REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 60 'B' OF 2016

NATIONAL SOCIAL SECURITY FUND…….....APPELLANT

VERSUS

SOKOMANIA LIMITED…….……...…1ST RESPONDENT

LULU EAST AFRICA LIMITED……2ND RESPONDENT

VALUE ZONE LIMITED……..……3RDRESPONDENT

HASMO AGENCIES LIMITED……..…….……4TH RESPONDENT

JUDGMENT

Introduction:

The Appellant is and was at all material times the registered proprietor of all those parcels of land known as Land Reference Numbers 209/11412, 209/11331, 209/12220, 209/12219 and 209/12287 situated along Kenyatta Avenue, Nairobi (hereinafter referred to as "the suit properties"). The Appellant has constructed on the suit properties a parking bay containing 455 parking spaces.

On 26th April, 2013, the Appellant and the 3rd Respondent entered into a car park management contract under which the 3rd Respondent undertook to manage and collect parking fees on behalf of the Appellant from the Appellant's said parking bay on the suit properties. The contract between the Appellant and the 3rd Respondent provided among others that:

1. The 3rd Respondent was entitled to a management commission fee of 4.75% exclusive of VAT of the gross monthly rent collection on a minimum monthly parking fees collection of Kshs.2,000,000/-.

2. The contract was for one(1) year with effect from 1st March, 2013.

3. During the subsistence of the contract, the 3rd Respondent was to have general day today control, operation and management of the suit properties.

4. The 3rd Respondent had power to do all such things on behalf of the Appellant which were reasonably required or concerned with or necessary for the sound and efficient management of and control of the suit properties.

5. The contract was terminable by 30 days notice.

Under the said contract, the 3rd Respondent made among others the following undertakings:

1. To pay to the Appellant the monies received from the use of the said parking bay on a monthly basis but not later than the 5th of every month together with detailed statement indicating the breakdown of the income received.

2. To ensure that the property is used for parking of motor vehicles within the parking bay in such position and manner as the Appellant in its sole discretion may decide.

3. To ensure that all fences, gates, pavements and surfaces are kept in good condition and in any event in no worse condition than their condition at the date of the contract.

4. To ensure proper records and book of accounts relating to the business are maintained at all times on behalf of the Appellant and such records and books of account are at all reasonable times available for inspection by the officials of the Appellant and auditors of the Appellant when reasonable notice is given for such inspection.

5. To provide the services using commercially acceptable standards of care and skill and within a reasonable time and use its business and professional endeavours to carry out and perform the services.

The Appellant and the 3rd Respondent entered into the said contract after the 3rd Respondent emerged as the winner of a tender that the Appellant had advertised for the provision of management and collection of parking fees services in respect of the said parking bay.

Following the said contract between the Appellant and the 3rd Respondent, the 3rd Respondent as agent of the Appellant entered into a car park license with the 1st Respondent on or about 1st March, 2013. Under the said license, the Appellant made available for the use of the 1st Respondent for a fixed term of six (6) months with effect from 1st March, 2013 and terminating on 31st August, 2013 the parking bay containing 230 parking spaces constructed on Land Reference Numbers 209/12287 and 209/12219 (hereinafter referred to as "the 1st Respondent's parking bay"). Under the said license the 1st Respondent was to pay to the 3rd Respondent a fee of Kshs.1,000,000/= per month for the use of the said parking bay for the license period.

The license provided that it was not a lease or a tenancy and that it did not confer upon the 1st Respondent any estate, right or interest or exclusive right whatsoever in the use of the said parking bay and that the same was only a permission to the 1st Respondent to occupy the Appellant's parking bay. The license provided further that the same did not create and was not to be construed to create a statutory tenancy as provided under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya.

The license was terminable at the instance of either party giving the other Seven (7) days written notice and it was renewable at the discretion of the 3rd Respondent provided the 1st Respondent gave to the 3rd Respondent thirty (30) days notice of intention to renew before the expiry of the term of the license.

The 3rd Respondent entered into a similar Car Park License with the 2nd Respondent in respect of the parking bay constructed on Land Reference Numbers 209/11331, 11412 and 12220 (hereinafter referred to as "the 2nd Respondent's Parking bay"). The license between the 3rd Respondent and the 2nd Respondentwas not exhibited by any of the parties. It is however said to have been similar to the license between the 3rd Respondent and the 1st Respondent the terms of which I have highlighted above.

