REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL CASE 529 OF 2008

DEVSON WHOLESALERS LIMITED ……..1ST PLAINTIFF

VELANI ALUMINIUM……...……2ND PLAINTIFF

HIND CONSTRUCTION CO. LTD……..3RD PLAINTIFF

MITSUBA AUTOSPARES……4TH PLAINTIFF

VERSUS

JAMES GITHINJI KIBUGI ……...……1ST DEFENDANT

ROSEMARY N. GITHINJI…....……..2ND PLAINTIFF

RULING

The Plaintiff/Applicant moved to this court, by way of a plaint dated 26th day of November 2008, and filed on 27th day of November 2008. In summary, their grievance is that they have been tenants of the suit premises since 1980. The defendant became owners of the suit premises in August 2008. There is no written tenancy agreement in place, but that not withstanding there exists in law a monthly tenancy, which in law is a protected tenancy. It is averred that contrary to law, the new owners' advocates wrote to the plaintiffs a letter informing them that the ownership had changed, and gave them notice to quit, which letter was dated 28th day of October 2008. They became aggrieved, because on 24th November 2008 without notice, blocked the plaintiffs' access to the shops, making it impossible to operate the shops, and virtually closed the business. Efforts to resolve the matter amicably were fruitless, hence the filing of the suit. In consequence thereof they seek a declaration, that the plaintiffs are tenants of the Defendants in the said premises, which tenancy is a controlled tenancy, an order to direct the Defendants, or their servants, or agents and or licencees to give the plaintiff, access into the said premises, general damages for the embarrassment caused, costs and interest and any other relief that the court may deem fit to grant.

Simultaneous with the plaint, was filed a chamber summons dated the same 26th day of November 2008, and filed the same 27th November 2008. It sought 4 prayers:

1. Spent

2-3 Seeks a temporary injunction to be granted restraining the Defendants/Respondents or their servants, agents and/or licencees from interfering with the gulet enjoyment of the plaintiff in the shop premises known as Plot 209/136/147 Kirinyaga, by denying the Plaintiff/Applicant access until the hearing and determination of this application in the first instance and pending hearing and determination of the main suit in the second instance, and that costs be provided for."

The grounds in support are set out in the supporting affidavit, written skeleton arguments filed, and oral high lights. The sum total of the same is a reiteration of the content of the plaint and it is as follows:-

- They have been tenants of the suit premises for over 20 years under the landlordship of the former proprietor.

- That they have all along been meeting their rental payments commitments duty fully as and when the same fell due and their former landlord had no complaint.

- That in August 2008, the property changed ownership, from the former landlord, to the defendants, which change, was notified to the applicants through the defendants lawyers on or a bout 25/9/2008.

- That in obedience to the said communication, they applicants forwarded rent due for the months of September, October, November and December on 8th October 2008, and 4th November 2008, through the defendants advocate who had communicated to them the change of ownership when they applicants noticed that some cheques had not been banked, they applicants, asked their advocate to inquire and find out what could be the problem.

- It is their assertion that their cheques later cleared but the defendants again demanded that they applicants should vacate the premises effective 1st November 2008 without giving necessary notice as required by law.

- When the applicants advocates wrote back to the defendants, vide a letter dated 22nd October 2008, instructing the defendants to guarantee the applicants gulet possession of the premises, in pursuance of which the defendants advocates wrote to the applicants informing them that the notices allegedly served on the applicants purporting them to be coming from the Public Health Department of the city council were illegal.

- The applicants agree with the defendant's advocate's assertion that the notices were illegal, because to their knowledge, the said Public Health Department Officers have never visited and inspected the premises.

- They applicants do not know how the public health department came to know who the new landlords were, without going through the tenants. For this reason, it is their stand that this is a case of collusion whereby the new landlords want to use the Public Health department officials, to unlawfully evict the applicants from the suit premises without following the laid down procedures.

- The afore set out assertion has been confirmed by the fact that on 24th November 2008, without any reasonable exuse, the defendants blocked the entrance to the applicants business premises in a bid to harass and intimidate the applicants to vacate the said premises.

- The court, is urged not to believe the defendants allegation of carrying out repairs as the mooted repairs could easily be carried out without disturbing the tenancy, with mutual arrangements between the tenants and the landlord.

- That the land lords advocates, having confirmed that the notices had been withdrawn, there is no justification for the defendants to block the entrance to the applicants' business premises on the suit land.

- The assertion that the defendants are using an excuse to get them evicted, is confirmed by the fact that they purport to act on the report of a valuewer, instead of a structural engineer, which report has been faulted by the findings in the report of a structural engineer employed by the applicants to confirm the genuiness of the said valuation.

- The court, is also invited to take note, that the applicants being protected tenants, the defendants have no alternative but to follow the laid down procedures within the relevant law namely the landlord tenants, (shops, hotels and catering establishment Act) cap 301 laws of Kenya.

