



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 1300 OF 2014**

**THREE CUBE PRINTING LIMITED.....PLAINTIFF**

**VERSUS**

**STEPHEN JUMA ONYANGO**

**T/A INTIME AUCTIONEERS .....1<sup>ST</sup> DEFENDANT**

**HASHM LALJI PROPERTIES LIMITED.....2<sup>ND</sup> DEFENDANT**

**MARTIN LABAN MUIRURI NJUGUNA**

**AND LTDIA ZILPHA NDUTA NJUGUNA**

**T/A CRISTAL CERAMICS.....3<sup>RD</sup> DEFENDANT**

**MARY WANJA WANYOIKE.....4<sup>TH</sup> DEFENDANT**

**CHIMANDE INVESTMENTS LIMITED.....5<sup>TH</sup> DEFENDANT**

**RULING**

The application for this Court's consideration is the Notice of Motion dated 7<sup>th</sup> October 2014, brought under *Order 40 Rules 1 (a), (b), (2), (4) Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A,63(e) of the Civil Procedure Act* seeking for orders that:

- 1. The Honourable court be pleased to grant a temporary injunction restraining the defendants whether by themselves ,agents, servants, assigns or any other person acting on their or claiming through them from advertising for sale ,disposing off, selling, leasing or in any other manner whatsoever dealing or interfering with the proclaimed goods belonging to the plaintiff that were located in the rear store of the building erected on LR No 209/4360/56 Kijabe street, Nairobi [the suit premises]pending the hearing and determination of this suit.*
- 2. The honourable court be pleased to grant a temporary injunction restraining the defendants whether by themselves, their agents, servants, assigns or any other person acting in their behalf or claiming through them from interfering, letting out, leasing or entering into any contract for the lease of the suit premises or in any way dealing or interfering with the plaintiff's quiet use and possession of the suit premises pending the hearing and determination of this suit.*

3. ***The hounourable court be pleased to issue a Mandatory injunction compelling the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly together with their agents and/or servants to forthwith reinstate/restore the plaintiff's tenancy and its goods the subject of the illegal seizure to the suit premises, reconnect or procure the reconnection of power to the suit premises and give access of the suit premises to the plaintiff pending the hearing and determination of this suit.***

This application is premised on the grounds stated on the face of the application and the supporting affidavit of ***Benedictor Kavulwa Kimeu***, the Managing Director of the Plaintiff company. He deponed that the Plaintiff had been a tenant of the 4<sup>th</sup> Defendant and is engaged in the business of printing at the rear store of a building erected at Kijabe street .The 4<sup>th</sup> Defendant was a tenant of the 5<sup>th</sup> Defendant in relation to the demised premises He averred that the Plaintiff had without fail paid his rent .That on ***11<sup>th</sup> July 2014***, the 5<sup>th</sup> Defendant's advocates issued to the Plaintiff with a letter of offer for a formal lease which lease was to be executed on ***20<sup>th</sup> August 2014***.The Plaintiff accepted the terms of the offer, but the 5<sup>th</sup> Defendant unilaterally reneged on the agreement by retracting the offer. The 5<sup>th</sup> Defendant verbally directed the plaintiff to vacate the suit property. He further stated that the ***1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup>*** and 4<sup>th</sup> Defendants acting in concert proceeded to interfere with the plaintiff's quite use, occupation and possession of the property by disconnecting electric power supply to the premises and harassing and intimidating the plaintiff with a view of eviction. That in a bid to have the reconnection of power to the premises, the plaintiff filed proceedings in the Business Rent Tribunal and obtained interim orders prohibiting the 4<sup>th</sup> defendant from evicting, disconnecting power supply ,blocking access or harassing the plaintiff pending inter parties hearing on ***28<sup>th</sup> October 2014***.He further stated that the 2<sup>nd</sup> Defendant on the instructions of the 1<sup>st</sup> defendant purported to distrain for alleged rent arrears due from the 3<sup>rd</sup> Defendant who is the 2<sup>nd</sup> Defendant's tenant. That this action was premised on an ex parte court order issued to the 1<sup>st</sup> Defendant by the court on ***26<sup>th</sup> September 2014***.He claims that the 1<sup>st</sup> defendant has wrongfully refused to return the said goods and has threatened to proceed to advertise the goods for sale and unless restrained by the Court, the 1<sup>st</sup> Defendant is likely to move ahead and advertise for sale of the goods and proceed to sale the same yet the exercise of that right does not lie and the Plaintiff would therefore suffer irreparable loss and damage.