The car park management contract between and Appellant and the 3rd Respondent expired on 30th September, 2015 and was extended to 31st December, 2015. The car park licenses between the 3rd Respondent and the 1st and 2nd Respondents also expired at the same time and were extended to 31st December, 2015. Prior to the expiry of the car park management contract between the Appellant and the 3rd Respondent, the Appellant advertised for tenders for a new service provider for its parking bays aforesaid. Several bids were submitted and after the process of evaluation, the tender was awarded to the 4th Respondent. On 21st December, 2015, the Appellant and the 4th Respondent entered into a car park license for a period of one (1) year with effect from 1st January, 2016 in respect of all the parking bays constructed on Land Reference Number 209/11412, 209/11331, 209/12220, 209/12219 and 209/12287 with a total of 455 parking spaces.

Following the execution of the new parking license dated 21st December, 2015 between the Appellant and the 4th Respondent, the 3rd Respondent was required to vacate and handover possession of the said parking bays to the 4th Respondent. The 3rd Respondent as I have stated above had granted a license to the 1st and 2nd Respondent in respect of the said parking bays. The 3rd Respondent was therefore not in actual occupation of the said parking bays as at 31st December, 2015 when their contract with the Appellant came to an end. The 3rd Respondent had notified the 1st and 2nd Respondents that its bid to continue to manage and collect parking fees for the Appellants from the said parking bays was not successful and as such its contract with the Appellant and similarly with the 1st and 2nd Respondents was to come to an end on 31st December, 2015. The 1st and 2nd Respondents did not however vacate the said parking bays to enable the 4th Respondent to take over the management of the same in accordance with the car park license dated 21st December, 2015 between the Appellant and the 4th Respondent.

<u>The proceedings before the Business Premises Rent Tribunal:</u>

Instead of vacating the 1st Respondent's parking bay, the 1st Respondent filed a complaint at the Business Premises Rent Tribunal ("hereinafter referred to as "the tribunal") against the Appellant and the 3rd Respondent on 7th January, 2016. The complaint was assigned Tribunal Case No. 15 of 2016. In the complaint, the 1st Respondent contended that the Appellant and the 3rd Respondent had illegally threatened to evict it from the 1st Respondent's parking bay without issuing a termination notice under the provisions of the Landlord and Tenant (Shops, Hotels and catering Establishments) Act, chapter 301 Laws of Kenya. Together with the complaint, the 1st Respondent brought an application by way of Notice of Motion dated 7th January, 2016 seeking a temporary injunction restraining the 3rd Respondent and the Appellant from evicting it, taking possession or obstructing it from using or interfering with its use of the 1st Respondent's parking bay pending the hearing and determination of the complaint.

On the same date, the 2nd Respondent also filed a complaint at the tribunal which was assigned Tribunal Case No. 12 of 2016. In the complaint, the 2nd Respondent called upon the Tribunal to investigate an attempt by the Appellant to evict it from the 2nd Respondents parking bay. The 2nd Respondent contended that it was in occupation of the said parking bay and that it had no rent arrears. The 2nd Respondent's complaint was amended on 3rd February, 2016 to add the 3rd Respondent into the suit. In the amended complaint, the 2nd Respondent contended that the Appellant was trying to evict it from the 2nd Respondents parking bay while neither the 3rd Respondent which was the main tenant nor the Appellant had served it with a notice provided for in law.

Together with the complaint, the 2nd Respondent also filed an application by way of Notice of Motion dated 7th January, 2016 seeking an order of injunction restraining the Appellant from evicting it from the 2nd Respondent's parking bay and for leave to deposit the monthly rent in the tribunal.

The two (2) applications that were brought under certificate of urgency were heard exparte by the

chairman of the tribunal, Hon. Mbichi Mboroki on 7th January, 2016 who granted the orders sought on an interim basis pending the hearing of the two applications inter partes. The applications were served upon the Appellant and the 3rd Respondent together with the said ex-parte orders.

On 14th January, 2016 the 4thRespondent filed two (2) separate applications in Tribunal Case No. 12 of 2016 and Tribunal Case No. 15 of 2016. In the application that was filed in Tribunal Case No. 12 of 2016, the 4th Respondent sought the following orders:

1.THAT the 4th Respondent be joined to the proceedings as interested party.

2. THAT the tribunal be pleased to stay, review, vary and/or set aside the orders that the tribunal had issued on 7th January, 2016 pending the hearing and determination of the suit.

3. THAT the tribunal be pleased to issue an order compelling the 2nd Respondent to vacate the 2nd Respondents parking bay forthwith.

4. THAT the 2nd Respondent's Notice of Motion application dated 7th January, 2016 be dismissed as an abuse of the process of the court.

5. THAT damages in the sum of Kshs. 136,000/= per day be awarded to the 4th Respondent until the 2nd Respondent vacates the said parking bay.

In the 4th Respondent's application that was filed in Tribunal Case No. 15 of 2016, the 4th Respondent sought similar orders as in Tribunal Case No. 12 of 2016 save for damages in respect of which it did not seek a specified amount of money unlike in Tribunal Case No. 12 of 2016.

