



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 338 OF 2009**

**TRITON SERVICE STATIONS LIMITED ..... PLAINTIFF**

**VERSUS**

**PJP HOLDINGS LIMITED ..... DEFENDANT**

**RULING**

On or about 30<sup>th</sup> June 2004, the applicant leased the premises known as

**LR NO.209/8177** from the respondent for a period of ten years with effect from 1<sup>st</sup> March 2004. The applicant entered into occupation and erected a petrol station and a depot and carried on business until on 25<sup>th</sup> March 2009 when the respondents advocate issued the applicant with the notice of termination of tenancy and want of vacant possession of the suit premises. On 2<sup>nd</sup> May 2009 the applicant alleges that the defendant forcefully seized the premises which included cash and fuel products despite the fact that the tenancy had not expired.

This is what triggered the application by way of notice of motion dated 14<sup>th</sup> May 2009 in which the applicant seeks for a mandatory order of injunction against the respondent to remove all the guards, locks, agent's representatives and servants from parcel **NO. LR209/8177** pending the hearing and determination of the suit and subject to the respondent's right to enter the premises on strict terms. Counsel further sought for a temporary order of injunction to restrain the respondents either by themselves or agents from evicting, intimidating or harassing the applicant or interfering with their quiet enjoyment of their suit premises.

The application is based on the grounds stipulated on the body of the application and the supporting affidavit by **George Atwete**. According to the applicant, the respondent entered into a tenancy agreement for a period of twenty years beginning with the first ten years with an option to renew the lease. A lease agreement was subsequently entered into on 9<sup>th</sup> December 2005 which provided the period of commencement as 3<sup>rd</sup> March 2005 for a period of ten years. However the lease agreement was not registered because the respondent's was supposed to remove certain encumbrances in the suit property that inhabited the registration of the lease.

The applicant went ahead to construct a petrol station on the suit premises, until the 23<sup>rd</sup> March 2009, when a notice was issued by the respondent's advocates indicating the lease would be terminated with

effect from 1<sup>st</sup> May 2009. The reasons for the termination were not given. The applicant speculated that the tenancy was terminated because they had fallen in arrears of rent. The applicant then negotiated with the respondent on the payment on the accrued rents and issued post dated cheques. However by a letter dated 7<sup>th</sup> May 2009, the respondent rejected the payment proposals as well as post dated cheques. On 2<sup>nd</sup> May 2009 the respondent entered the premises by installing their own security guards and placing their own locks and took possession of the suit premises. By evicting the applicant, it was denied use of the petrol station including oil under the tanks and access to their offices and documents. Although there was rent in arrears, counsel for the applicant submitted that the respondent was not entitled to walk in and evict the applicant without a court order.

Counsel relied on the case of ***Gussi Mwalimu Investment & Another vs. Mwalimu Hotel Kisii Limited EA LR 1995 – 1998 2 EA PAGE 100.*** While drawing a parallel in that case, counsel argued that, the respondent could not have taken possession of the demised property without first obtaining an order of a competent court or a statutory tribunal. Counsel urged the court to excise its discretion and restore the applicant to the lawful status quo that is the possession of the demised property. The issuance of the notice of eviction clearly indicated that the applicant was unwilling to move, thus the applicant did not move, and the respondent was obliged to seek a court order for vacant possession of the premises.

What the respondent did according to Mr. Katwa was tantamount to taking law in their own hands which must be frowned upon by the court. Even if there was an outstanding rent, the respondent should have resolved it by levying distress to recover their money. He also referred to the Court of Appeal decision in the case of ***Kamau Muchuha vs. Ripples Limited civil appeal No. 186 of 1982.*** In which the English case of ***Thomas v Park [1944] 2 ALL ER page 477*** was adopted with approval especially the holding as per Lord Goddard LJ;-

***“Having got back into the house with strong hand and with multitude of people, he has established himself in the house, and, he then says:***

***‘I ought not to have an injunction given against me to make me go out because I got back here and got my boys back and, therefore, I want the status quo preserved’***

***The status quo that could be preserved was the status quo that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a court of law that we ought to held the defendant, who ahs 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.***

Thus counsel was of the view that a mandatory injunction should be issued to restore the applicant and to protect the principle that the law should be followed at all the times. On the balance of convenient the respondent would not suffer any prejudice whereas the applicant will suffer irreparable damage by way of loss of business as well as documents in respect of their business. The applicant put up the business premises for a petrol station with an aim of running it for twenty years whereas the respondent will have the land revert to it after the lease.