This application is contested. The 1<sup>st</sup> defendant in his Replying Affidavit stated that he was a licensed auctioneer .That he received instructions from the 2<sup>nd</sup> Defendant to levy distress for rent against the 3<sup>rd</sup> Defendant who were the 2<sup>nd</sup> Defendant's tenants to recover rent arrears of ***Ksh 756,621/=*** together with his charges of ***Ksh 50,000/=***.He proclaimed the 3<sup>rd</sup> Defendant's goods in the presence of ***Lydia Z. Nduta Njuguna***, who acknowledged that she was the owner of ***Crystal Ceramics*** and who endorsed his proclamation form by writing her name and ID Number. That the said Lydia stated that the debt related to disputed accounts and informed him that it would be sorted within the proclamation period. He later went to attach the goods that he had earlier proclaimed and carried away the goods for storage pending payment or sale in accordance with the Law. It was his avarements that he received a letter from the 2<sup>nd</sup> Defendant notifying him that the 3<sup>rd</sup> Defendants had paid the rent arrears and their fees and instructed him to release the attached goods to the 3<sup>rd</sup> defendants upon payment of the attachment fees and storage charges. He has however not released the goods to the 3<sup>rd</sup> Defendant because his storage charges have not been paid. That there is no imminent threat to sale the goods as the substantive claim has been settled and as such the orders sought are not merited at all and has been overtaken by events.

The 2<sup>nd</sup> Defendant's Legal Officer, ***Martin Bett*** in his Replying affidavit stated that the 2<sup>nd</sup> Defendant was the owner of all that property known as Land Reference Number ***209/5360/56- Kijabe Street***, which property comprises of two shops and a store on the ground floor which are currently leased to the 3<sup>rd</sup> defendant and the 4<sup>th</sup> defendant. He stated that there has never been any tenancy relationship or contract of any nature between the 2<sup>nd</sup> Defendant and the Plaintiff therefore the application herein is an abuse of the court process.

The 3<sup>rd</sup> Defendant's through ***Lydia Zilipha Nduta Njuguna*** swore a Replying Affidavit where she stated

that together with her husband, they owned Cristol Ceramics. She further averred that the 2<sup>nd</sup> Defendant granted them a lease of a period of **6 years** from **1<sup>st</sup> August 2008** to **31<sup>st</sup> July 2014**, in respect of shop number 1 and upon its expiry for another **6 years** from **1<sup>st</sup> August 2014** to **31<sup>st</sup> July 2020**. That they applied for the rear store which had previously been leased to the 4<sup>th</sup> defendant and they were granted a lease of 6 years from **1<sup>st</sup> September 2014** to **31<sup>st</sup> August 2020**. That the rear store was handed over to them on **1<sup>st</sup> September 2014**. That by the time they were taking over the rear store the Plaintiff was moving out and when they took possession they transferred their goods to the store. That by the time the first lease of shop 1 expired, they had accrued arrears of **Ksh 756,621/=** on account of repairs and service charges which they had disputed. That the 1<sup>st</sup> Defendant then instructed the 2<sup>nd</sup> Defendant to proclaim their goods but they did not pay the rent arrears as they had requested the 2<sup>nd</sup> defendant to waive the said monies. She also acknowledged that they had paid the rent arrears and had now regularized their relationship with the 2<sup>nd</sup> defendant. She denied the allegations that they evicted the plaintiff from the rear store. She further denied engaging in any fraudulent activities with the defendants against the Plaintiff.

The 3<sup>rd</sup> and 4<sup>th</sup> Defendants raised a preliminary objection on the grounds that the plaintiff's suit as constituted under ELC offends the provisions of Article 162 (2) (b) of the Constitution and the Provision of the Environment and Land Act 2012, that mandates the court to deal with disputes relating to environment and title to land and that the plaintiffs suit that deals with distress from a business room is fatally defective, misconceived and an abuse of the court process and should be struck off with costs.

Parties canvassed this application by way of written submissions which the court has taken into consideration together with the authorities relied on. The issue for consideration is whether the plaintiff has shown that he deserves the orders sought in his application. It is now well established that there are three main factors to be considered in determining whether to grant an injunction. (See *Giella v. Cassman Brown*). The trial court must evaluate whether:

- a. ***The Applicant has shown that it is likely to prevail on the merits;***
- b. ***The Applicant has demonstrated that it will suffer imminent irreparable harm if the injunction is not granted; and***
- c. ***The harm the Applicant is likely to suffer absent the injunction outweighs the harm it would cause to the adverse party.***