The tribunal consolidated Tribunal Case No. 12 of 2016 with Tribunal Case No. 15 of 2016 and heard the applications that had been filed therein together. The tribunal had before it four (4) applications namely;

1. The 1st Respondents Notice of Motion application dated 7th January, 2016 filed in Tribunal case No. 15 of 2016

2. The 2nd Respondents Notice of Motion application dated 7th January, 2016 filed in Tribunal case No. 12 of 2016.

3. The 4th Respondents Notice of Motion application dated 14th January 2016 filed in Tribunal case No. 12 of 2016.

4. The 4th Respondent's Notice of Motion application dated 14th January, 2016 filed in Tribunal Case No. 15 of 2016.

<u>The parties respective cases before the tribunal:</u>

<u>The 1st Respondent'scase:</u>

In its application, the 1st Respondent contended that it was a protected tenant under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya (hereinafter referred to as "the Act"). The 1st Respondent contended that with the full knowledge of the Appellant and the 3rd Respondent it had been in occupation of the 1st Respondent's parking bay from the year 2013 and that, in the year 2015, the Appellant and the 3rd Respondent extended its tenancy until September, 2015. The 1st Respondent contended that the Appellant and the 3rd Respondent continued to accept monthly rent from it even after September, 2015 thereby making it a protected tenant. The 1st

Respondent contended that although it was faithfully paying rent on time, the Appellant and the 3rd Respondent had threatened to evict it from the said parking bay.

The 1st Respondent contended that the Appellant had not served it with a valid termination notice under the Act. The 1st Respondent annexed to its affidavit in support of its application among others, a copy of undated Car Park License between the 1st Respondent and the 3rd respondent and a copy of a letter of renewal of the said license dated 28th January, 2015 for a period of one (1) year from 1st October, 2014 until 30th September, 2015. The 1st Respondent contended that the Appellant and 3rd Respondent's threat to evict it from the said parking bay was illegal.

The 2nd Respondent's case:

The 2nd Respondent contended that the lease that the Appellant and the 3rd Respondent had entered into in respect of the 2nd Respondent's parking bay came to an end on 31st December, 2015. The 2nd Respondent contended that it was a sub-tenant of the 3rd Respondent and that it had remained in occupation of the said parking bay even after the expiry of the said lease between the Appellant and the 3rd Respondent. The 2nd Respondent contended that it was a protected tenant and that the Appellant and the 3rd Respondent had threatened to evict it from the said parking bay without notice. The 2nd Respondent contended that the said threat was illegal. The 2nd Respondent annexed to its affidavit in support of the application among others, a letter of renewal of Car Park License dated 28th January, 2010, and a letter of renewal of Car Park License dated 4th November, 2015.

The 3rd Respondent's Case:

The 3rd Respondent contended that there was no tenant and landlord relationship between it and the 1st and 2nd Respondents and that prior to the termination of the relationship between the 3rdRespondent and the Appellant, the 1st and 2nd Respondents were occupying the subject parking bays as licensees and not as tenants. The 3rd Respondent contended that it entered into a management license with the Appellant in 2013 pursuant to which it entered into license agreements with the 1st and 2nd Respondents for fixed terms renewable at the discretion of the 3rd Respondent. The 3rd respondent contended that the license agreement between it and the 1st and 2nd Respondents were dependent on the period of contract it had with the Appellant. The 3rd Respondent contended that following the formalization of its relationship with the Appellant, it extended the 1st and 2nd Respondent's licenses upto 30th September, 2015. The 3rd Respondent contended that on 17th September, 2015 it submitted a bid to manage the appellant's said parking bays for the year 2016 but the bid was unsuccessful a development that was communicated to the 1st and 2nd Respondents. The 3rd Respondent averred that the tender was won by the 4th Respondent. The 3rd Respondent averred that due to the procurement process and the dispute that ensued after the award of the said tender to the 4th Respondent, the contract between the 3rd Respondent and the Appellant that was to terminate on 31st August, 2015 was extended from time to time until 31st December, 2015. The 3rd Respondent likewise extended the 1st and 2nd Respondents licenses with the 3rd Respondent. The 3rd Respondent averred that the 4th Respondent was ultimately awarded the tender for the management of the Appellant's parking bays for the year 2016 a fact that was also communicated to the 1st and 2nd Respondents. The 3rd Respondent contended that after the tender for the management of the said parking bays was awarded to the 4th Respondent, the relationship between the 3rd Respondent and the Appellant came to an end so did the relationship between the 3rd Respondent and the 1st and 2nd Respondents. The 3rd Respondent averred that it handed over the said parking bays to the appellant on 1st January, 2016. The 3rd Respondent urged the tribunal not to entertain the 1st and 2nd Respondents' applications. The 3rd Respondent averred further that the tribunal had no jurisdiction to entertain the 1st and 2nd Respondents'complaintsbecause there was no landlord and tenant relationship and also on account of the fact the Appellant is a state corporation and as such not subject to the jurisdiction of the tribunal.

