REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 150 OF 2017

HAROLD TUVA …….....…..… PLAINTIFF/APPLICANT

VERSUS

DAVID CHARO KATANA ……..... 1ST DEFENDANT/RESPONDENT

MAURICE M. OTIENO ……..…2ND DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 17th April, 2017. It is brought under Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act Chapter 21 Laws of Kenya and all other enabling provisions of the Law.

2. It seeks orders that;

a. Spent

b. Spent

c. The Honourable Court be pleased to restrain the Defendants/Respondents by themselves, employees, agents, servants and/or otherwise by way of a temporary injunction from encroaching, trespassing, constructing, fencing, parking motor vehicles, obstructing the Applicants right of access and/or access into all that property known as Plot Number 12787/1/MN (Original No. 1499/2/1/MN) pending the hearing and final determination of this suit.

d. The Defendants/Respondents be condemned to pay costs of this suit.

3. The grounds are on the face of the application and are;

a. The Applicant is the bona fide registered proprietor of that entire parcel known as Plot Number 12787/1/MN (Original No. 1499/2/1/MN).

b. The Respondents have since invaded the said parcel without the Applicant's consent and have thus trespassed thereon.

c. The Respondents have unlawfully entered into a lease agreement between themselves over the Applicant's suit property and without his consent.

d. The Applicant had leased out the suit property to the 1st Respondent but the said lease has since terminated.

e. The Applicant is entitled to exclusive use of the suit parcel.

4. The application is supported by affidavit of Harold Tuva, the Plaintiff/Applicant herein sworn on the 17th April, 2017.

5. The application is opposed. There is a replying affidavit sworn by David Charo Katana, the 1st Defendant/Respondent on the 19th June, 2017 and filed in court on the 20th June, 2017.

6. It is the Plaintiff/Applicant's case that he is the proprietor of parcel Number 12787/1/MN (Original No. 1499/2/1/MN). That on 1st august, 2013 he entered into lease agreement with the 1st Respondent for a portion of the suit parcel whereof the 1st Respondent was paying kshs10,000 per month.

7. On 1st June, 2016 he issued a notice to the 1st Respondent terminating the tenancy agreement.

That the 1st Respondent has since in total regard of the said terms of the tenancy agreement and further without any express authority from the Applicant sub-let the suit parcel to the 2nd Respondent and is infact purporting to draw more from the purported sub-lease as evidenced in the letter dated 30th May, 2016.

8. It is also the Plaintiff's case that he has established a prima facie case with a probability of success at the trial.

The Defendants/Respondents have put up a structure without the express approval of the landlord.

Further, that the Plaintiff/Applicant has shown that he will suffer irreparable injury which would not adequately be compensated by an award of damages.

The Replying Affidavit of David Charo Katana confirms that a building structure known as "Queen Bar & Lounge" has been put up without written consent of the landlord.

Further that the Plaintiff/Applicant has satisfied the conditions for grant of temporary injunction. They have put forward the case of ***Joseph Mbugua Gichanga –versus- Cooperative Bank of Kenya Limited (2005) eKLR.***

9. It is the Defendant/Respondent case that he did sublet the suit premises the 2nd Defendant/Respondent herein. That tenancy agreement neither prohibited him from subletting nor compelled him to inform the Plaintiff when subletting the suit property.

10. Further that the tenancy has not been terminated because the lease was to be inforce in perpetuity.

That he has made improvements on the property amounting to Kshs.4,600,000.

That the Plaintiff has not met the conditions grant of temporary injunctions.

11. The Plaintiff issued notice to terminate tenancy but the same is void and unenforceable as the 1st Defendant has not been compensated. Nothing in the agreement prevents the 1st Defendant/Respondent from subletting.

12. That the Plaintiff/Applicant has not proved that he will suffer irreparable injury if the orders re not granted. That on the contrary the Defendants will suffer irreparable injury should they be asked to vacate the suit premises, their businesses will be disrupted leading to financial loss.

