



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENT AND LAND COURT**

**CIVIL CASE NO. 396 OF 2014**

**BABUBHAI M. SHAH ..... PLAINTIFF**

**VERSUS**

**M & M SCIENCE LTD. .... DEFENDANT**

**RULING**

The matter coming up for determination is the Notice of Motion application dated 28<sup>th</sup> March 2014 brought by the Plaintiff/Applicant herein **Babubhai M. Shah T/A Magnalal Meghji Shah & Partners** against the Defendant/Respondent **M & M Science Ltd.** The application is brought under **Order 50 Rule 1, Order 40 Rule 2 (i)** of the *Civil Procedure Rules* and **Sections 1A, 1B and 3A** of the *Civil Procedure Act* seeking for orders that:

- i. **A mandatory injunction do issue against the Defendant to deliver vacant possession of shop No. 2 on LR. No. 209/4360/4 pending the hearing and determination of the suit herein.**

The application is supported by the grounds on the face of the application and also the annexed affidavit of **Babubhai M. Shah**. These grounds are:

- i. **That the landlord/tenant relationship herein was governed by a lease dated 29<sup>th</sup> March 2010 which was for 5 years and 3 months commencing on the 1<sup>st</sup> October 2007 and terminating on 1<sup>st</sup> January 2013.**
- ii. **Further, that the tenant requested renewal of the lease but the Landlord declined and informed the tenant in good time of the decision not to renew the lease.**
- iii. **Furthermore, the Landlord issued a Notice of termination of the tenancy in the prescribed form on 18<sup>th</sup> of February 2013, after the tenant refused to hand over vacant possession of the premises to the landlord.**
- iv. **However, the tenant never opposed the Notice of Termination of Tenancy and the Notice therefore took effect on the 19<sup>th</sup> April 2013, pursuant to Section 10 of the Landlord and Tenants Act Cap 301 Laws of Kenya.**
- v. **Further, the landlord filed a suit for possession of the suit premises at the Lower Court but the same has abated as the Plaintiff's advocates inadvertently failed to take out summons.**

**vi. Therefore in the interest of justice, the court should compel the tenant to give the landlord vacant possession of the premises.**

In his Affidavit in support of the Notice. **Babubhai Megji Shah**, one of the Partners of the Plaintiff averred that the Landlord/Tenant relationship herein commenced sometime in October 2007 wherein the tenant had taken possession without the express consent and knowledge of the landlord. Later, the parties entered into a lease agreement for 5 years commencing on 1<sup>st</sup> October 2007 and was to expire on 1<sup>st</sup> January 2013. However, at the end of the lease, the Defendant/Tenant sought for renewal of the lease but the landlord refused such renewal on the basis that they wanted to have the suit shop for their own use as per annexure BMS2.

He further averred that the Defendant remained adamant and wanted to continue with the tenancy and that prompted the landlord to formally issue a Notice under the lease as the annexure BMS3.

He also contended that the Defendant though aware that the lease had come to an end has refused to hand over possession of the premises to the Plaintiff prompting the Plaintiff to issue another reminder seeking possession of the premises as per annexure BMS4.

He further contended that since the Defendant refused to vacate, the said tenancy was converted to **controlled tenancy**, and the landlord therefore demanded the rent due for two months Notice period and also issued a Notice of termination of tenancy as per the prescribed forms as evidenced by BMS5 and BMS6.

He also deposed that the Defendant ignored the Notices and it is indebted to the Plaintiff in terms of mesne profits and that there is no reference made at the Tribunal challenging the **Notice** of termination of tenancy and it was his contention that the Notice took effect on 19<sup>th</sup> April 2013 pursuant to **Section 10 of Cap 301** and the defendant is now a trespasser.

The applicant further contended that he filed a suit at the lower court but it abated as their advocate inadvertently failed to take out summons to enter appearance. It was his further contention that he was not aware of any heavy investment in the building by the Defendant and relocation would not injure any good will that Defendant had. It was further contended that the Plaintiff has a hardware business in Nyeri which it intends to relocate to Nairobi hence the need for renovation of the premises for personal use and as per the Notice of Termination of tenancy. Therefore, it was in the interest of justice that the Defendant should be compelled to hand over possession of the premises to the Plaintiff.

The application is contested. **Stephen Njoroge Nganga**, the shop accountant for the Defendant swore a Replying Affidavit and averred as follows: He admitted that they entered and took possession of the premises in use with the express consent of the Plaintiff contrary to the Plaintiff's allegations. Further, that indeed they entered into a lease agreement with the Plaintiff for a period cited, however the lease created was controlled tenancy and the Plaintiff ought to have followed the laid down procedure of terminating a tenancy under **Cap 301** of the *Laws of Kenya*. He further contended that the purported Notice issued by the Plaintiff pursuant to **Section 4 (2)** of *Cap 301* is illegal and unenforceable in law as it is not in the prescribed form provided. He also deposed that they gave the Plaintiff their verbal Notice of Intention to review the lease in October 2012 and later communicated to them formally indicating their intention to review the lease and at first they had no problem only to turn around towards the end of the lease.