The defendants have moved to oppose the said application on the grounds in the replying affidavits, reply to the applicants further affidavits, annextures and skeleton arguments and the major ones are as follows:-

- That them Respondents received notices from the Public Health Department of the city council of Nairobi, instructing them defendants to carry out certain repairs, which repairs are major, which major repairs required that the plaintiffs do vacate the said premises for a period of at least 6 months.

- That the respondents were fair to the applicants, in that upon receiving a short notice, within which to comply, and on their own, applied for an extension and for this reason it is only proper that the applicants do vacate the premises for the major repairs.

- That the magnitude of the repair is evidenced by the cost of the repairs.

- That the defendant is simply undertaking the repairs to escape penalties and condemnation of the entire building.

- Denied allegation that they are only bend on harassing and intimidating the said tenants.

- That they are willing to reinstate the tenants to the premises as soon as the repairs are over.

- By reason of what has been stated above, the court, is invited to order the applicants to vacate the said premises for a period of at least 3 months in order to enable the repairs to be effected.

In response to the applicants further affidavit the respondents reiterated their deponement in the replying affidavit and then stressed the following:-

- They maintain the Public Health department, of the city council of Nairobi moved on their own volition, to issue the said notices and it is not true that it is them who instigated the issuance of the said notices.

- Maintain that the canopy needs to be redone since a lot of canopies in old buildings in Nairobi have been falling in the recent past.

- That the costs of the repairs, is sufficient proof that the repairs sought to be carried out are major and not minor and therefore require vacant possession of the premises.

- The extend of the repairs is confirmed by the valuation report annexed.

On case law, the court, was referred to the famous case of **GIELLA VERSUS CASMAN BROWN AND COMPANY LIMITED (1973) EA 358,** which is a land mark decision on injunctive reliefs. It sets out the ingredients that a litigant wishing to avail himself/herself of the injunctive relief needs to establish. These are set out in holding numbers IV-VI namely:-

(iv*) An applicant must show a prima facie case with a probability of success.*

(v) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

(vi) When the court, is in doubt it will decide the application on the balance of convenience of both parties.

The case of **RAO JAIVIR SINGHJI N AND 3 OTHERS VERSUS PRUDENTIAL DRY CLEANERS LIMITED NAIROBI HCCC NO. 830 OF 1997** decided by Ole Keiwa J as he then was (now JA) on the 30th April 1997. In this case, a tenant had been unlawfully evicted and the court, on the application of the tenant, "*granted a mandatory injunction to restore the tenant back into the premises, as the court, could not allow the landlord to benefit from his own wrong doing. Further that premises unlawfully obtained cannot be let and if let such letting cannot stand."*

In the said ruling, the learned judge quoted with approval Sha JA as he then was in the case of **M/S GUSII MWALIMU INVESTMENT LIMITED AND ANOTHER VERSUS MWALIMU HOTEL, KISII LIMITED, CA NO. 160 OF 1995 (UR)** Thus:-

"*I Have no hesitation whatsoever in holding that the landlord did all it could to obtain the possession unlawfully, and the learned judge was entirely right in making the orders he made. If what the landlord did in this case is allowed to happen, we will reach a situation when the landlord will simply walk into the demised premises exercising his right of ve-entry and obtaining possession extra judicially. A court of law, cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law, that unless the tenants consents or agrees to give up possession, the landlord has to obtain an order of a competent court, or statutory tribunal as appropriates to obtain possession."*

At page 4 of the said ruling, the same judge quoted with approval the decision of **THOMPSON VERSUS PARK (1944) 2AER 447** also quoted by Sha JA as he then was, in the afore quoted case thus: "*a litigant cannot wrongfully and illegally bring about a state of affairs and then apply to court, to preserve that state of affairs, as the status quo, by way of an injunction…… (As per Goddard L.J) the status quo that could be preserved was the status quo before these illegal and criminal acts on the part of the defendants. It is a strange argument to address to a court of law, that we ought to help the defendant who has trespassed and got himself into these premises. In the way in which he has done and say that that would be preserving the status quo and that it would be a good reason for not granting an injunction"*

On the basis of the above reasoning, the learned judge went on to rule at page 5 line 16 from the bottom thus:-

"*In those circumstances, I am of the opinion that the defendant is not entitled to rely on its own act of illegality, to resist the restoration of the position before the defendants illegal, take over of the premises. This court, shall not allow the proposed new tenants to take over the premises……"*

On the courts' assessment of the facts herein, it is clear that, there is no dispute that, prior to the defendants coming on board, in respect of the said property, there was a previous landlord. The terms of occupancy between the applicants and the previous landlord, have not been exhibited, save that it has been deponed in the supporting affidavit, as well as a averred in the plaint that, the said landlord and tenants relationship had lasted 20 years, as at the time the Respondents herein came on board. This court, has judicial notice of the fact that, there is now a wealth of decisions on the subject emanating both from the superior court, and the CA that, such a relationship is termed a month to a month tenancy, and its effects is that it is a protected tenancy, in terms of the applicable law namely the landlord, tenant (shops, hotels and catering establishment Act) cap 301 laws of Kenya.