From the material placed before Court, the plaintiff has alleged that he had been a tenant of the 4<sup>th</sup> Defendant and that the 4<sup>th</sup> defendant has been a tenant of the 5<sup>th</sup> defendant and has been paying his rent to the 4<sup>th</sup> defendant. The owner of the suit premises is the 2<sup>nd</sup> defendant who has claimed that it has no landlord tenant relationship with the Plaintiff, and does not know the Plaintiff. From the affidavit of the 3<sup>rd</sup> Defendant, she claims to have been in a lease agreement with the 2<sup>nd</sup> Defendant and later on got into another lease agreement with the 2<sup>nd</sup> Defendant on the rear store shop that the plaintiff claimed to have been in occupation. The 3<sup>rd</sup> Defendant acknowledges that the plaintiff had moved some of his property from the store and left a few items in it. That in the said rear store, the 3<sup>rd</sup> Defendant had transferred some of their goods and when they could not pay the rent arrears, the 2<sup>nd</sup> Defendant being the owner of the premises instructed the 1<sup>st</sup> Defendant to levy distress upon the 3<sup>rd</sup> Defendant since the 2<sup>nd</sup> Defendant with whom it had a tenancy relationship. Further the 3<sup>rd</sup> Defendant has acknowledged that indeed she was indebted to the 2<sup>nd</sup> Defendant and had paid the rent arrears. The plaintiff has not shown that he had any tenancy relationship the 2<sup>nd</sup> Defendant. It seems like the Plaintiff was not aware that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have signed a lease agreement in regards to his shop. The alleged landlord of the Plaintiff, the 4<sup>th</sup> defendant has not filed any response to the allegations raised by the plaintiff. Further the Plaintiff has not by evidence shown his relationship with the 5<sup>th</sup> Defendant for the court to confirm the veracity of his claim. In the absence of any lease, or any letter of agreement between the plaintiff and any of the defendants, this court is not convinced that the plaintiff has shown a prima facie case with a probability of success.

The 2<sup>nd</sup> limb that the court considers when granting injunction is whether the plaintiff will suffer irreparable harm that cannot be compensated by way of damages. His claim is mainly that the 1<sup>st</sup> defendant disdained his goods on the instructions of the 2<sup>nd</sup> defendant. The goods that were disdained by the 1<sup>st</sup> defendant were ostensibly goods that belonged to the 3<sup>rd</sup> defendant. I note that from the 3<sup>rd</sup> defendant's affidavit, the said premises in dispute contained both the goods belonging to the plaintiff and that of the 3<sup>rd</sup> defendants.

I have perused the plaintiff's supporting affidavit and note that in annexure **BKK-15** the plaintiff has itemized the goods that were taken away by the 1<sup>st</sup> defendant. These items can be quantified and should the court find that the actions of the 1<sup>st</sup> defendant were against the law, then the plaintiff can be paid damages equivalent to the itemized goods. My finding is that the plaintiff can be adequately compensated by way of damages.

On a balance of convenience, the 3<sup>rd</sup> defendant has stated that it is in possession of the disputed property and has further shown that they signed a lease agreement with the 2<sup>nd</sup> defendant for a period of 6 years. The plaintiff has however not shown any lease agreement between himself and the 2<sup>nd</sup> defendant or the 5<sup>th</sup> Defendant. In the absence of a lease agreement, the court finds that the balance of convenience lies in favour of the 3<sup>rd</sup> Defendant. There is also a claim by the 3<sup>rd</sup> defendant that the plaintiff has partially moved his goods from the disputed shop which claim was not countermanded by the plaintiff. He cannot therefore claim to be in possession of the said shop when he has indeed partially moved away from it.

The 3<sup>rd</sup> and 4<sup>th</sup> defendants raised a preliminary objection on the grounds that the suit as filed cannot be heard at the ELC Court since this court is only mandated to deal with disputes on land. **Section 38(1) of the Land Act, No. 6 of 2012** which provides that:

**38 (1). No suit shall be brought upon a contract for the disposition of an interest in land unless—**

**a) the contract upon which the suit is founded—**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.**

**Section 2 of the Land Act, No. 6 of 2012**

the word "**Disposition**" includes a transfer charge, grant, partition, exchange, lease, assignment, surrender or disclaimer. The plaintiff has not exhibited any lease agreement between himself and any of the defendants. In the absence of such an agreement, this court is stripped of jurisdiction. That notwithstanding the plaintiff stated that he had filed a suit at the Business Premises Rent tribunal **Case No 596 of 2014** on the dispute regarding their tenancy either as substantive parties or interested parties. Since there is already in existence proceedings involving this dispute before a competent Tribunal, the parties should first use the said avenue and later they can come to this court if they are aggrieved with the findings of the tribunal as an appeal.

Having now considered the pleadings in general, the Written Submissions and the relevant Laws, the Court finds that the plaintiff's **Notice of Motion** dated **7<sup>th</sup> October 2014** is without merit and the same is dismissed with costs to the Defendants. The Court further directs and orders that this suit be transferred to the Business Premises Rent Tribunal to be determined alongside BPRT **Case No 596 of 2014**.

Dated, Signed and Delivered this 5<sup>th</sup> day of June, 2015

**L.GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff

.....For the 1st Defendant

.....For the 2<sup>nd</sup> Defendant

.....For the 3<sup>rd</sup> Defendant

.....For the 4<sup>th</sup> Defendant

..... Court Clerk

**L. GACHERU**

**JUDGE**