REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO 257 OF 2017

HELLEN KAY HARTLEY …….. PLAINTIFF/APPLICANT

VERSUS

ADVENTURE ADRENALIN AFRICA LIMITED…….DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion application dated 11th July 2017 the Plaintiff/Applicant is seeking the following orders:

1) Spent

2) That an interlocutory mandatory injunction be and is hereby issued to compel the Defendant, by itself, its directors, officers, employees and/or agents to forthwith vacate and deliver to the plaintiff in vacant possession, the suit premises known as L.R. NUMBER KWALE/DIANI BEACH BLOCK/808 situated in Diani in KWALE County, otherwise known as Diani House, by removing itself, its directors, officers, employees and/or agents and any and all of their moveable property and/or chattels from the said suit premises forthwith.

3) That in default, the plaintiff be at liberty to forcefully cause the eviction of the Defendant, its directors, officers, employees and/or agents from the said suit premises together with any and all their moveable properties and chattels forthwith and;

4) That the officer Commanding Station, Diani Police Station, or the Commandant, Administration Police, Kwale County, do assist in the immediate enforcement and compliance with these orders by the Defendant.

5)That any costs and expenses occasioned by and indicated to the forceful eviction of the Defendant, its directors, officers, agent and all of their moveable property and chattels be borne by the Defendant.

6) That the costs of this Motion be in the cause.

2. The Application is based on the grounds in the face of the Motion and supported by the affidavit of Helen Kay Hartley, the Plaintiff sworn on 11th July 2017 and a further affidavit sworn on 28th July 2017. In her said affidavits the Plaintiff has deponed that she is the registered proprietor of all that parcel of land known as **L.R. NUMBER KWALE/DIANI BEACH BLOCK/808** which she leased to the Defendant on 1/5/15 for a period of two (2) years commencing on 1/5/15 and expiring on 1/5/17 at a rent of kshs.50,000 per month inclusive of taxes payable monthly in advance. The Plaintiff avers that under the

subject lease, upon the expiry of the lease, the Defendant had the option of applying for a new two year agreement under fresh terms to be agreed upon. The Plaintiff avers that during the pendency of the lease agreement, she instructed her advocates who communicated to the Defendant her intention not to renew the lease upon expiry. That the Defendant, upon receipt of the Plaintiff's advocates letters, filed case no.70 of 2017 at the Business Premises Rent Tribunal on the basis that the notices terminating the tenancy were irregular. The Plaintiff states that she raised a preliminary objection to the Tribunal's jurisdiction on grounds that the letters issued by the Plaintiff's advocates to the defendant were not Notices of Termination of Tenancy as contemplated by Section 4 (2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, hence the Tribunal's jurisdiction on account of termination of controlled tenancy was misconceived. It is the Plaintiff's contention that as per the terms of the Lease Agreement, the lease naturally expired on 1/5/17, hence the jurisdiction of the Tribunal in the reference has been overtaken by events. The Plaintiff depones that her claim against the Defendant does not fall within the ambit of the Tribunal since it arose post the expiration of the lease and have not executed any other Lease Agreement. The Plaintiff further depones that she has not accepted any rent from the defendant post 1/5/17 nor has she dealt with the Defendant in a manner to suggest that the lease shall or has been renewed. The Plaintiff states that following the expiry of the Lease Agreement, she requested the Defendant to hand over vacant possession of the suit premises but the Defendant has refused to do so. According to the Plaintiff, the Defendant now continues to occupy the Suit Premises without her permission and despite numerous requests to vacate the premises. The Plaintiff contends that the Defendant continued occupation of the Suit Premises amounts to criminal trespass to land and is also in open defiance of her title to the property and the legal rights that accrue to it. The Plaintiff further avers that she requires the premises to carry out redevelopment works with other partners which add considerable value to the premises that would be quite beneficial to her and her family and that the defendant's continued delay in vacating the premises is putting her to considerable expenses and huge economic loss. The Plaintiff reiterates that there is no legal or contractual basis upon which the Defendant can continue occupying the Suit Premises against the Plaintiff's clearly expressed wishes and that it is the interest of justice and fairness that the Honourable Court grants the orders sought.

3. The Application is opposed by the Defendant through a Replying Affidavit dated 24th July 2017 sworn by Anjali Dayaramani. It was deponed on behalf of the Defendant that the tenancy between the Plaintiff and the Defendant was a controlled tenancy and is governed by the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya and that it was on the basis of that the Defendant filed **Tribunal Case No.107 of 2016** and **Case No.70 of 2017** (both of Mombasa) when the Plaintiff threatened to terminate the tenancy without following the procedure provided in the Act. The Defendant avers that in **Tribunal case No.107 of 2016** the Plaintiff had sent an email to the Defendant in respect of the Suit Premises giving a Notice to the Defendant for three (3) months to vacate the premises. It is the Defendant's contention that the said Notice was withdrawn by the Plaintiff when the application came up for hearing before the Tribunal and that the Plaintiff was restrained by the Tribunal from evicting the Defendant or interfering with its quiet and peaceful possession of the Suit Premises without complying with the provisions of the Act. That the said orders were issued by consent of the parties after the Plaintiff conceded that the tenancy was controlled. The Defendant states that the Plaintiff filed an Application seeking the review of the interim orders issued by the Tribunal but abandoned the same during the hearing on 21st November 2016. The Defendant further states that afterwards, the Plaintiff caused to be served on the Defendant notices requiring it to vacate from the Suit Premises on or before 1st May 2017 and the Defendant filed **Tribunal Case No.107 of 2017** contesting the said notices principally on the grounds that he tenancy is controlled and cannot be determined without following the requirements of the law and the said application was allowed and the Plaintiff was notified of the same. It is the Defendant's contention that the Plaintiff from the Month of May 2017 refused to accept rent and the Tribunal gave an order for the same to be deposited in the Tribunal. It is the Defendant's contention, *inter alia,* that this Court has no jurisdiction to hear and determine the matter and that the Plaintiff has not satisfied the requirements of law for granting of an Interlocutory Mandatory Injunction.