That therefore the balance of convenience tilts in favour of the Defendants who will be forced to close their businesses.

13. I have considered the pleadings, the Notice of Motion, the Supporting Affidavit and the annexures.

I have also considered the Replying affidavit and the annexures.

I have considered the written submissions on record.

The issues for determination are:

i. Whether or not the Plaintiff/Applicant's case has met the conditions of grant of temporary injunctions.

ii. Who should bear costs of this application?

14. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were set down in the precedent setting case of ***Giella –versus- Cassman Brown And Company Limited (1973) EA 358.***

They are as follows;

i. An application must show a prima facie case with a probability of success at the trial.

ii. An interlocutory injunction will normally be granted unless an applicant can show that he would suffer irreparable loss if the injunction is not granted.

iii. If the court is in doubt it will decide the application on a balance of convenience.

15. In the case of ***Mrao Limited –versus- First American Bank Limited And 2 Others (2013) eKLR*** the court of Appeal gave a definition of what amounts to a prima facie case.

It stated;

> **"A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case 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."**

16. Has the Plaintiff made out a prima facie case with a probability of success at the trial? The Plaintiff/Applicant is the proprietor of the suit premises. The 1st Defendant/Respondent entered into possession vide a tenancy agreement dated 1st August, 2013.

Clause (4) of the said agreement states;

> **"Tenancy is in perpetuity unless parties agree mutually to terminate it by giving the other party three months' notice or three months' rent in lieu of notice, upon which the tenant shall be adequately compensated for developments or improvements made to the premises by the tenant."**

17. It appears the Plaintiff/Applicant was relying in this clause when he gave the 1st Defendant/Respondent notice dated 1st June, 2016.

The Notice was to expire on 31st December, 2016. It was a six months' notice. The 1st Defendant/Respondent does not deny that he received the notice. His contention appears to be compensation for the improvements under clause 4 and 14 of the agreement.

18. I have gone through the tenancy/lease agreement. The same is silent on sub-letting.

Clause 4 gives either party the right to terminate tenancy by giving three months' notice or three months' rent in lieu of notice.

19. The Plaintiff./Applicant gave the 1st Defendant/Respondent six (6) months' notice under clause 4, the tenant ought to be compensated for the improvements on the suit premises.

The 1st Defendant/Respondent has not told the court whether he has approached the Plaintiff/Applicant with a view to being compensated.

I believe clause 14 takes care of his concerns.

20. Under clause 7 major improvements would not be undertaken without the written consent of the landlord. In his replying affidavit the 1st Defendant/Respondents admits he has made improvements amounting to Kshs.4,600,000/=.

These must be major improvements. He ought to have sought consent from the landlord. To this extend I find that he breached one of the terms of the tenancy agreement.

21. I find that the Plaintiff/Applicant was within his right to issue a notice of termination of the tenancy. He is the proprietor of the suit premises.

I find that he has established a prima facie case with a probability of success at the trial.

22. I also find that he has demonstrated that he is likely to suffer irreparable injury if these orders of injunction are not granted. He runs the risk of the suit premises being altered completely to his detriment.

23. All in all, I find merit in this application and I grant the orders sought namely;

a. That a temporary injunction be and is hereby issued restraining the Defendants/Respondents by themselves, employees, agents, servants and/or otherwise from encroaching, trespassing, constructing, fencing, parking motor vehicles, obstructing the Applicant's right of access and/or access into and/or out of all that property known as Plot Number 12787/1/MN (Original No. 1499/2/1/MN) pending hearing and final determination of this suit.

b. The costs of this application do abide the outcome of the main suit.

It is so ordered.

Dated, Signed and Delivered at *Mombasa* on the *22nd* day of *November, 2017*.

L. KOMINGOI

JUDGE

22/11/2017

Mr. Koleni – I pray for a date for Pretrial.

Court – Pretrial directions on 1/3/2018

L. KOMINGOI

JUDGE