



**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL CASE NO. 18 OF 2013**

**TAHRCQUELINE WAKASA SHIKUKU ..... PLAINTIFF**

**VERSUS**

**KENYA INDUSTRIAL ESTATES LTD. .... DEFENDANT**

**RULING**

Before me is an application dated 15th May 2013 brought by way of Notice of Motion brought **Order 40 rule 1** and **2** of the **Civil Procedure Rules 2010** and **Section 63 (e)** of the Civil Procedure Act, under certificate of urgency. The prayers are as follows -

- 1. The application be certified urgent and be heard on priority basis.**
- 2. Pending the hearing of the application inter-partes, there be an order of temporary injunction restraining the defendant, his agents from interfering with the plaintiff's use and occupation of the suit premises.**
- 3. Pending the hearing of this suit, there be an order of temporary injunction restraining the defendant, his agents from interfering with the plaintiff's use and occupation of the suit premises.**

The application has grounds on the face of the Notice of Motion. The grounds are firstly, that the plaintiff was in occupation of the premises. Secondly, that the defendant had ordered the plaintiff to give vacant possession. Thirdly, that no notice to vacate had been issued as per the lease agreement. Fourthly, that the plaintiff had a good case against the defendant.

The application was filed with a supporting affidavit sworn on 15th May 2013 by the applicant. It was deponed therein inter-alia that the plaintiff was a tenant of the defendant and had so far paid Kshs.77,900/= as deposit and rent upto April 2013. That she was not in arrears of rent. That though the lease agreement provided for a notice period before termination of tenancy, on 10th May, 2013 the defendant's manager asked the plaintiff to hand over the keys which surprised her. That if the said notice to vacate was effected and repossession of the premises done, the plaintiff would suffer disruption of business and irreparable loss. That the action of the defendant was unlawful and done in bad faith.

The application is opposed. A replying affidavit sworn on 18th July 2013 by Joel Bett, the Regional Manager, Kakamega of the defendant was filed. It was deponed therein that the plaintiff was offered the premises through a letter of offer dated 1st October 2012. That she made payment of Kshs.77,300/= which constituted quarterly rent for the months of November to January as well as three months deposit. It was also deponed that the plaintiff had not paid rent from February 2013. That because the rent arrears were in excess of three months, the tenancy had lapsed and the plaintiff was therefore liable to eviction as per clause 5 of the letter of offer without notice. That the plaintiff had deliberately refused to sign an incubation agreement which would contain the detailed terms of the lease. That the plaintiff was, in the

absence of tenancy agreement, a statutory tenant and only the Business Premises Rent Tribunal could adjudicate on her complaint, not this court. That the plaintiff had intimated that she might not be able to proceed with the tenancy and had already been trying to illegally lease the premises to a third party one Stephen Agwata for purposes other than those contained in the letter of offer. That the plaintiff had not shown a prima facie case with probability of success. Annexed to this affidavit was a copy of the letter of offer and an incubation agreement.

On the hearing date, Mr. Munyendo who appeared for the plaintiff relied on the documents filed. Mr. Kiveu for the defendant relied on the replying affidavit filed.

This is an application for interlocutory injunctive orders. The considerations to be taken by a court in such an application were clearly stated in the now famous case of ***Giella -vs- Cassman Brown & Co. Ltd. [1973] EA 358.*** An applicant has to show a prima facie case with probability of success. Secondly an injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss that cannot be compensated adequately in the form of damages, if the prayers sought are not granted. Thirdly, if the court is in doubt, it will decide the matter or application on the balance of convenience.

The plaintiff has shown that there exists a tenancy agreement between her and the respondent. It is apparent that a formal tenancy agreement has not been signed, but there is a written offer and acceptance through payment and occupation. There is a dispute with regard to failure to pay rent, as well as failure to serve eviction notice.

The defendant's counsel has argued that this court has no jurisdiction to entertain the matter because it rests squarely within the jurisdiction of the Business Premises Rent Tribunal, in view of the fact that no formal tenancy agreement was signed. In my view, the defendant is raising issues which will have to be determined in the hearing of the main case. Besides, the defendant's counsel has not cited the section of the law which bars this court from hearing this matter.

A prima facie case is one that may or may not succeed. There is no indication that the case herein is fatally defective. In my view therefore, the plaintiff has demonstrated a prima facie case with probability of success.

On whether the plaintiff will suffer irreparable loss if the orders sought are not granted, I am of the view that once the plaintiff is evicted from the business premises, there will be no possibility of her coming back therein. She entered into the tenancy agreement in order to do business. The actual loss that may be suffered by her in the business if evicted cannot be easily ascertained and computed in money terms. I am of the view that the plaintiff will suffer irreparable loss if the orders sought are not granted.

However, the plaintiff has provided evidence that she is not in arrears of rent. Since she entered into a business tenancy agreement, she cannot use the premises of the defendant and at the same time fail to pay rent. Having satisfied the two main parameters for the grant of interlocutory injunction, I will grant temporary injunctive orders provided that the plaintiff pays the rent currently outstanding within this month of June 2014.

The balance of convenience is also in favour of the plaintiff, as she is not likely to get similar business premises if she is evicted.

To conclude, I allow the application and grant prayer 3 since prayers 1 and 2 have already been spent. The grant of injunctive orders herein will have effect only if the plaintiff pays all the currently outstanding rent, for the agreed intervals, by 30th June 2014, otherwise, the injunctive orders herein granted will automatically lapse. The costs of the application are in the cause as the suit herein is yet to be heard and determined.

***Dated and delivered at Kakamega this 12th day of June, 2014***

**George Dulu**

**JUDGE**