



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 127 OF 2013**

**HERBERT NGUNYI KAMAU ..... PLAINTIFF**

**VERSUS**

**ISAIAH NGOTHO .....1<sup>ST</sup> DEFENDANT**

**ANDREW KIMANI .....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff/Applicant filed his Notice of Motion application dated 25/1/13 in which he sought a temporary injunction against the Defendants restraining them from evicting him out of L.R. No. 209/230/1 (the "Suit Property) pending the hearing and determination of this application and of the suit. He also sought the costs of the application.

The said application was premised on the Supporting Affidavit of the applicant sworn on 25/1/13 in which he stated that he entered into an agreement with one Isaiah Ngotho on 23<sup>rd</sup> January 1997 for the purchase of Coronation Garden Restaurant situated in the Suit Property. He stated that he paid Ksh. 1,600,000/- being full payment for the said business together with the goodwill attached thereto. The applicant further stated that Isaiah Ngotho assured him he was one of the administrators of the estate of the late Watheka Kimani and he had the authority to ensure that the subsisting lease of 10 years would be renewed in favour of the applicant as from 1<sup>st</sup> February 2007. The applicant further indicated that he always paid rent to the agent of the 1<sup>st</sup> Respondent Isaiah Ngotho. He also stated that the 1<sup>st</sup> Respondent through his advocates extended the applicant's tenancy for a further term of 6 years. The applicant further stated that it was a term of his agreement with the 1<sup>st</sup> Respondent that he would always renew his tenancy in priority to any third party. The applicant further stated that as his lease approached expiry, he wrote to the 1<sup>st</sup> Respondent indicating he wished his lease extended whereupon he was responded to by J. M. Mugo & Company Advocates by their letter dated 31/10/12 stating that they acted for the registered proprietors of the Suit Property and stating that they did not intend to renew the applicant's lease.

The application is contested by both Respondents who each filed a Replying Affidavit. The 1<sup>st</sup> Respondent stated in his Replying Affidavit sworn on 6/12/13 that he never identified himself as the proprietor of the Suit Property and only identified himself as the beneficial owner of Coronation Garden Restaurant for which he was selling goodwill as shown in the sale Agreement. He also stated that he did not assure the Applicant that the lease would be renewed as from 1<sup>st</sup> February 2007. He stated that he only assured the Applicant that as one of the administrators' of the estate of Watheka Kimani, he would sign a lease in favour of the applicant for 10 years from 1<sup>st</sup> February 1997. He also stated that in the year 2007 the Suit Property was already registered in the name of the 2<sup>nd</sup> Respondent so he could not extend any tenancy. He also stated that the applicant has already sold the business to one Joseph Miiro Kamau.

He also stated that the said Joseph Miiro Kamau once approached him seeking renewal of the lease but he informed him to go to the registered owner.

The 2<sup>nd</sup> Respondent also filed his Replying Affidavit sworn on 6/2/13 in which he stated that he is the registered owner of the Suit Property. He stated that he was not privy to any agreement between the Applicant and the 1<sup>st</sup> Respondent. He also stated that on 1<sup>st</sup> February 2007 he extended the Applicant's lease for a further 6 years. He also stated that he had informed the Applicant that he would not extend his lease any further. He also stated that he was aware that the Applicant had since sold the business to Joseph Miiro Kamau.

The Respondents further filed their Grounds of Opposition dated 6<sup>th</sup> February 2013 in which they stated that the application does not satisfy known legal principles upon which injunctions are issued, the lease on the Suit Property expired by effluxion of time on 1<sup>st</sup> February 2013 and the same was not renewed and that the Applicant did not come with clean hands as he failed to disclose that he sold the business to a known third party.

Both the Applicant and the Respondents filed their written submissions which have been read and taken into consideration in this ruling.

The principles to be relied upon when considering an application such as this one for an interlocutory injunction are the ones enunciated in the celebrated case of ***Giella vs. Cassman Brown & Company Limited [1973] EA 358***.

They are:

First the applicant must establish a *prima facie* case with a probability of success at the trial. Secondly an interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not be adequately compensated in damages. Thirdly if the court is in doubt it will decide the application on the balance of convenience.

So has the applicant established a *prima facie* case with a probability of success? From the facts of this case, it emerges that there was no real clarity as to the registered proprietor of the Suit Property. The Applicant at first dealt with the 1<sup>st</sup> Respondent when he obtained the 10 year lease but thereafter dealt with the 2<sup>nd</sup> Respondent in respect of the extension of the lease for a further 6 years expiring on 30/1/13. The 2<sup>nd</sup> Respondent claimed to be the registered proprietor of the Suit Property but he did not produce any documentary evidence to support his assertion. The Applicant dealt with the two Respondents. He produced a sale agreement in respect of the sale of Coronation Garden Restaurant to him by the 1<sup>st</sup> Respondent. No separate lease agreement was produced to this court. This court finds it difficult to believe the Applicant's passionate assertion that he was assured that his tenancy on the Suit Property would be extended beyond 31/1/13. The facts and the evidence produced do not support this assertion. In view of this, this court finds that the applicant has not established a *prima facie* case with a probability of success. I need therefore not consider the second and third criteria for the grant of an interlocutory injunction.

I therefore proceed and dismiss this application with costs to the Respondents.

It is so ordered.

**SIGNED AND DELIVERED AT NAIROBI**

**ON THE 5<sup>TH</sup> DAY OF JULY 2013.**

**MARY M. GITUMBI**

**JUDGE**