to interfere with the tenants occupation of the two shops, to restrain the landlord from claiming rent for the period the tenant had to move out of the shop due to renovations being undertaken and a mandatory injunction directing the landlord to reinstate the tenant into possession.

29. The Landlord's opposition to the Notice of Motion centered on the argument that the tenant was the author of his own misfortune, so to speak. That is to say that the tenant undertook renovation of Shop No. 2 and thereby made the building unsafe. That resulted in the County Government ordering the tenants in the whole building to vacate to enable the Landlord to repair damage caused by tenant's renovation.

30. The tenant in response deponed that the building had been condemned because the Landlord had made it unsafe by undertaking increase of floors to the building, which was without authority from the County Government.

31. I need to remind myself that I am considering an interlocutory application. With that in mind I will follow the caution set out in the holding of **MBUTHIA –Vs- JIMBA CREDIT FINANCE CORPORATION & ANOTHER [1988]KLR 1** held-

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The lower Court Judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits.”

32. Being guided by that holding I set out the evidence which will guide my finding on the third issue.

33. There is no doubt that at present the tenant is not in possession of the two shops on the suit property.

34. It is clear that by the time the Landlord filed **Mbsa HCCC No. 98 of 2013**, filed on 8th August 2013, the tenant was still in possession of the shops. Indeed by one of the Landlord's prayer in the action was for the tenant to surrender possession of the Shop No. 2.

35. The tenant through its Manager was charged with two Counts. First Count was the offence of failing to comply with a requisition of enforcement Notice. The particulars of that Count are that on 1st October 2013 the tenant had failed to vacate the two shops which vacation was necessitated

by lack of safety standards of the building. On the second Count tenant's Manager was charged with offence relating to Section 119 of the Public Health Act Cap 242 in that he as either owner, occupier/caretaker of the premises failed to remove the nuisance thereof.

36. From the dates shown in those two counts the tenant was still in possession of the two shops. It does seem that the tenant lost possession in the month of October 2013, presumably after the Criminal charges were brought against his Manager by the Inspectorate Department of the County Government.

37. Perhaps the more important issue is why did the tenant lose that possession. The landlord has alleged that the building was rendered unsafe by the tenants unauthorized renovation of shops No. 2. The landlord has failed to place material before Court to support that contention. To the contrary the documents before Court show otherwise. In the first instance the tenant attached a photograph showing that the Landlord undertook major repair, that is adding further floors to the building, which the tenant said were unauthorized by the County Government. The tenant deposed that it was that construction which led to the County Government ordering all tenant to vacate the building for their own safety. Interestingly the landlord did not deny in his replying affidavit that the photograph was of the building or that it was taken at the material time when the County required vacation of the building. The tenant's contention is supported by the charge on the second count, referred to above. The particulars of that count are very telling, and are as follows-

“The Manager Ali Rashid on the 1st day of October, 2013, being the owner, Occupier/caretaker of premises situated on Plot No. 450/XVII/MI, Mombasa within Mombasa County where nuisance exist and having been served with a Notice within such period that is-

1. **Half demolished ceiling in the first floor which is hanging dangerously.**
2. **Half demolished canopy which are dangerous and can collapse any time.**
3. **Half demolished canopy adjacent Moi Avenue hanging dangerously.**
4. **Constructed safety guards along the Moi Avenue blocking pedestrians from accessing the safety movement corridors.**
5. **The half demolished building is likely to harbor drug addicts and criminals.**
6. **There are electric wires hanging dangerously in the entire building.”**

38. From those particulars of Count 2 it is clear the nuisance the charge referred to were on the first floor, it will be recalled the tenant occupied the ground floor. The half demolished walls; half demolished canopy adjacent to Moi Avenue; and the eclectic wires that were hanging were in respect of the entire building. It is not understood how renovation of one shop could have led to the above nuisances subject to the charge in Count two. I find on prima facie basis that those nuisances are more compatible with major construction such as increase of floors on a building.

39. The Landlord attached architectural and structural drawings to his replying affidavit and those drawings show that the landlord undertook major repairs of the building which included subdividing what was originally 4 shops on the ground floor into 7 shops. It is clear that what was originally rented out to the tenant as Shop No. 1 and No. 2 does not today exist in its original size due to that subdivision. The structural drawing shows that the landlord undertook major structural changes to the building. I just wish to pose a question here. Were the evictions of the tenants of the building made to enable the landlord undertake those major constructions? The answer to that issue will have to await the full hearing of this suit.

40. What however is of concern to this Court is that the landlord, without awaiting this Court's decision on his claim for vacant possession in **Mbsa HCCC No. 98 of 2013**, has denied the tenant the right to reoccupy his leased shops after the construction was complete. Parties, it has often been stated, are bound by the terms of their contract: see **NATIONAL BANK OF KENYA LTD -Vs- PIPE PLASTIC SAMKOLIT (K) LTD C.A. NAIROBI CIVIL APPEAL NO. 95 OF**

1999. The landlord in 2013 obviously appreciated this principle of Law because he sought through **Mbsa HCCC NO. 98 of 2013** vacant possession of Shop No. 2. The obligation of the Landlord to be bound by the terms of the contract, unless the Court finds otherwise, is not obviated by his offer to the tenant of another lease for alternative premises. That alternative premise is not what the tenant bargained for.

41. The landlord has deponed that he has now rented the available space to other people and that the mandatory injunction sought by the tenant cannot be issued more particularly in the absence of those other people who are now tenants on the building.

