



**REPUBLIC OF KENYA**

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

**ELC NO. 157 OF 2019**

**YVONNE EDWINA WAGA OWITI.....PLAINTIFF**

**VERSUS**

**MOHAMMED S. BAKHRESSA.....DEFENDANT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 2<sup>nd</sup> September, 2019 filed by the plaintiff seeking an order of injunction restraining the Defendant whether by himself, his agents, employees or otherwise howsoever from evicting the plaintiff or in any other manner interfering with the plaintiff's tenancy of the suit premises, namely PLOT NO.MN/I/5502 pending the hearing and determination of this suit. The case of the plaintiff as elaborated in the plaint is that by a tenancy agreement dated 18<sup>th</sup> March, 2014, the defendant let to the plaintiff the suit premises for a term of 5 years and 3 months and that the plaintiff carries on a guest house and restaurant known as Oceanview Nyali Boutique Hotel. The plaintiff averred that though the tenancy is for a period of 5 years and 3 months, the agreement contains a clause which provided that the tenancy may be determined 'by party delivery to the other three (3) months written notice of intention to terminate the tenancy,' thereby making the tenancy a controlled tenancy as defined in Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap 301 Laws of Kenya. It is the case of the plaintiff that the tenancy of the suit premises can only be determined or its terms altered in accordance with the provisions of Section 4 of the said Act. It is averred that the defendant has threatened to evict the plaintiff from the suit premises without following the procedure laid down under Cap 301.

2. The supporting affidavit to the application is sworn by Lucy Adhiambo Nyalwanga, the Attorney of the plaintiff. She has annexed a copy of Special Power of Attorney, a copy of the Tenancy Agreement and a copy of the single business permit.

3. The defendant has opposed the application through the replying affidavit of Daud Dube, the property Manager and Agent of the defendant sworn on 9<sup>th</sup> September, 2019. He has deposed that the suit premises were let for a fixed term of 5 years and 3 months commencing on 1<sup>st</sup> June 2014 up to 31<sup>st</sup> August, 2019. He has deposed that clause 2 (m) of the Agreement provided that upon the termination of the term, the plaintiff was to deliver the premises to the defendant and settle all bills for utilities supplied to the premises. He has further deposed that the tenancy agreement at clause 4 (b) further provided on how the tenancy may be determined by the landlord if at anytime any part of the rent is not paid on the day on which it becomes payable or if at anytime there shall be any breach on the tenant's part, or by either party giving to the other three month's written notice of intention to terminate. He has contended that the plaintiff in praying for an equitable order injunction has been economical with the truth. He has deposed that sometime in the year 2014, the plaintiff fell into rent arrears which caused the defendant to levy distress for rent and the plaintiff rushed to court and obtained an injunctive order in **Mombasa CMCC 59 of 2015; Yvonne Edwina Waga –v- Mohamed S. Bakresa & Another**. He has annexed the said order issued on 21<sup>st</sup> January, 2015. That the plaintiff proceeded to pay the balance outstanding only to fall into rent arrears again. That the plaintiff again filed **Mombasa CMCC NO.1160 of 2015** and obtained an injunctive order restraining the defendant from levying for distress for rent. A copy of the order issued on 21<sup>st</sup> June 2016 is also annexed. He has deposed that due to the injunctive order in place, the rental arrears have accumulated to the tune of Kshs.6,104, 000 as at 31<sup>st</sup> August 2019. That **while Mombasa CMCC 1160 of 2015** was still ongoing the plaintiff in a bid to resolve the matter requested for a new lease agreement and made a proposal on how to settle the rent arrears. That the defendant through his advocates responded that since the tenancy would terminate on 31<sup>st</sup> August, 2019, the defendant expected vacant possession on 1<sup>st</sup> September, 2019. Copies of the said letters have been annexed. It is the defendant's contention that the tenancy cannot be deemed a controlled tenancy since the term is beyond 5 years and that even if deemed so, Section 4 of Cap 301 does not apply as the plaintiff is in rent arrears. It is contended that the plaintiff has not come to court with clean hands because she is in rental arrears and failed to disclose the previous two cases. The defendant further contends that the plaintiff has not met the prerequisites for the grant of a temporary injunction. He has deposed that in the event the injunction is granted, the plaintiff should be ordered to provide Kshs.6,104, 000 being the rent arrears as security.

4. Both the plaintiff and the defendant filed their written submissions which have been read and considered in this ruling.

5. The issue for determination is whether the injunction orders should issue in favour of the applicant. The conditions for the grant of temporary injunctions were laid in the case of **Giella –v- Cassman Brown & Company Limited (1973) EA 358** as follows:

**“First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not**

be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

6. Has the plaintiff made out a prima facie case with probability of success? In the case of **Mrao Ltd –v- First American Bank of Kenya Ltd & 2 Others (2003) eKLR**, a prima facie case was described as follows:

**“A prima facie case in a civil application include 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.”**

7. In this case, there is no dispute that the suit premises were let to the plaintiff by the defendant for a term of 5 years and 3 months from 1<sup>st</sup> June, 2014. It is the plaintiff’s case that in view of the termination clause in the tenancy agreement between the parties, her tenancy is a controlled tenancy as defined in Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which provides as follows:

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

**a) Which has not been reduced into writing,**

**b) Which has been reduced into writing and which –**

**i. ....**

**ii. Contains provision for termination otherwise than for breach of covenant, within five years from the commencement thereof, or**

**iii. ....”**

8. The plaintiff avers that though the tenancy agreement dated 18<sup>th</sup> March 2014 was for a period of five years and three months, it contained a clause which provides that the tenancy may be determined “by either party delivering to the other three (3) months written notice of intention to terminate the tenancy.” It is therefore the plaintiff’s contention that the tenancy of the suit premises which is used by the plaintiff in running a hotel business is a controlled tenancy and can only be terminated in accordance with the provision of Section 4 of the said Act which provides as follows:

**“4 (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 the 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.”**

9. The defendant contends that as at the time of filing this suit, the tenancy agreement had already been determined by the effluxion of time. The issue that arises is whether the plaintiff had established a prima facie case.

10. It has been held in various decisions that a prima facie case is not a case which must succeed at the hearing of the hearing of the main case. However, it is not a case which is frivolous. In other words, an applicant has to show that he or she has a case which discloses arguable issues. Looking at the material placed before me, it is clear that this case discloses arguable issues for trial. It cannot be said that the plaintiff’s case is frivolous or unarguable. Without saying more, it suffices to state that from the material on record, I find that the plaintiff has established a prima facie case with a probability of success. Further, the plaintiff certainly stands to suffer irreparable loss if the defendant proceeded with the intended eviction of the plaintiff from the suit premises as such an eviction will render the plaintiff’s suit a nugatory. Until the issues raised by both parties are determined, the defendant ought not be allowed to evict the plaintiff from the suit premises or in any other manner interfere with the plaintiff’s possession and occupation of the suit premises as long as the plaintiff is not in breach of the covenants in the tenancy. Even if I was to consider the balance of convenience, the same tilts towards maintaining the status quo until the suit is heard and determined.

11. Given the above discourse, I do allow the application for injunction as prayed. I do specifically order as follows:

**(1) That an order of injunction do hereby issue restraining the defendant whether by himself, his agents, employees or otherwise howsoever from evicting the plaintiff or in any other manner interfering with the plaintiff’s’ tenancy in the suit premises namely PLOT NO. MN./I/5502 pending the hearing and determination of this suit.**

**(2) Costs of the application shall be in the cause.**

12. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 5<sup>th</sup> day of October 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**