The 4th Respondent's case:

The 4th Respondent contended that the 1st and 2nd Respondents' applications were vexations and amounted to an abuse of the process of the court. The 4th Respondent contended that the sub-tenancies between the 1st and 2nd Respondents and the 3rd Respondent were terminated on 31st December, 2015 after the 4th Respondent was awarded a tender by the Appellant to manage the parking bays in question. The 4th Respondent averred that the 1st and 2nd Respondents derived their rights from the relationship that existed between the 3rd Respondent and the Appellant which had ceased to exist. The 4th Respondent contended that the relationship between 1st and 2nd Respondentsand the 3rd Respondent similarly ceased to exist. The 4th Respondent contended that since the 3rd Respondent had handed over possession of the said parking bays to the Appellant, the 1st and 2nd Respondents who remained in occupation of the same were trespassers. The 4th Respondent contended that the 1st and 2nd Respondents obtained the order that was issued by the tribunal on 7th January, 2016 through concealment of material facts and were enjoying illegal benefits courtesy of the said orders. The 4th Respondent contended that the tribunal had no jurisdiction to entertain the complaint by the 1st and 2nd Respondents since they had no known rights over the said parking bays protectable by law.

The Appellants case:

The Appellant averred that it was the owner of the parking bays in dispute that had 455 car parking spaces. The Appellant averred that there was no landlord and tenant relationship between it and the 1st, 2nd and 3rd Respondents in relation to the said parking bays. The Appellant averred that following a tender that was awarded to the 3rd Respondent for the management of the Appellant's said parking bays, it entered into a car park license with the 3rd Respondent pursuant to which the 3rd Respondent managed the said parking bays and paid to it a monthly license fees of Kshs.2,600,000/=. The Appellant contended that the license between it and the 3rd Respondent expired on 30th September, 2014 and was extended until 31st December 2015 to enable the Appellant complete the procurement process in accordance with the Public Procurement and Disposal Act. The Appellant averred that following the tenders that it invited in 2015, the 4th Respondent emerged as the winner and entered into a car park license with the Appellant on 21st December, 2015 which license came into force on 1st January, 2016. The Appellant contended that the 3rd Respondent handed over the said parking bays to the Appellant and the 4th Respondent on 31st December, 2015. The Appellant contended that the 1st and 2nd Respondents' complaint before the tribunal had no basis. The Appellant contended that the 1st and 2nd Respondents were not its tenants and as such there was no landlord and tenant relationship between them. The Appellant averred that the 1st and 2nd Respondents were trespassers on the suit property and that the tribunal had no jurisdiction to determine the dispute as the 1st and 2nd Respondents had no rights in the said parking bays protectable by law. The Appellant urged the court to discharge the interim orders that had been granted by the tribunal so that the 4th respondent could proceed with the management of the said parking bays in accordance with the agreement it entered into with the Appellant on 21st December, 2015.

The ruling of the tribunal:

The parties filed written submissions in respect of applications that were before the tribunal and were given opportunity to highlight the same. In a ruling that was delivered on 27th May, 2016, the tribunal allowed the 1st and 2nd Respondents' applications and dismissed the applications by the 4th Respondent. The Tribunal also terminated the proceedings as against the 3rdRespondent.

The tribunal in its ruling held that the relationship between the 1st and 2nd Respondents and the 3rd Respondent was that of a landlord and a tenant. The tribunal held that the contracts that the 1st and 2nd Respondents entered into with the 3rd Respondent were leases and not licenses. The tribunal held further

that the 1st and 2nd Respondents were sub-tenants of the 3rd Respondent who in turn was a tenant of the Appellant. The tribunal held that since the period of tenancies between the 1st and 2nd Respondentsand the 3rd Respondent were for less than 5 years, the 1st and 2nd Respondents were protected tenants under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya ("the Act"). The tribunal held that the Appellant had granted to the 3rd Respondent power to sub-let the parking bays in dispute and since the 3rd Respondent had ceased to have any interest in the said parking bays, the Appellant became the landlord of the 1st and 2nd Respondents pursuant to Section 5(1) of the Act. The Tribunal held further that the termination of the relationship between the 3rd Respondent and the Appellant did not terminate the tenancies that existed between the 1st and 2nd Respondents and the 3rd Respondent. The tribunal held that the 1st and 2nd Respondents' tenancies could only be terminated in accordance with the provisions of the Act. The tribunal held that since the 1st and 2nd Respondents were rendering services for money, the said parking bays qualified to be shopsunder the Act.

