



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**  
**ELC SUIT NO. 1361 OF 2013**

**ALICE WANJIRU MWAURA T/A JALIWA PRINTERS AND STATIONERS .....PLAINTIFF**

**VERSUS**

**POLYCHEM (E.A) LIMITED.....DEFENDANT**

**RULING**

**The Application**

The application before the Court is a Notice of Motion dated 6<sup>th</sup> November 2013 filed by the Plaintiff, in which she is seeking the following orders:

1. That the Defendant be restrained from closing and denying access to Plaintiff's business (shop) known as Jaliwa Printers and Stationers on LR 209/136/120 Kirinyaga Crescent (hereinafter referred to as "the suit premises"), until this case is heard and determined.
2. That the Defendant be ordered to open the said premises which it closed on Friday, 20<sup>th</sup> September 2013, and in which there are many of the Plaintiff's clients' property which they urgently need as well as the Plaintiff's tools of trade including expensive printing machinery.
3. That the Defendant be restrained from raising the monthly rent otherwise than in accordance with the provisions of Cap 301, or until further orders of this Court.

The grounds for the application are that the Defendant arbitrarily and without reasonable cause closed down the Plaintiff's business on 20<sup>th</sup> September, 2013 thereby causing her and her clients enormous loss and inconvenience. Further, that the Defendant has unlawfully sought to raise the monthly rent by over 80 percent and demanded immediate payment of the same, and that his conduct is oppressive and intended to cripple the Plaintiff's business

The Plaintiff gave a detailed account of the background to the dispute herein in a supporting affidavit and further affidavit she swore on 6<sup>th</sup> November 2013 and 6<sup>th</sup> August 2014 respectively. In summary she claims to have entered into a partnership in September 2011 with one Andrew Mutuku Mulumba who was running a business in the suit premises, and that they agreed to be partners under her business name being Jaliwa Printers and Stationers. Further, that the Plaintiff has been paying rent of Kshs.20,000/= per month into the account of the Defendant at Equity Bank, Westlands.

The Plaintiff further stated that on 14/8/2013 she received a letter of offer signed by one Sylvester

Ndung'u as managing Director of Homesplus Realtors Limited demanding Kshs.150,000/= being 3-months rent deposit at Kshs.35,000 per month, the rent for August 2013 and legal fees. Further, that the said Sylvester Ndung'u later informed her verbally that the amount was actually Shs.165,000/=. The Plaintiff also stated that the said demand was accompanied by a proposed lease also dated 14/8/2013, and she attached copies of the said letter of offer and lease. Further, that on 20/8/2013 the said Sylvester Ndung'u proceeded to close her business on the suit premises.

### **The Response**

The Defendant opposed the Plaintiff's Notice of Motion in a replying affidavit sworn on 23<sup>rd</sup> January 2014 by Dr George G. Gatiri, who deponed that he is the owner of the suit premises and that by a lease agreement dated 1<sup>st</sup> November 2007 he rented out one shop in the said premises to Mr. Andrew Mutuku Mulumba, at the rate of Kshs.20,000.00 per month for a term of five (5) years and (1) month. Further, that it was an express term of the lease agreement that the tenant would not assign any part to the tenancy premises without prior written consent of the landlord. A copy of the said lease agreement was annexed by the deponent.

The deponent further stated that he gave the said tenant his personal bank account where he could deposit the rent, and that on 20<sup>th</sup> January, 2013, he wrote to the said tenant to inform him that his lease agreement had expired on 30<sup>th</sup> November, 2012, and that he should hand over vacant possession immediately. However, that he did not get any response from the tenant, and that he subsequently appointed Homeplus Realtors Ltd to be the managing agent of the suit premises and instructed them to find out why the tenant had refused to hand over vacant possession of the shop after the lease had expired.

The deponent explained that Sylvester Ndung'u, a director of Homesplus Realtors Ltd informed him that he had gone to the shop and found that the person in actual occupation of the shop was the Plaintiff herein, and not Andrew Mutuku Mulumba. Further, that after discussions with Mr. Ndung'u they agreed that the Plaintiff could be allowed to take over the tenancy from Andrew Mutuku Mulumba, but on condition that she accepts to enter into a lease agreement with the landlord on terms and conditions to be specified by Homesplus Realtors Ltd, and that the rent to be charged should be kshs.35,000.00 per month.

The deponent averred that Mr. Ndung'u issued the Plaintiff with a letter of offer on 14<sup>th</sup> August, 2013, and that on 25<sup>th</sup> September 2013, in an apparent reaction to the said letter of offer, the Plaintiff herein filed a suit at the Chief Magistrates Court, Nairobi being **CMCC No. 5966 of 2013**. Further, that on 27<sup>th</sup> September, 2013 the said Chief Magistrates Court issued a mandatory injunction order, requiring the landlord to open the suit premises, and that the Plaintiff using the said order forced open the padlock that Mr. Ndung'u had put on the door to the shop, and she has remained in possession of the shop ever since.

The deponent annexed a copy of the said order, and also stated that upon filing a Notice of Preliminary Objection dated 7<sup>th</sup> October, 2013, the Plaintiff withdrew the suit in the Chief Magistrate's Court on 7<sup>th</sup> November 2013.