Formidable opposition was put forth by the respondent. Counsel for the respondent relied on the replying affidavit sworn by **Carey Mureith Ngingi** sworn on 2<sup>nd</sup> June 2009. According to the respondent, it is not in dispute that there is an existing lease dated 9<sup>th</sup> December 2005, between the plaintiff and the defendant over the demised property. This lease was preceded by correspondences which set out the terms of the lease and the rent payable for the first ten years was Ksh.7.932,120/-. This rent was to be paid in four equal installments for every two years with effect from August 2004.

However that lease was not registered and by dint of section 106 of the Indian Transfer of Property Act, any lease over immovable property in excess of one year is supposed to be by way of a registered instrument. The respondent acknowledges that the lease applied inter parties as a contract. According to Mr. Ohaga for the respondent, this court should address the validity of the termination of the tenancy.

The applicant has acknowledged it was in arrears of rent, when the notice of the termination of the lease was issued giving them 30 days within which to vacate the premises. The payment in respect of the 2<sup>nd</sup> installments fell due on 1<sup>st</sup> March 2009, as per clause (5a) of the lease. The applicant signed the lease with all the clauses thereby agreeing to be bound by the terms. If the rent was unpaid for 14 days it was lawful for the landlord to enter the demised premises and take possession. (See Clause 5(a) of the lease) which provided as follows:-

***“If the rent hereby reserved or any part thereof shall be unpaid for Fourteen (14) days after becoming payable (whether formally demanded or not) or if any covenant on the Lessee’s part herein contained shall not be performed or observed ... then and in any such case it shall be lawful for the Lessor at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon the term hereby granted shall absolutely determine but without prejudice to any claim by the Lessor in respect of any antecedent breach of any covenant or provision herein contained.”***

The applicant was duly issued with the invoice on 23<sup>rd</sup> February 2009 requiring the payment of rent from 1<sup>st</sup> March 2009. That notice although addressed to the applicant was received by a different entity called Triton Gas Stations. The participation of a different entity gave doubt as to who was in occupation of the premises. Further, post dated cheques purportedly to pay the outstanding rents were also issued by this entity. No explanation was offered and the respondent could not tell whether this entity was in occupation of the premises. It is also within the general knowledge that the affairs of Triton had been placed under receivership by Kenya Commercial bank. Therefore the landlord protected his possession of the premises by terminating the lease.

For reasons that the lease is not registered, the respondent had no obligation to ascribe a reason for termination, provided a reasonable notice was given. Under the TPA, the notice required is 15 days but the respondent gave 30 days. Receipt of that notice is not denied by the applicant. During the period of the notice the applicant did not come to court to seek for interim orders of injunction if they felt threatened by the notice of termination.

On 2<sup>nd</sup> May 2009, the respondent took possession but the applicant stationing their own guards. The respondents advocate wrote another letter on 30<sup>th</sup> April 2009 informing the applicant that they would take possession of the suit premises with effect from 1<sup>st</sup> May 2009 in accordance with the notice. The respondent made arrangement and took possession of the suit premises on 2<sup>nd</sup> May 2009 without any resistance or objection from the applicant.

It was not until 4<sup>th</sup> May 2009 the representative of the respondent received a delegation from the applicant requesting the notice of termination be withdrawn and they promised to abide with all the conditions and the terms of the lease. The applicant wrote a letter proposing to pay the outstanding rent in four equal installments and annexed post dated cheques. This proposal was not acceptable to the respondent. Counsel contended that there was no forceful eviction and if there was, the same would have been reported to the police.