The tribunal found the 4th Respondent's applications unmerited. The tribunal held the view that the dispute if any between the 4th Respondent and the Appellant should have been taken to a civil court. The tribunal held that the 1st and 2nd Respondents had established a prima facie case with a probability of success. The tribunal held further that since the 1st and 2nd Respondents were in possession of the said parking bays, the balance of convenience tilted in favour of maintaining the status quo.It is against this ruling that this appeal has been preferred by the Appellant.

The appeal before this court:

The Appellant has challenged the decision of the tribunal on twelve (12) grounds which are set out in its memorandum of appeal dated 20th June, 2016. The Appellant has contended that:

1. The tribunal erred in making a finding that the occupation of the premises by the 1st and 2nd Respondents was a protected tenancy.

2. The tribunal erred in law and in fact in making findings on seriously contested issues which findings were final on the hearing of an interim application.

3. The tribunal erred in finding that the dispute did not relate to the facts of the case but was limited to the law only.

4. The tribunal erred in making a final determination on the nature of the relationship between the parties in an interim application.

5. The tribunal erred in finding that the car park licenses between the 1st and 2nd Respondents and the 3rd Respondent created tenancies and not licenses.

6. The tribunal erred in finding that the relationship between the 1st and 2nd Respondents on one hand and the 3rd Respondent on the other was that of a headtenant and a sub tenant and that the tenancy created was for a period of less than five years and falls within the provisions of the Landlord and Tenant (shops, hotels and catering establishments) Act, Chapter 301, Laws of Kenya ("the Act").

7. The tribunal erred in finding that the 3rd Respondent was the Appellant's managing agent and that the 3rd Respondent had general powers to sublet the property.

8. The tribunal erred in finding that the Appellant became a landlord to the 1st and 2nd Respondents by operation of law.

9. The tribunal erred in finding that the termination of the relationship between the Appellant and the 3rd Respondent did not terminate the sub-tenancy between the 1st and 2nd Respondents and the 3rd Respondent.

10. The tribunal erred in finding that the suit premises are shops within the provisions of the Act.

11. The tribunal erred in issuing temporary injunctive orders to the 1st and 2nd Respondents.

12. The tribunal erred in terminating the proceedings against the 3rd Respondent.

The appeal was heard by way of written submissions. The Appellant, the 1st Respondent and the 4th Respondent filed their submissions on 6th February, 2017, 16th March, 2017 and 21st June, 2017 respectively while the 2nd Respondent filed its submissions on 30th January, 2018.

In its submissions, the Appellant reiterated its case before the tribunal. The Appellant contended that the tribunal had no jurisdiction to determine the complaint and the applications that were brought before it by the 1st and 2nd Respondents. The Appellant submitted that the Appellant was a Government agency established under the National Social Security Fund Act, Chapter 258 Laws of Kenya and as such it was not subject to the jurisdiction of the tribunal pursuant to the proviso to section 2(1) of the Act. The Appellant submitted further that even if it is assumed that there were tenancies between the Appellant and the 1st and 2nd Respondents, the subject of such tenancies were parking bays and not shops, hotels or catering establishments which are protected under the Act. The Appellant submitted further that the relationship between the Appellant and the 1st and 2nd Respondents was a license and not a lease and as such was not within the jurisdiction of the tribunal.

The Appellant submitted further that the tribunal erred in making final orders on an interlocutory application. The Appellant submitted that the tribunal should not have made a final finding that the 1st and 2nd Respondents were protected tenants. The Appellant contended that the tribunal should have restricted itself to the issue as to whether or not the 1st and 2nd Respondents had established a prima facie case. The Appellant submitted further that the tribunal erred by removing the 3rd Respondent from the proceedings without being asked to do so. The Appellant submitted that the 3rd Respondent was a necessary party in the proceedings and should not have been removed.

The appellant submitted further that even if the 1st and 2nd Respondents had established a prima facie case, the tribunal should not have issued an injunction unless it was satisfied that the 1st and 2nd Respondents would suffer irreparable harm that could not be compensated by an award of damages. The Appellant submitted that the tribunal failed to consider this issue. The Appellant submitted that the 1st and 2nd Respondents' loss if any was quantifiable and as such the 1st and 2nd Respondents could be compensated in damages if they were to be successful in their complaints.

The Appellant submitted that the tribunal failed to consider the prejudice that it was going to suffer if the injunction was granted to the 1st and 2nd Respondents. The Appellant submitted that it was subject to the Public Procurement and Disposal Act that was in force at the material time and that it had invited tenders for the management of its parking bays in 2015 in anticipation of the expiry of the license it had granted to the 3rd Respondent. The Appellant submitted that the 4th Respondent emerged the winner of the tender and entered into a new license agreement with the Appellant. The Appellant submitted that by its ruling and orders challenged herein, the tribunal had suspended the provisions of the said Public Procurement and Disposal Act as it relates to the subject parking bays. The Appellant submitted that the tribunal had caused it to breach the said Act.