It is also on record and not disputed by the respondents that the suit property changed ownership in August 2008 with the applicants on board. No new agreement was entered into by the parties but rent for the months of September, October, November and December was paid to the respondents and accepted as a evidenced by annextures SS3 (a) (b) (c) (d) (e) and (f), a matter not denied by the Respondents. The holding by the applicants, payments of rents by the applicants and acceptance of the same by the Respondents created a month to month tenancy which this court has judicial notice of that the same is protected under the relevant law quoted above.

There is no dispute proceedings herein were sporked off by the notice to vacate issued by the respondents to the applicants on the basis of notices illegally issued by the public Health department of the city council of Nairobi requiring certain repairs to be carried out. It is on record that the applicants resisted the notice prompting the respondent to block the entrance to the premises which in turn prompted the applicants to move to this court. It is apparent that the need to carry out repairs does not appear to be inserious contest is the magnitude of the said repairs. The applicants have termed them minor and that the same can be carried out with the tenants in SIFU. Where as the Respondents have termed them major thus requiring the vacation of the tenants how ever temporally for a period of 3-6 months to enable the repair to be carried out and thereafter the tenants can be reinstated, a fact that the Applicants are apprehensive is a ploy to get them out of the premises.

To support their case, each side has exhibited supporting documents to their affidavits namely, a valuation report by the respondents annextures JGK3 and an engineers' report annexture SS1, to the further affidavit by the applicant. It is on record that both documents have given opposing findings as regards the extend of the repairs needed, with each side claiming to be the one portraying the correct position on the ground.

The question for determination is whether on the facts, this court, can safely assume jurisdiction to determine finally the dispute herein? In the first instance, and in the second instance, the relief being sought being an injunctive relief, the applicants have brought themselves within the ambit of the ingredients governing the granting of an injunctive relief set out above.

In answer to the first question, this court, is of the opinion and it has judicial notice of the facts, that it is now trite law that the superior court, has jurisdiction over disputes relating to landlord and tenants only in two aspects firstly:-

In its original jurisdiction, when dealing with the issue of the granting of an injunctive relief, because the tribunal mandated to adjudicate over landlord and tenants disputes does not have jurisdiction to grant an injunctive relief. This is so because the mandate of the relevant tribunal, is governed specifically by the provisions of the landlord, tenants (shops, hotels and catering establishment Act) cap 301 laws of Kenya. The mandate is clearly set out in section 4 of the said Act. There is no power to grant an injunctive relief. The second reason is that an injunctive relief is specifically provided for in order 39 CPR, which specifies clearly that it has to be anchored on a plaint whereas proceedings before the tribunal, are originated not by plaint but by References by either landlord or tenants, and responded to by notices. For this reason the farthest, that this court, can go in dealing with the matter is either to grant or decline to grant an injunctive relief and direction on the way forward in the second instance, where the superior court, has jurisdiction is by way of an appeal against an order issued by the tribunal, which is not applicable to these present proceedings.

Turning back to the establishment of ingredients relevant for injunctive reliefs, this court, is stating that a prima facie case has been established by the applicants, necessary to warrant the granting of the relief sought, because the respondent though, has an apparent genuine reason for requiring vacation of the premises, non the less they resorted to a wrong method to achieved their aim. They should have served the tenants applicant a notice in the prescribed form, upon whose receipt the applicants tenants would have elected to comply or to proceed to the tribunal to oppose the same, and thereafter parties would have proceeded according to law to finally determine the dispute.

Having ruled that this courts', jurisdiction is limited to the granting of the relief and giving directions on the way forward, the court, proceeds to make the following orders;-

1. Prayer 3 of the application dated 26/11/2008 and filed on 27/11/2008 be and is hereby granted for a period of 90 days from the date of the reading of this ruling on condition that the defendants, do issue to the applicants notice in the prescribed form, forthwith upon delivery of this ruling and in any case not later then 30 days from such delivery.

2. The applicants do respond to the same in the prescribed form addressed to the mandated tribunal

within the time frame stipulated by the relevant law (cap 301).

3. If No. 2 above has been undertaken by the applicants the respondents, do respond to the same also within the time frame stipulated by the relevant Act (cap 301) and thereafter parties do proceed according to law.

4. In default by either party of items 1, 2, and 3 above the orders granted herein should stand lapsed after the expiry of the stipulated 90 days.

5. The proceedings were occasioned by the respondents who will accordingly pay the costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2009.

R.N. NAMBUYE

JUDGE