4. In his submissions Mr. Mugambi, learned Counsel for the Plaintiff reiterated the contents of the Affidavits in support of the motion and added that the special circumstances to warrant issuance of a Mandatory Injunction are that the lease between the Plaintiff and the Defendant has expired and there has been no renewal; that there has been no constructive tenancy between the parties; and that the Plaintiff

has not acquiesced her right of the Suit Premises. He submitted that the Plaintiff made full disclosure and the Court had jurisdiction as the case was filed on 13th July 2017 after the termination of the lease. The learned Counsel cited the cases of **Saroj K. Shah –vs- Naran Mani Patel & 2 Others (2015) eKLR, Maher Unissa Karim –vs- Edward Oluoch Odumbe (2015)eKLR** and **Babubhai M. Shah – Vs- M& M Science Ltd (2015)eKLR** in support of the Plaintiff's case.

5. In his submissions, Mr. Wainaina, learned Counsel for the Defendant reiterated the contents of the Replying Affidavit. He submitted that this court does not have jurisdiction to hear and determine issues of a controlled tenancy. In addition, Counsel submitted that even if the Court had jurisdiction, it cannot grant the orders sought at an interlocutory stage. He added that there is an order served on the Plaintiff on 14th July 2017 given by the Tribunal restraining the Plaintiff from interfering with the Defendant's business or evicting it from the Suit Premises, and the order has not been challenged, set aside or appealed against. It was Counsel's submission that the filing of this Suit is an abuse of the Court process and the Plaintiff is guilty of non-disclosure, hence not deserving the discretionary order of the Court. Counsel further submitted that the Plaintiff has not met the threshold of grant of the orders sought and stated that the authorities relied on by the Plaintiff's Counsel are distinguishable, and relied on the case of **Beatrice Nduta Kiarie –v- John Mwangi (2013)eKLR** and **Kenya Breweries Ltd –v- Okeyo (2002)IEA 109**. He urged the Court to not only dismiss the Application but to also strike out the Suit.

6. In his reply, Mr. Mugambi submitted that the Defendant was a protected tenant form 1st May 2015 to 1st May 2017 and the Reference to the Tribunal filed within that period were properly filed. He submitted that the Plaintiff filed this Suit after the lease had expired and the Tribunal no longer had jurisdiction. On the issue of non-disclosure, Counsel submitted that the plaintiff filed the Suit on 13th July 2017 and was not aware of the orders given by the Tribunal and served on him on 14th July 2017 after the Suit had been filed. He further submitted that any orders issued by the Tribunal after the expiry of the lease were issued without jurisdiction and cannot bind this Court.

7. I have carefully considered the Application, the Affidavits on record, the Submission made and the authorities cited. This Application is brought under Article 159 (2)(c) and (d) of the Constitution of Kenya, Sections 1A, 1B, 3A, 63(e) of the Civil Procedure Act and Order 40 Rules 1,4 and 10 and Order 51 Rules 1 & 4 of the Civil Procedure Rules. There is no dispute that the Plaintiff and the Defendant entered into a Lease Agreement dated 1st May 2015 in which the Plaintiff leased the Suit Premises to the Defendant for a period of two (2) years commencing on 1st May 2015. The Lease Agreement provided that in the event the Landlord wished to terminate the lease, the tenant would be given three (3) months notice.

During the pendency of the lease, the plaintiff, through her Advocates wrote to the Defendant about her intention not to renew the upon expiration, this prompted the Defendant to file References at the Business Premises Rent Tribunal at Mombasa being **Tribunal case No.107 of 2016** and **Tribunal Case No.70 of 2017** challenging the notices to terminate. According to the Plaintiff, the said Reference has been overtaken by event, the lease having expired on 1st May 2017 and therefore the Tribunal no longer had jurisdiction.

8. From the documents filed herein, I note that **Tribunal Case No.107 of 2016** was settled by consent of the parties entered on 21st November 2016. With regard to **Tribunal Case No.70 of 2017**, the Plaintiff had filed a Notice of Preliminary Objection to the Defendant's application challenging among others the Reference and the jurisdiction of the Tribunal. However, from the documents filed and in particular annexures marked "AD7" and "AD8" in the Defendant's Replying Affidavit, it is apparent that the Tribunal issued orders in favour of the Defendant on 7th July 2017 in which the Tribunal, inter alia restrained the Plaintiff from interfering with the Defendant's business operated from the Suit Premises or evicting it from therefrom. The Defendant was allowed to deposit rent in the Tribunal.

9. Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act states as follows:

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

a) which has not been reduced into writing; or

b) which has been reduced into writing and which –

i. is for a period not exceeding five years; or

ii. contains provisions for termination, otherwise than for breach of covenant, within five years from the commencement thereof: or

iii. relates to premises of a class specified under section (2) of this section."

In view of the orders already issued by the Tribunal, and which are still in force, will at this stage refrain from deciding whether or not the tenancy entered into between the Plaintiff and the Defendant is continues.

10. The powers of the Tribunal are spelt out under Section 12 of Act and include the power-

a) To determine whether or not any tenancy is a controlled tenancy

e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at the material time in occupation of the premises comprised in a controlled tenancy.

The Plaintiff having expressed her intention not to renew the lease upon expiry, and the tenant having filed a Reference and remained in occupation, in my view the Plaintiff could still have invoked the powers of the Tribunal under section 12(e) above to recover possession. Under Section 15(1) of the Act, any party to a Reference aggrieved by any determination or order of the Tribunal may, within thirty days after the date of such determination order appeal to the Environment and Land Court. I believe that the issues raised in this application could have been raised at the Tribunal. If the Plaintiff was not satisfied with the order of the Tribunal, he ought to have applied for its review or appeal against it instead of filing a fresh suit and application in this Court while the case at the Tribunal was still pending.

11. The issue for determination is whether in the circumstances of this case the Plaintiff would be entitled to the reliefs sought which indeed are in the nature of a mandatory injunction which, if granted, would virtually dispose of the suit wholly or substantively at the interlocutory stage. The principles governing grant of a temporary mandatory injunction are well settled. In the case of **Kenya Breweries Ltd & Another –v- Washington Okeyo (2002)eKLR** the Court of Appeal had occasion to discuss and consider those principles and held that the test for grant of a Mandatory Injunction was as correctly stated in Vol.24 Halsbury's Laws of England 4th Edition paragraph 948 which reads: -

"A mandatory Injunction can be granted as well as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempted to steal a march on the plaintiff, a Mandatory Injunction will be granted on an Interlocutory Application."

Also in **Locabail International Finance Ltd –vs- Agro export and others 1986 1 ALL ER 901 at page 901**, it was stated:

"**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 end of the trial it would appear that the Injunction had been rightly granted, that being a different and higher standard than required for a prohibitory Injunction."

In the case of **East African Fine Spinners Ltd (in Receivership) & 3 others –vs- Bedi Investments Ltd** (as he then was) cited the case of **Shepherd Homes Ltd _ -vs- Sandalim 1971 ICH 34** which stated:

"It is plain that in most circumstances a Mandatory Injunction is likely, other things being equal, to be more drastic in its effect than a Prohibitory Injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the Interlocutory stage, when the final result of the case cannot be known and the court has to be unusually strong and clear before a Mandatory Injunction will be granted, even if it is sought in order to enforce a contractual obligations"

Referring to the application of those principles, the Court of Appeal in **Kenya Airport Authority –vs- Paul Njogu Muigai & 2 others, Civil Application No. NAI 29/97 (UR)** stated that an order which results in granting a major relief claimed in the suit, which may not be granted at the final hearing, ought not to be granted at an Interlocutory stage. Again referring to the principle in the **Shepherd Homes Case Supra** as adopted in the case of **Locabail International Finance Ltd** Mustil LJ said at page 906.

"**The matter before the court is not only an application for a Mandatory Injunction, but it is an application for a Mandatory Injunction which, if a granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case…**"

12. In this case, it is the Plaintiff's contention that the lease entered into between the parties was terminated by effluxion of time on 1st may 2017 and the Defendant's on 1st May 2017 and the Defendants continued occupation of the suit premises amounts to trespass. On its part, the Defendant maintains that it is a protected tenant whose lease is still running and the same has not been terminated in accordance with the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. In my considered view, and having taken into consideration the principles outlined for the grant of a Mandatory Injunction, and having applied the same to this case, the Plaintiff's case herein does not pass the tests outlined. From the facts that have emerged, it is apparent that this is not a case that one can regard as plain and clear and which the Court can decide at once. Ordering the Defendant to vacate from the Suit Premises at this stage will be tantamount to making a final decision in the case before the main issues are heard and determined in the main Suit, or the Suit is otherwise determines in summary manner. In my view, granting the orders sought at this stage would leave nothing further to await in the main suit. In addition and as already pointed out, others are orders in force in favour of the Defendant granted by the Tribunal in **Tribunal Case No.70 of 2017** which orders have not been set aside. This application is not an appeal against those orders.

13. In the circumstances, I decline to grant the orders sought and order that the motion dated 11th July 2017 be and is hereby dismissed with costs to the Defendant.

Ruling dated, signed and delivered at Mombasa this 11th day of October 2017

C. YANO

JUDGE