The Appellant submitted that since this is an interlocutory appeal, the court should restrain itself from making findings that would prejudice the hearing of the complaints that are pending determination before the tribunal. The Appellant submitted that the tribunal in exercising its discretion did not act judiciously

and misdirected itself in law in issuing final orders in an interlocutory application. The Appellant urged the court to set aside the ruling and orders of the tribunal made on 27th May, 2016 and substitute the same with an order dismissing the 1st and 2nd Respondents' applications dated 7thJanuary, 2016. The Appellant cited a number of authorities in support of its submissions.

In its submissions in reply, the 1st Respondent submitted that the Appellant was in no way aggrieved by the decision of the tribunal and that the aggrieved party was the 4th Respondent. The 1st Respondent supported the decision of the tribunal and submitted that the tribunal was correct in granting the orders of 27th May, 2016. The 1st Respondent submitted that the orders issued by the tribunal were temporary in nature and were to subsist until the hearing of the complaints by the 1st and 2nd Respondents.

The 1st Respondent submitted that in the circumstances, the appeal herein was unnecessary. The 1st Respondent submitted that it had satisfied the conditions for granting interlocutory injunction and as such the orders complained of were validly issued. The 1st Respondent submitted that the Appellant could not turn a tenancy into a license by calling it as such. The 1st Respondent submitted that the tribunal had powers to grant orders for the maintenance of status quo pending the hearing of the complaints that were submitted before it. In support of this submission, the 1st Respondent cited Section 12(4) of the Act and the decision of Odunga J. in Republic vs. Business Premises Rent Tribunal &another, Exparte Davies Motor Corporation Ltd. (2013) eKLR. The 1st Respondent reiterated that the relationship between the 1st and 2nd Respondents and the Appellant was a tenancy and not a license.

On its part, the 2nd Respondent also supported the tribunal's ruling. The 2nd Respondent submitted that the tribunal had jurisdiction to grant the orders that were issued on 27th May, 2016. The 2nd Respondent submitted that there was a landlord and tenant relationship between the 2nd Respondent, the 3rdRespondent and the Appellant. The 2nd Respondent contended that the tribunal was correct in its findings on this issue. The 2nd Respondent submitted that the tribunal had power to among others determine whether or not a tenancy is controlled.The 2nd Respondent urged the court to dismiss the appeal as having no basis.

In its submissions, the 4th Respondent supported the appeal. The 4th Respondent submitted that the tribunal lacked jurisdiction to entertain the 1st and 2nd Respondents' complaints. The 4th Respondent submitted that no landlord and tenant relationship existed between the 3rd Respondent and the Appellant and between the 3rd Respondent and the 1st and 2nd Respondents. The 4th Respondent submitted that this fact was well known to the 1st and 2nd Respondents. The 4th Respondent submitted that the relationship between the 1st and 2nd Respondents and the 3rd Respondentwas a license and not a lease and that was expressly stated in clause 5 of the car park license that was granted by the 3rd Respondent to the 1st and 2nd Respondents. The 4th respondent submitted that the parties having entered into a license, the tribunal could not re-write the contract for them. The 4th Respondent submitted that what the 3rd Respondent had from the Appellant was a license and as such it could not give the 1st and 2nd Respondents leases or tenancies as it did not have such interest.

The 4th Respondent reiterated the Appellant's submission that the Act was not applicable to the Appellant as it was a Government agency pursuant to the proviso to Section 2(1) of the Act. The 4th Respondent also reiterated that the tribunal erred in issuing final orders on an interlocutory application. Finally, the 4th Respondent submitted that the 1st and 2nd Respondents did not meet the threshold for granting interlocutory injunction. The 4th Respondent urged the court to allow the appeal, set aside the orders that were granted by the tribunal on 27th June, 2016 and allow the 4th Respondent's applications dated 14th January, 2016.

Analysis and determination:

I have perused the proceedings and the ruling of the tribunal which is the subject of this appeal. I have also considered the appellant's grounds of appeal and the submissions by the parties' respective advocates. The orders that were sought by the 1st and 2nd Respondents before the tribunal were principally orders for interlocutory injunction pending the hearing and determination of the complaints that had been lodged before the tribunal. The 1st and the 2nd Respondents' applications before the tribunal called for an exercise of discretion on the part of the tribunal. The same applies to the applications that were filed by the 4th Respondent. In the case of Mbogo vs. Shah (1968) E. A. 93, it was held that:

> " a Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been a misjustice".

In the case of United India Insurance Co. Ltd. vs. East African Underwriters (Kenya) Ltd. [1985] E.A 898, Madan J.A (as he then was) stated as follows:

> "The Court of Appeal will not interfere with a discretionary decision of the judge appealed from…….The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take into account considerations of which he should have taken into account, or fifthly, that his decision, albeit a discretionary one , is plainly wrong".

