



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 210 OF 2018**

**ALI ABDALLA SHEIKH OMAR..... 1<sup>ST</sup> PLAINTIFF**

**ABDUL SWALEH ALI alias ABDUL GAWA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HAJI SHARIFF.....DEFENDANT**

**RULING**

1. By a Notice of Motion dated 20<sup>th</sup> September 2018 brought under Section 1A, 3A, 63 (e) of the Civil Procedure Act and Order 40 Rule 7 of the Civil Procedure Rules, the Plaintiffs/Applicants seek the following orders:

**1. Spent**

2. That in the interim there be a temporary injunction restraining the defendant/respondent herein by himself, agent or otherwise howsoever from selling and/or disposing of the Applicants' goods/stock in trade removed from their business premises on PLOT NO.53/3/VI MN CHANGAMWE on 16<sup>th</sup> July, 2018 and/or letting out or parting with possession of the premises to any third party pending hearing and determination of this Application.

3. That in the first instance the respondent be ordered to render a complete inventory of the goods removed from the Applicant' shop and to file the same prior to the hearing date of this Application inter- partes.

4. That pending hearing and determination of the suit filed herein there be a temporary injunction restraining the defendant/respondent herein by himself, agent or otherwise from selling and/or disposing of the Applicants' goods/stock in trade removed from premises on PLOT NO.53/3/VI MN CHANGAMWE on 16<sup>th</sup> July, 2018 and/or letting out or parting with possession of the premises to any third party.

5. That upon inter partes hearing of the Application the Defendant/Respondent be ordered to forthwith restore the applicants into the suit premises even pending disposal of the suit herein.

6. That prayers 2 and 3 do issue ex-parte in the first instance.

7. That there be an order for costs.

2. The Application is premised on the following grounds:

i. That the Respondent has forcibly and without adherence taken possession of the Applicants' tenancy premises and the goods lying therein in circumstances that are unlawful and/or illegal, and there is now real apprehension that the premises will be turned over to third parties.

ii. That the removal of the Applicants' goods has been done outside the law governing distress, which distress was itself unlawful and/or malicious, and the subverting of the applicants' tenancy rights a blatant violation of the trite provisions of the Landlord and Tenant Law (cap 301), Section 4 thereof which restricts the Landlord's right to repossess.

iii. The Defendant's conduct is wanton, oppressive and such as would likely bring the administration of justice into disrepute.

**iv. That there is a case for the preservation orders sought as satisfy the prescriptions in *Giella –v- Cassman Brown*.**

**v. The circumstances disclosed herein are exceptional enough to warrant the mandatory interlocutory orders sought.**

3. The Application is further supported by the affidavit of Ali Abdalla Sheikh Omar sworn on 31<sup>st</sup> August 2018 and further affidavit sworn on 5<sup>th</sup> March 2019 in which he depones *inter alia*, that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants are tenants on the premises known as PLOT NO 53/3/VI/MN which they have occupied for over 25 years paying rents of Kshs.2,000/= and Kshs.4,000/= per month respectively. That the tenancies are controlled within the meaning of Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301. It is further deponed that in 2017, the Defendant levied distress against the Applicants and issued notices to increase rent, both subject of references before the Business Premises Rent Tribunal. It is the Applicants contention that on 16<sup>th</sup> July 2018, they were evicted by the Defendant who was purportedly executing a distress, despite the Applicants having paid undisputed rentals. That the Defendant has effectively taken possession of the premises and even repainted and altering the interior, and has in effect terminated the tenancies. The Applicants are apprehensive that the Defendant may proceed to lease out the premises to third parties, thereby exposing the Applicants to gross injustice. It is the Applicants contention that the Defendant has acted in blatant disregard of the law, and outside the terms of the order of the Tribunal sanctioning the distress, and that while they remain outside, the Tribunal will be shorn of jurisdiction. Copies of the orders, applications, notices, and references have been attached.

4. In opposing the Application, the Defendant/Respondent filed a Replying Affidavit sworn on 19<sup>th</sup> February 2019 in which he depones *inter alia* that the Applicants had not paid rent for 18 months which amounted to Kshs.252,000/= as at November, 2017. That the Applicants have deliberately ignored to pay rent since November 2017 and kept filing suits and/or applications in different courts to defeat justice, including BPRT No.37/17, BPRT No.38/17 and Mombasa RMCC No.2064 of 2017. The Defendant avers that Mombasa RMCC No.2064 of 2017 was dismissed with costs on 2<sup>nd</sup> August 2018. The Defendant states that on 5<sup>th</sup> July 2018, the Chairman of the Business Premises Rent Tribunal ordered the Applicants to pay undisputed rents of Kshs.4,000/= and Kshs.2,000/= respectively by 13<sup>th</sup> July 2018, but the Applicants failed to remit the rent arrears as per the said order. The Defendant avers that he took possession of the premises after the Applicants failed to pay him the rent arrears as ordered by the Tribunal on 5<sup>th</sup> July 2018, and that the premises have since been leased out to third parties. It is the Defendant's contention that this matter is *res judicata* and the same ought to be dismissed with costs. Further, the Defendant argues that this court does not have original jurisdiction to adjudicate on disputes relating to controlled tenancies. The Defendant also filed a Notice of Preliminary Objection dated 19<sup>th</sup> February 2019 on the grounds that the suit is incurably defective and bad in law, that the suit has been filed contrary to the provisions of Section 15 of the Cap 301, is *res judicata* and an abuse of the court process.

