



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 15 OF 2020**

**ABDI MOHAMED.....PLAINTIFF**

**VERSUS**

**MARTHA TEVULO MUINDI.....1<sup>ST</sup> DEFENDANT**

**JANE NDILA GITHINJI.....2<sup>ND</sup> DEFENDANT**

**NATHANIEL MIKE MUINDI.....3<sup>RD</sup> DEFENDANT**

**ZICK MUINDI.....4<sup>TH</sup> DEFENDANT**

**JACKLINE MUINDI.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 2/3/2020 and filed in court on 3/3/2020 brought under **Order 40 Rule 2(1) of the Civil Procedure Rules, Section 63 (C) of the Civil Procedure Act**, the plaintiff/applicant seeks the following orders against the defendants:

(1) ...spent

(2) ...spent

(3) **That this honourable court be pleased to issue an order of temporary injunction to restrain the defendants by themselves or anyone claiming through them from blocking the applicant/plaintiff's access to the suit premises by padlocking the same, letting the premises to anyone else or interfering with the plaintiff's quiet enjoyment of the said premises, pending the hearing and determination of this application and pending the hearing and determination of the main suit.**

(4) **That this honourable court be pleased to order immediate release of the distressed goods to the applicant unconditionally.**

(5) **That the court broker's charges if any, be paid by the defendants.**

(4) **Costs of this application be provided for.**

2. The application is supported by the affidavit of the plaintiff sworn on 2/3/2020. The grounds upon which the application is based on are that the applicant is a lawful tenant on the respondents' premises commonly known as River Nile Hotel & Lodging; that on **28/2/2020** without any notice whatsoever, the respondents caused Femfa Traders Auctioneers to descend on the suit premises, and they seized and carried away the applicant's tools of trade without any prior proclamation notice; that after the alleged illegal levy of distress the said court brokers also locked the business premises including lodging rooms with all the beds, mattresses, blankets and all incidental lodging items inside; that the auctioneers carried away perishable items which are listed in the application; that the perishable items may become a total loss unless this application is heard on a priority basis; that the applicant has come to court with clean hands and that the applicant has met the threshold for the grant of injunctive reliefs.

3. The applicant depones in his supporting affidavit that after the demise of his father he entered into a lease agreement with the respondents on **26<sup>th</sup> November 2018** in respect of the suit premises located at Laini Moja, Kitale; that his family has run the same business on the suit premises for **25 years**; that the respondents attempted to increase the rent by **Kshs. 50,000/=** unilaterally on **23<sup>rd</sup> December 2019**; that he had already deposited the rent for **January and February 2020** as at the time of filing the instant application; that the defendants failed to comply with the provisions of **Section 4 of the Landlords And Tenants (Shops Hotels And Catering Establishments) Act** and that the defendants distrained against the business, carting away numerous items, some of them perishable. A copy of a lease agreement apparently

signed by the parties in the presence of an advocate is annexed as an exhibit in the supporting affidavit of the applicant.

4. The 3<sup>rd</sup> defendant filed a sworn replying affidavit dated **13/3/2020** on his own behalf and on behalf of his co-defendants. He deposes that according to information he has obtained, no perishable goods were seized; that notice of distress dated **12/2/2020** was issued to the applicant before the seizure which took place on **28/2/2020**; that the actions of the defendants were justified by the lease agreement; that no rents for January and February have been paid as alleged; that payment of **Ksh 180,000/=** was effected on **2/3/2020** and that it having preceded the filing of the suit by only a day it was in bad faith and that the applicant is in breach of the lease agreement.

5. The plaintiff filed his submissions on **28/6/2020**. The defendants filed their submissions on **14/7/2020**. I have considered the application, the response and the filed submissions.

6. The issues that arise in the instant application are as follows:

- (1) *Whether an injunction should issue against the respondents as prayed;*
- (2) *Whether the applicant's goods should be ordered released;*
- (3) *What orders should issue?*

7. The conditions for the grant of an interim injunction were set out in the case of **Giella Vs Cassman Brown 1973 EA 358**. They are namely that the applicant must establish a *prima facie* case and also that he must show that he would suffer loss that can not be compensated for by way of damages; further, if the court is in doubt in regard to any of the above two conditions then it may rule on the application on a balance of convenience.

8. There is no doubt that there was a lease agreement executed by the parties on **26/11/2018**. The respondents admit having distrained against the plaintiff's assets, but claim justification by virtue of the lease agreement. **Clause 6** of the lease agreement which the respondents rely on states that if the rent at any time during the period of the tenancy becomes more than **14** days in arrears whether legally demanded or not the landlord shall reserve the right to terminate the tenancy and assume possession of the demised premises immediately and take action to recover the arrears of rent or obtain redress required.

9. On his part, the applicant relies on **Section 4** of the **Landlords and Tenants (Shops Hotels and Catering Establishments) Act**. That section provides as follows:

**“4. Termination of, and alteration of terms and conditions in, controlled tenancy**

**(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.**

**(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.**

**(3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.**

**(4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:**

**Provided that-**

**(i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;**

**(ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;**

**(iii) the parties to the tenancy may agree in writing to any lesser period of notice.**

**(5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.**

**(6) A tenancy notice may be given to the receiving party by delivering it to him personally, or to an adult member of his family, or to any other servant residing within or employed in the premises concerned, or to his employer, or by sending it by prepaid registered post to his last known address, and any such notice shall be deemed to have been given on the date on**

which it was so delivered, or on the date of the postal receipt given by a person receiving the letter from the postal authorities, as the case may be.”

10. It is of course the approach of the applicant that his is a controlled tenancy. **Section 2** of the same **Act** provides as follows:

**“Controlled tenancy” means a tenancy of a shop, hotel or catering establishment-**

**(a) which has not been reduced into writing; or**

**(b) which has been reduced into writing and which-**

**(i) is for a period not exceeding five years; or**

**(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or**

**(iii) relates to premises of a class specified under subsection (2) of this section:**

**Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;”**

11. The applicant’s premises fall under the category of “hotel” or “catering establishment”. The applicant had been on the premises for a year under the lease agreement dated **26<sup>th</sup> November 2018**. He has shown that after the expiry of that lease agreement he paid **Kshs. 180,000/=** as rent for **January and February 2020**. There is no indication by the respondents that they are intent on terminating the applicant’s occupation of the premises. Indeed the applicant has exhibited a copy of the respondent’s letter dated **23/12/2019** indicating that the applicant’s tenancy period shall be extended for two **(2)** years with effect from **1/1/2020**.

12. In this court’s opinion the applicant was entitled to notice under the lease agreement if his tenancy was to be terminated yet the respondents appear to have shut him out of the premises without such a notice. This court must consider termination and distraint as two separate remedies for the purpose of this application, and that being the case the provisions of the law cited herein above and the circumstances of the respondents’ actions make it apparent that the applicant has established a *prima facie* case against them. It is also obvious that the applicant may suffer loss that may be irreparable by way of damages of the orders sought are not granted as he may not find any premises or location identical to the suit premises he and his family have been offering his clientele for many years.

13. In this court’s view the applicant has established that the application dated **2/3/2020** has merit and I hereby grant the application in terms of **Prayers No. (3), (4), and (5)** thereof.

14. Parties shall comply with the rules in readiness for the fixing of the main suit for hearing. This suit shall be mentioned on **30/9/2020** for the purpose of confirming compliance and for issuance of a hearing date.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 4<sup>th</sup> day of September, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**