



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

**AT NAKURU**

**CIVIL CASE NO. 51 OF 2014**

**JANE WANGARI GITHIGA.....PLAINTIFF**

**-VERSUS-**

**ANTHONY NTUTU & 2 OTHERS.....DEFENDANT**

**RULING**

1. The application dated 15<sup>th</sup> July 2014 has been filed under the Provisions of Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules. The Plaintiff seeks, *inter alia*, the following orders:
  - (a) **That pending the hearing and determination of this suit, this honourable court be pleased to issue an order of temporary injunction restraining the Defendants by themselves, their agents and servants from evicting the Plaintiff, regaining possession of or in any way howsoever from interfering with the Plaintiff's quiet and peaceful possession and occupation of her business premises known as Parida Hotel on land parcel No. 62 Narok Town; and**
  - (b) **that the costs of this application be provided for.**
2. The application is supported by the Applicant's affidavit sworn on 15<sup>th</sup> July 2014.
3. Briefly, the background of this application is that Respondents leased the applicant the property known as Parcel No. 62 Narok Town to the Applicant for a monthly rent of Kshs. 150,000/=. This lease was for a period of three years, from 1<sup>st</sup> August to 1<sup>st</sup> July 2014. On the 4<sup>th</sup> April 2014, the Applicant notified the Respondents that she wished to renew the lease. By their letter dated 3<sup>rd</sup> June 2014 they notified her that they would not extend the lease and that the applicant should surrender vacant possession of the property by 31<sup>st</sup> July 2014 when the lease expired.
4. The applicant is aggrieved by the Respondent's actions which she considers to be a breach of the contract. She alleges that the Respondents did not give her a six months' notice as per the tenancy agreement. In her suit she seeks a permanent injunction restraining them from breaching the contract. In the present application she seeks a temporary injunctive orders restraining the Respondents from evicting her pending the hearing of the main suit.
5. She avers that after she leased the property, she undertook extensive developments on it and now runs a hotel. The Applicant is apprehensive that the Respondents may forcefully eject her from the property in breach of the terms of the contract. If this is done, she will suffer substantial damages.
6. In their Replying Affidavit sworn on 16<sup>th</sup> September 2014, the Respondents deny being in breach of the agreement. They allege that the lease expired by effluxion of time. They explain that they rejected the Applicant's request for renewal of the lease because she had not remitted rent in

accordance with the terms of the agreement. In fact as at the time of the hearing of the application she was in rent arrears of Kshs. 280,000/=. For them there was no reason for the court to grant the application.

7. I have considered the pleadings and the submissions of Counsel which restated the averments in the respective affidavits.

#### **ISSUES FOR DETERMINATION:**

8. The issues for determination in this application flow from the principles for grant of an injunction stated in **Giella V. Cassman Brown**, [1973] E.A. 358 whether the Applicant has established a *prima facie* case with a probability of success, if she will suffer substantial damage if the order of injunctive is not granted and where there is doubt whether the balance of convenience tilts in her favour.

#### **ANALYSIS**

9. A *prima facie* case was defined by the Court of Appeal in the case of **Mrao Ltd V. First American Bank of Kenya Ltd & 2 Others**, [2003] eKLR as follows:

**“a *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

10. The right which the Applicant seeks to protect is her leasehold interest over the suit premises. The conditions under which her right is to be exercised must be determined from her tenancy agreement with the Respondents. This agreement was for a period of commencing on 1/8/2011 until 31/7/2014. The terms of the agreement were that any party who wished to terminate the lease before it expired must issue a six months' notice. The tenant was granted a right to apply for renewal of the lease provided that she gave two months' notice and her application would be given first priority.
11. From their letter dated 3<sup>rd</sup> June 2014, it is apparent that the Respondents intended to see the agreement to its full term. They however did not wish to continue with the lease. It is this decision with which the Applicant is aggrieved. She alleges that they should have given her a six months' notice.
12. However this is not a requirement under the agreement. The six months' notice was only mandatory if the Respondents wanted to terminate the agreement before time. That the notice was not given six months' earlier did not amount to a breach of the agreement.
13. The question of whether the decision not to renew the lease was made without due consideration is addressed in the Replying Affidavit. The Respondents gave two reasons for declining the Applicant's request to renew the lease. Firstly they aver that the Applicant had severally defaulted in paying the rent as and when it was due. It was further averred that currently the Applicant was in arrears of Kshs. 280,000/-. The Applicant did not file an affidavit to refute these averments and they must therefore be deemed uncontroverted.
14. An injunction is an equitable remedy. Any party seeking the discretion of the court must come to court with clean hands. It follows that the Applicant cannot seek orders of the court to restrain the Respondents from what she terms as a breach of an agreement which she herself was not honouring.
15. From the above analysis I find that the Applicant has not shown any unlawful action on the part of the Respondents which would entitle her to the injunction sought. I also find that she was in breach of the agreement which precludes her from being granted the equitable relief.
16. Having so established, I am not satisfied that the Applicant will suffer substantial damages which cannot be compensated by damages. The balance of convenience in this case tilts in favour of the Respondents.

**DETERMINATION**

17. In the circumstances, I find that the application dated 15<sup>th</sup> July 2014 has no merit and dismiss it with costs for the Respondents.

Orders accordingly.

**Dated, Signed and Delivered at Nakuru this 10th day of July, 2015.**

**A. MSHILA**

**JUDGE**