5. The Application was canvassed by way of written submissions which were duly filed and also highlighted by the advocates for the parties. I have considered the Application, the affidavits in support and against, the rival submissions as well as the authorities cited. The essence of the Plaintiffs' case is that they were unlawfully dispossessed of the suit premises. The Plaintiffs want the defendant ordered to render a complete inventory of the goods removed from the suit premises and for their reinstatement into the premises. No doubt, these prayers are in the nature of the mandatory injunction. The law as regards the principles to be applied when considering whether or not to grant interlocutory mandatory injunction is different from the principles set out in the ***Giella –v- Cassman Brown*** case for the standard of approach is higher.

6. In the case of ***Locabail International Finance Ltd –v- Agro Export & Another (1986)1 ALL 901***, it was held:

***“A mandatory injunction ought not to 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 easily be 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 sense of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than required for a prohibitory injunction.”***

7. In this case, it is common ground that the tenancies held by the Plaintiffs were controlled within the meaning of Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301. It is also not disputed that prior to the filing of this suit, there were disputes before the Business Premises Rent Tribunal and the subordinate court. Indeed the Plaintiffs were distressed and dispossessed of the suit premises pursuant to orders made by the Tribunal while the case before the subordinate court was dismissed.

8. Without going into the merits of the case, as already stated, the tenancy that existed between the parties was a controlled tenancy. It is not in dispute that there were references filed in the Tribunal. Under Section 15(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, any party to a reference aggrieved by any determination or order of a Tribunal may appeal to the Environment and Land Court. Under Section 12 (1)(e) a Tribunal has power to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears. From the above mentioned provisions of law, it is clear, in my view, that the Tribunal had jurisdiction to also make the orders sought herein so far as it relates to a controlled tenancy.

9. Having carefully considered the material before me, in my humble view a case of a mandatory injunction has not been made out. No special circumstances have been shown by the Plaintiffs and the case is not one that I can consider a clear one that can be decided at once or in a summary manner. From the evidence on record, I find that the Plaintiffs have not established a *prima facie* case with a probability of success against the Defendant. Secondly, the Plaintiffs have not shown that they stand to suffer irreparable harm not compensable in damages. Whatever damage they may suffer in my view can be quantified in damages.

10. The Preliminary Objection by the Defendant is mainly that this court lacks original jurisdiction to entertain the suit and the Application and that the suit is *res judicata*. As already stated, it is admitted that the dispute herein is over controlled tenancies. There is no dispute that the dispute has been subject of BPRT Nos.37 & 38 of 2017 as well as Mombasa RMCC No.2064 of 2017. There is also no dispute that the parties in those previous proceedings are the same as in these proceedings. The issues in my view are similar in all forms and both the Tribunal and the Magistrate's Court determined them. The present suit is not an appeal from any of the previous proceedings. The statutory provision under Section 7 of the Civil Procedure Act is clear ad bars a court from hearing a suit or issue if the same was subsequently in issue

in a former suit between the same parties, if the issue was determined in the former suit after a hearing. In my view, whatever issue being raised now could have been raised in the former proceedings. Moreover, under Section 15(1) of Cap 301, a party who is aggrieved by any determination or order made by a Tribunal may appeal to this court. I do agree with the defendant's submissions that the Plaintiffs herein were required to invoke Section 15 of the said Act and approach this court in its appellate jurisdiction. This is because the Tribunal is the one with original jurisdiction to hear and determine disputes relating to controlled tenancies. By virtue of the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act this court has no original jurisdiction to entertain the Plaintiffs' suit. In addition, by virtue of the Civil Procedure Act, this suit is barred by the doctrine *res judicata*.

11. By reason of the foregoing, I find that the Preliminary Objection raised by the Defendant is merited and the same is upheld. The upshot is that the Notice of Motion dated 20<sup>th</sup> September 2018 is without merit and the same is hereby dismissed with costs to the Defendant. I am also inclined to dismiss the suit in limine as requested by the Defendant. The same is dismissed with costs to the Defendant.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 17<sup>th</sup> day of September 2019.**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Mwakisha for plaintiff

Gitonga holding brief for Tolo for defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**