What I need to determine in this appeal is whether the appellant has established valid grounds that would justify interference with the exercise of discretion by the tribunal. In considering this issue, I have to bear in mind the fact that this is an interlocutory appeal. In the case of Vivo Energy Kenya Limited vs. Maloba Petrol Station Limited & 3 others [2015]eKLR, the court stated as follows:

> "From the outset, we must reiterate that this is an interlocutory appeal and that the hearing of the suit on merits before the High Court is yet to take place. Accordingly and as this court has stated time and again, in an interlocutory appeal where the suit is yet to be tried in the High Court, this court will refrain from expressing concluded views on any issue which it thinks may arise in the pending trial."

It is with the foregoing principles in mind that I now proceed to consider the grounds on which the decision of the tribunal has been challenged. The appellant did not argue its grounds of appeal in any particular order. On my part, I will consider grounds 2 and 4 of appeal together. I will thereafter consider ground 11 of appeal which shall also encompass grounds 1, 3, 5, 6, 7, 8, 9 and 10 of appeal. Finally, I will consider ground 12 of appeal. With regard to grounds 2 and 4 of appeal, I am in agreement with the appellant that the tribunal made several conclusive findings that it was not supposed to make in an interlocutory application. The issue as to whether the relationship between the parties was that of a landlord and tenant or a licensor and licensee could only be determined conclusively at the hearing of the complaint. The tribunal made a final determination that the 3rd Respondent was the Appellant's tenant and that the 1st and 2nd Respondents were the 3rd Respondents subtenants. The tribunal also made a conclusive finding that the Appellant was by operation of law the 1st and 2nd Respondents landlord after the termination of the relationship between the Appellant and the 3rd Respondent.

With regard to ground 11 of appeal, I have stated earlier in this judgment that, the 1st and 2nd Respondents' applications before the tribunal were principally seeking interlocutory injunction. The Appellant, the 3rd Respondent and the 4th Respondent had contended before the tribunal that the tribunal had no jurisdiction to issue an injunction. Although the tribunal failed to address this issue that touched on its jurisdiction, I am not in agreement with that contention. In the Court of Appeal case of John MugoNjuguna vs. Margaret M. Murangi [2014]eKLR, which I believe is the latest case from that court on the issue of the jurisdiction of the tribunal to issue injunctive relief, the court held that the tribunal had jurisdiction to grant an order of injunction on a complaint. The court stated as follows:

> "…On the jurisdiction of the Tribunal to issue an order of injunction, it is clear the judge was right, the jurisdiction is provided for in the Act and that was further fortified by the aforesaid decision of this court".

The principles upon which the discretion to grant or refuse an application for an interlocutory injunction is exercised are well settled. In the case of Giella vs. Cassman Brown and Co. Ltd. (1973) E.A 358, it was held that an applicant for a temporary injunction must establish:

> i. A prima facie case with a probability of success;
>
> ii. That if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages and;
>
> iii. If in doubt, the court shall determine the application on a balance of convenience.

In the of Mrao Limited vs. First American Bank Limited & 2 Others (2003) KLR 125, the court defined a prima facie case as;

> "a case in 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."

In the case of Nguruman Limited vs. Jan Bonde Nielsen& 2 others (2014) eKLR the court stated that:

> "The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."

The court went further to state that;

> "……in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation."

This being a first appeal, this court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions. See, the cases of Verani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle vs. Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court. I have considered the evidence that was before the tribunal on the basis of which the tribunal arrived at the findings I have mentioned herein earlier. I am not in agreement with the finding of the tribunal that the 1st and 2nd Respondents had established a prima facie case against the Appellant and the 3rd Respondent. I am not persuaded that the 1st and 2nd Respondents established before the tribunal that they had a right that had been violated or was threatened with violation by the Appellant and the 3rd Respondent.

The tribunal considered at length the law on what constitutes a lease and a license. The tribunal in my view failed to apply that law to the facts that were before it. I am not persuaded that the agreement that was entered into between the 3rd Respondent and the Appellant (See page 55 of the record of appeal) constituted a lease that could enable the 3rd Respondent to enter into subleases with the 1st and 2nd Respondents. The Appellant was the owner of a parking bay with 455 parking spaces. The Appellant invited tenders for the provision of management services for the said parking bay. The duties of the service provider entailed the management of the parking bay and collection of the parking fees on behalf of the Appellant in consideration of an agreed commission. The 3rd respondent was awarded the tender pursuant to which, it entered into the contract dated 26th April, 2013 with the Appellant. The contract

between the 3rd Respondent and the Appellant was in my view strictly a management and service contract. Contrary to the findings by the tribunal, there was nothing in the contract between the Appellant and the 3rd Respondent that allowed the 3rd Respondent to sublet the said parking bay.