Thus counsel argued the situation in ***Gussi Mwalimu & Kamau Muchuha*** cases is distinguishable from the present cases. Because the landlord obtained possession under the guise of levying distress for rent which was illegal and

Unprocedural. Counsel submitted that that the lease was terminated according to the agreement and as provided for under the law. The landlord has the right of re- entry. The landlord is entitled to re-enter and take possession of his premises subject to certain statutory restrictions on forceful entry (see **Halbury laws of ER 3<sup>rd</sup> edition vol.23 page 705**). Mr. Ohaga also referred to several persuasive English authorities and the case of ***Tumushabe and another v Anglo-African Ltd and another EA law reports (1999) 2 EA page 320***. The Court of Appeal of Uganda held that:-

***“When the appellants refused to pay rent or acknowledge the title of the owner as landlord, they became trespassers. The owner had therefore the right to remove the appellants from his property***

***using no more force than was reasonably necessary”.***

On whether the plaintiff/applicant has established a prima facie case with a probability of success, it is trite that a mandatory order can only be granted in very clear cases and the applicant's case does not comply with the standards for granting such an order.

Having set out the background information and the summary of the rival submissions, the issue for determination is whether the applicant was forcefully evicted from the suit premises through the use of force and in contravention of the law. The applicant is seeking to be reinstated in the suit premises. The law and the principles to bring to bear when considering this issue are well settled by a long line of authorities both by the High Court and the Court of Appeal. The Court of Appeal cited with approval the often cited case of ***Locaball International Finance Ltd vs. Agro Export & Others otherwise known as the Sea Hawk Case (1986) (1 All ER page 901)***. In their Lordships judgment in the case of ***Kenya Breweries Ltd V Okeyo EALR (2002) 1 EA 110***

In that case it was stated as follows:-

***“A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory injunction, the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being on a different and higher standard than was required for a prohibitory injunction”.***

Was the applicant forcefully evicted from the suit premises? There are no allegations of force, and indeed if there was any, it is most obvious and expected that the applicant would have protested and reported the matter to the police. The applicant admits it was in arrears of rent, when the notice was issued to terminate the lease. The notice was for a period of one month and the applicant did not take any steps to challenge the notice terminating the lease, if indeed the respondent was not entitled to terminate the lease.

On the part of the respondent it is not disputed that the agreement for lease was not registered and therefore under section 101 of the Transfer of Property Act, HS Gour, VOL 2 9<sup>th</sup> edition, a lease of immovable property determines on the expiration of the notice to determine the lease, or to quit or intention to quit.

In this case it is determinable from the material before the court that the applicant was duly given notice after they fell in arrears of rent. They failed to heed the notice and respondent took possession after the applicant became a trespasser. The situation of a trespasser is compounded by the fact that a different entity known as Triton Gas Services was now entering into correspondence with the respondent and purporting to issue the post dated cheques.

I have evaluated all the material before this court; there is no allegation that the respondent used force to evict the applicant. I cannot ascribe any illegal or criminal acts on the part of the respondent when they issued notice of termination of the lease and subsequently took possession of the premises as per the provisions of the agreement of lease. The applicant was further given liberty to access the premises from the 7<sup>th</sup> May 2009 and 13<sup>th</sup> May 2009 to remove any items they would wish to remove from the premises. This is further reinforced by the fact that even after the respondent took possession on 2<sup>nd</sup> May 2009, the applicant sent a delegation on 5<sup>th</sup> May 2009 which tried to negotiate for the withdrawal of the termination notice, and they purported to pay the outstanding rent with post dated cheques.

Finally I find no special circumstances in the present case to warrant the granting of the mandatory injunction. The agreement of lease specifically provided that if rent was unpaid for a period of (14) fourteen days, the respondent was at liberty to enter the premises and take possession. That is what the respondent did, as stated earlier, this was not criminal and no law was contravened. Accordingly the

applicant is not entitled to the orders sought in the application. I have not dealt with the prayer seeking for an interim order of injunction because this was overtaken by events when the respondent took over the possession of the suit premises.

The upshot of the above analysis is that the plaintiff's notice of motion dated 14<sup>th</sup> May 2009 is hereby dismissed with costs to the respondent.

**RULING READ AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JULY 2009.**

**M.K. KOOME**

**JUDGE**