The Defendant also filed an affidavit sworn on 23<sup>rd</sup> January 2014 by Andrew Mutuku Mulumba, who stated that on 1<sup>st</sup> November, 2007 he became a tenant of Polychem (E.A) Ltd in a shop within Polychem House, Nairobi, by virtue of a written lease agreement signed on that day, a copy of which he annexed. Further, that it was an express term of the said lease agreement that he would not assign any part of the premises without the written consent of the landlord.

The said deponent further stated that by a written agreement dated 14<sup>th</sup> July, 2011, he sold his business in the tenancy premises to the Plaintiff, and he annexed a copy of the said sale agreement. He stated that he gave the Plaintiff the account number of George G. Ngatiri, into which he sometimes paid rent into, so that she could continue paying rent into the account. However, that it was the Plaintiff's responsibility to approach the Defendant to negotiate a tenancy agreement for herself as provided in their Sale Agreement.

## **The Issues and Determination**

The parties were directed to file and serve written submissions and the Plaintiff's counsel in submissions dated 16<sup>th</sup> October 2014 reiterated the arguments in her pleadings and asked the Court to refer this matter to the Business Premises Tribunal that is now operational.

The Defendant's counsel filed submissions dated 12<sup>th</sup> November 2014 wherein he summarized the facts of the respective parties' cases, and submitted that the Plaintiff had not brought any evidence of the rent she alleges to have paid, and had lied to the court the circumstances in which she took over possession of the suit premises by alleging that she entered into a partnership with Andrew Mutuku Mulumba, and which possession was without the landlord's consent as required by the lease agreement.

I have read and carefully considered the pleadings, annexed evidence and submissions made by the Plaintiff and Defendants. The issue arising herein is whether the Plaintiff has met the threshold for the grant of the temporary and mandatory orders of injunctions she seeks. The requirements for the grant of temporary injunctions are stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and these are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

For the grant of mandatory injunctions, the principles were set out by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** wherein it was held that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

Lastly, as to what constitutes a *prima facie* case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** stated as follows:

**“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.”**

This Court notes that the issues in dispute in this application are the nature of the Plaintiff's occupation of the Defendant's premises, and any rent due or owing by the said parties. In this regard the Court notes that section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act defines a controlled tenancy to include a tenancy of a shop, hotel or catering establishment that has not been reduced into writing, and therefore the determination of the issue whether the Plaintiff's occupation of the suit premises falls within this category falls within the jurisdiction of the Business Premises Rent Tribunal.

In addition, if the tenancy is found to be a controlled tenancy, the issue of any rent due and owing and recovery of such rent will also fall within the jurisdiction of the Tribunal as stated in section 12(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which provides as follows:

**(1) A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power -**

**(a) to determine whether or not any tenancy is a controlled tenancy;**

**(b) to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;**

**(c) to apportion the payment of rent payable under a controlled tenancy among tenants**

sharing the occupation of the premises comprised in the controlled tenancy;

**(d) where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;**

**(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 any material time in occupation of the premises comprised in a controlled tenancy;**

**(f) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;**

**(g) where the landlord fails to carry out any repairs for which he is liable -**

**(i) to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;**

**(ii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;**

**(h) to permit the levy of distress for rent;**

**(i) to vary or rescind any order made by the Tribunal under this Act;**

**(j) to administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the Tribunal considers relevant regarding rents and terms or conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the Tribunal;**

**(k) to award costs in respect of references made to it, which costs may be exemplary costs where the Tribunal is satisfied that a reference to it is frivolous or vexatious;**

**(l) to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent;**

**(m) to require a tenant or landlord to attend before the Tribunal at a time and place specified by it, and if such tenant or landlord fails to attend the Tribunal may investigate or determine the matter before it in the absence of such tenant or landlord;**

**(n) to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal.**

This Court notes in this regard that the Plaintiff claims that at the time of filing the instant application the Business Premises Rent Tribunal was not sitting. The said Tribunal is now operational, and this Court will therefore defer this dispute to the Business Premises Rent Tribunal, and the Plaintiff should file the necessary reference for relief from the said Tribunal.

In addition, I find that the Plaintiff is not entitled to the orders sought in the interim period for two reasons. Firstly, the Plaintiff has no agreement with the Defendant as regards the occupation of the suit premises, and is relying on an agreement entered into with a previous tenant as the basis of her

occupation. To this extent she has not shown a *prima facie* case.

Secondly, the Plaintiff did not disclose to this court that she had obtained previous orders as regards the suit premises, and is in actual possession of the same, and is therefore not deserving of the equitable orders she seeks as she has not come to court with clean hands. The Plaintiff's Notice of Motion dated 6<sup>th</sup> November 2013 is accordingly denied for the foregoing reasons. The Plaintiff shall meet the costs of the said Notice of Motion.

Orders accordingly.

**Dated, signed and delivered in open court at Nairobi this \_\_\_\_\_26<sup>th</sup>\_\_\_\_\_ day of \_\_\_\_\_January\_\_\_\_\_, 2015.**

**P. NYAMWEYA**

**JUDGE**