I agree with the findings of the tribunal that whether or not an agreement is a lease or a license does not depend on the name the parties give it. However, having regard to the nature and the terms of contract between the 3rd Respondent and the Appellant and the subsequent agreements that the 3rd Respondent entered into with the 1st and 2nd Respondents, it is difficult to justify the tribunal's finding that the relationship between the Appellant and the 1st,2ndand 3rdRespondents was that of a landlord and tenant.

The Appellant had also raised a jurisdictional issue which the tribunal failed to consider. The Appellant had contended that it is a Government agency established by an Act of Parliament and as such exempted from the provisions of the Act pursuant to the proviso to section 2(1) of the Act. Although the issue as to whether or not the Appellant was exempted from the provisions of the Act could not be determined conclusively in the application that was before the tribunal, the evidence that was placed before the tribunal to the effect that the Appellant was subject to the Public Procurement and Disposal Act raised the possibility of the Appellant being a Government agency as was contended by the Appellant before the tribunal. This evidence should have been taken into account by the tribunal when considering the weight to attach to the 1st and 2nd Respondents' cases.

The Appellant and the 4th Respondent had also contended that the tribunal erred in its failure to address its mind to the issue as to whether or not the 1st and 2nd Respondents would suffer irreparable injury that could not be adequately compensated by an award of damages which is one of the conditions that must be met before an interlocutory injunction is granted. A part from stating that they were in possession of the suit property, the 1st and 2nd Respondents did not demonstrate that they would suffer irreparable harm or injury that could not be adequately compensated in damages.

I have noted from the record that the 2nd Respondent had already filed a civil suit to recover the deposit that it had paid to the 3rd Respondent. I agree with the Appellant that the tribunal erred in its failure to consider whether the 1st and 2nd Respondents could be compensated in damages. I am of the view that if the tribunal had considered this factor, it would not have issued the orders which are the subject of this appeal.

With regard to ground 12 of appeal, I am in agreement with the Appellant's contention that the tribunal erred in discharging the 3rd Respondent from the proceedings. The tribunal made the order discharging the 3rd Respondent from the proceedings without being called upon to do so. From the evidence on record, there is no doubt that the presence of the 3rd Respondent in the complaint before the tribunal would enable the tribunal to effectively and conclusively determine all the issues which have been raised before it. I am in agreement that the 3rd Respondent is a necessary party to the 1st and 2nd Respondent's complaint before the tribunal and should not have been discharged from the proceedings.

In its submissions, the 4th Respondent urged the court to set aside the orders that were issued by the tribunal on 27th May, 2016 and to allow its applications dated 14th January, 2016 that were dismissed by the tribunal. The 4th Respondent did not appeal against the dismissal of its said applications by the tribunal. Since the Appellant has appealed against the whole decision of the tribunal that was made on 27th May, 2016, under Order 42 rule 5 of the Civil Procedure Rules, the court has power to grant the prayers sought by the 4th Respondent herein.

With regard to the said applications by the 4th Respondent that were dismissed by the tribunal, I am of the view that the 4th Respondent had established sufficient interest in the dispute that was before the tribunal and as such should have been added to the complaint that was before the tribunal as an interested party. I am however of the view that no good grounds had been put forward to justify the grant of the other orders

that were sought by the 4thRespondent. Most of the orders that the 4th Respondent had sought could not be granted at interlocutory stage.

Due to the foregoing, I am in agreement with the Appellant that the tribunal misdirected itself on several issues and as a result arrived at a wrong decision. I am satisfied that the Appellant has established grounds that justify interference with the tribunal's exercise of discretion. I therefore make the following orders:

1. I allow the appeal and set aside the orders made by the tribunal on 27th May, 2016.

2. The 1st Respondent's Notice of Motion application dated 7th January, 2016 in Tribunal Case No. 15 of 2016 and the 2nd Respondent's Notice of Motion dated 7th January, 2016 in Tribunal Case No. 12 of 2016 are dismissed with costs.

3. The 4th Respondent's Notice of Motion applications dated 14th January, 2016 in Tribunal Case No. 12 of 2016 and Tribunal Case No. 15 of 2016 are allowed with costs in terms of prayers (b) and (g) thereof.

4. The Appellant shall have the costs of the Appeal.

Delivered and Dated at Nairobi this 14thday of February 2018

S. OKONG'O

JUDGE

Judgment delivered in open court in the presence of:

Mr. Oduor for the Appellant

Mr. Karanja h/b for Mutiso for the 1st Respondent

Mr. Maina h/b for Ondabu the 2nd Respondent

No appearance for the 3rd Respondent

Mr. Muganda for the 4th Respondent

Catherine Court Assistant