42. The jurisprudence relating to the issue of mandatory injunction is well captured by the often cited case of **LOCABALL INTERNATIONAL FINANCE LTD –Vs- AGRO EXPORT & OTHERS (1986) IALLER – 901** where it was stated-

“A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and 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 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 on a different and higher standard than was required for a prohibitory injunction.”

Also in the case **MALINDI AIR SERVICES –Vs- HALIMA ABDINOOR HASSAN, Kenya Court of Appeal Civil Application No. NAI 202 of 1998.** The Court had this to say-

“A mandatory injunction at an interlocutory stage is rarely granted; only when the Plaintiff’s case is clear and incontrovertible.”

43. Are there circumstances in this case to justify the granting of mandatory injunction?

44. The tenant has stated that he was using the shops as booking office from the bus company called Dream Liner. Although the landlord was doubtful if the tenant owns that Bus Company there was no document before Court to counteract tenants said contention. To however bolster tenant’s said contention is the letter dated 30th September 2013 from the Mombasa County Government which was received by the tenant and was addressed to the “Dream Liner”. That was the letter which required the construction on the building to be stopped and for the tenants to vacate in view of unsafe state of the building.

45. If the tenant was running a booking office on the shops and if its customers were accustomed to making their booking at those shops, undoubtedly the tenant has suffered and continues to suffer damage in loss of business. It is often said, and it bears having it in mind that in business, such as the tenant’s business location is everything. It can mean the difference between profit and loss of profit. I do feel, because of the above finding a “high degree of assurance that at the trial [of this case] it will be found that the mandatory injunction had been rightly granted. See **LOCABALL** case (supra).

46. The landlord did argue that the tenant had failed to meet the principles of **GIELLA –Vs- CASSMAN BROWN [1973] E.A. 358.** To the contrary, bearing in mind my discussion above in this Ruling I do find that the tenant has shown a prima facie case with probability of success and in that view damages are not adequate to compensate the tenant. How can damages that the tenant incur be quantifiable when one cannot accurately state what increase of business the tenant would have enjoyed if he had continued running his business at those shops?

47. With that in mind I am of the view that the landlord cannot be allowed to rely on his action which led to the building being vacated to deny the tenant the order of mandatory injunction. This is

what was the holding in the case of **KAMAU MUCHUA –Vs- RIPPLES LIMITED, CA CIVIL APPEAL NO. 106 OF 1992** where the Kenya Court of Appeal stated-

“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.”

The landlord undoubtedly obtained an advantage in subdividing the ground into 7 shops. No doubt the landlord is likely to obtain more rental income than before.

48. In my view the landlord entered into the purported leases with other person there by dispossessing the tenant of his leased shops and the landlord will have to bear the consequences of his actions. Above all we are all living under a new Constitutional dispensation by virtue of The Constitution of Kenya 2010. What used to receive a blind eye in the past cannot now be allowed. I have in mind the National Values set out in Article 10; and the inherent right to have ones dignity respected under Article 28. Those values in Article 10 bind all persons, such as the landlord in this case and so does Article 28. To arbitrarily take the tenant’s shops is failure of the landlord to respect the tenant’s dignity. That cannot be countenanced. For that reason the tenant does succeed in the prayers in his Chamber Summons.

49. In my view the overriding objective in Section 1A and 1B of the Civil Procedure Act would best be served by also ordering that this case be consolidated with **Mbsa HCCC No. 98 of 2013**. In that regard I rely on the decision of the Court of Appeal in **JOHN GAKURE & 148 OTHERS – Vs- DAWA PHARMACEUTICALS CO. LTD CIVIL APPLICATION NO. 299 OF 2007** where it was held-

“... Jurisdiction of the Court has been enhanced and its latitude expanded in order for the Court to drive the Civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principle aims. In the Court’s view, dealing with a case justly includes inter alia, reducing delay and costs, expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the Court including granting of appropriate interim relief in deserving cases.”

The consolidation of the two suits would in my view “facilitate the just, expeditious, proportionate and affordable resolution” of these suits. [See Section 1A of Cap 21].

CONCLUSION

50. In the end I grant the following orders-

- a. **An interlocutory injunction is hereby issued against the Defendant by himself, his servants or agents or any one authorized by him or claiming under him from in any manner or otherwise howsoever subjecting the Plaintiff his servants or agents to any annoyance or harassment with the intention thereby of inducing or compelling the Plaintiff to vacate the demised suit premises or any part thereof and/or in any manner to occasion the frustration or termination of the tenancies enjoyed by the Plaintiff over the demised suit premises pending the hearing and final determination of this suit.**
- b. **A temporary injunction is hereby issued against the Defendant by himself, his servants or agents or any one authorized by him or claiming under him from in any manner or otherwise whatsoever demanding for and/or collecting any rental from the Plaintiff in respect of the months running from October, 2013, when the demised suit premises were rendered unfit for occupation and use until such a date that the Plaintiff shall be reinstated in the possession of the demised suit premises pending the hearing and final determination of this suit.**

- c. A mandatory injunction is hereby issued against the Defendant by himself, his servants or agents or any one authorized by him or claiming under him directing the Defendant to forthwith and unconditionally reinstate the Plaintiff in the possession of the demised suit premises pending the hearing and final determination of this suit.
- d. This case is hereby consolidated with Mombasa High Court Civil Case No. 98 of 2013. The lead file shall be Mbsa HCCC No. 98 of 2013.
- e. The Plaintiff is awarded costs of Notice of Motion dated 27th November, 2014.

DATED and DELIVERED at MOMBASA this 5TH day of MARCH, 2015.

MARY KASANGO

JUDGE