He further deposed that after the expiry of the lease which for all intents and purpose was controlled tenancy, the Plaintiff continued to receive rent thereby legitimizing their continued presence in the premises and any purported termination ought to adhere to the laid down procedure provided under *Cap 301 Laws of Kenya*. Therefore the Notice purportedly issued by the Plaintiff is illegal and unlawful as it is not in the prescribed form contrary to the Plaintiff's allegations. He further alleged that there is an existing reference in the Business Premises Rent Tribunal on the said premises and therefore the court has no jurisdiction.

The Respondent further contended that they have invested heavily in the premises and some of their equipment for demonstration are embedded in the premises and therefore removing and transferring them will require a lot of time. Further, that the Plaintiff has not demonstrated that they own a hardware business as alleged and/or they have the resources to engage in the business at such level as the Defendant.

It was further averred that the Plaintiff's present application is an abuse of the court process as the Plaintiff had filed a similar application in the lower court being **PMCC No. 3087 of 2013** which application was dismissed with costs for failure to comply with certain conditions set by the court as per annexure SN3. Further, that though they have been litigating with the Plaintiff over multiple frivolous interlocutory applications filed by the Plaintiff in the lower court, they have always honoured their responsibility of paying rent, which the Plaintiff has refused to accept and/or acknowledge. Further, the Respondent averred that the Plaintiff simply wants the premises to lease to a third party and not for personal use as alleged. It was alleged that the orders sought by the Plaintiff if granted are drastic and punitive and capable of crippling the Defendants investment substantively.

Moreover, the Defendant would suffer irreparable loss if the orders sought are granted as they would not be able to secure a similar premises within a reasonable time. Therefore the Plaintiff's application and suit is premature and an abuse of the court process and he prayed for its dismissal with costs.

The Plaintiff filed a further affidavit and contended that there was no competent suit pending on the Business Premises Tribunal a fact which was determined on merit by the lower court as per annexure BMS9. Further that since the lower court suit abated for failure to take out summons, no relief is capable of being granted on the same suit and hence the present suit. It was also deposed that the allegations of pending suit are unjust, dishonest, irrelevant and oppressive as it is meant to delay the trial herein, embarrass the Plaintiff and defeat the cause of justice contrary to **Article 159** of the *Constitution*.

On their part, the Defendant also filed a further Affidavit and averred that the Plaintiff's application is res-judicata as it had filed similar application in the lower court in **PMCC No. 3087 of 2013** which application was dismissed and the Plaintiff has not applied to set aside the said order of dismissal to warrant filing of the present application. It was also contended that there is no proper suit before the court since the lower court suit abated and the Plaintiff has never made any application to revive the said suit and/or leave to file the present one. Therefore, the present application and suit is therefore incompetent an abuse of the court process and ought to be dismissed with costs.

The parties herein canvassed this present application by way of written submissions. I have carefully considered the said written submissions, the attached authorities and annexures thereto and the relevant laws and I make the follow findings.

There is no doubt that the Plaintiff and the Defendant herein entered into a lease agreement on 29<sup>th</sup> March 2010. The lease was for **Shop No. 2 on LR. No. 209/4360/4** owned by the Plaintiff herein. The lease was to commence on 1<sup>st</sup> October 2007 (... now past) and it was for a period of 5 years 3 months. The lease was therefore to expire on 1<sup>st</sup> January 2013.

There is no doubt that before the expiry of the lease, the Defendant had on 9<sup>th</sup> November 2012, sought for renewal of the subject lease of **Shop No. 2 of LR. NO. 209/4360/4 Kijabe Street**. It also evident that on 18<sup>th</sup> December 2012, the Plaintiff however expressed to the defendant their desire not to renew the lease as they intended to use the premises for their own use and the Defendant were requested to make arrangements of getting alternative premises. There was a further reminder that the lease would not be renewed by a letter dated 28<sup>th</sup> January 2013 to the Defendant. Further a Notice to terminate the tenancy pursuant to **Section 4 (2)** of the *Landlord and Tenant (Shops, Hotels and Catering Establishment)* was issued by the landlord on 19<sup>th</sup> February 2013.

It is not in dispute that the Defendant is still on the premises and on 8<sup>th</sup> May 2013, the Chairman of Business Premises Rent Tribunal informed the Plaintiff's Advocate that the Defendant had not opposed

the Notice to terminate the tenancy dated 19<sup>th</sup> February 2013. However, the Defendant objected to the Notice to terminate the tenancy by their letter dated 22<sup>nd</sup> April 2013 from their advocate to the advocate for the Plaintiff (Landlord).

There is no doubt that failure to vacate the premises by the Defendant prompted the Plaintiff herein to file **Civil Suit No. 3087/2013** at the Chief Magistrate's Court, Milimani. The Plaintiff had sought for vacant possession of the said premises. However, it has been admitted that the said suit was dismissed for having abated for failure to take out summons within the stipulated period. It is the Defendant's allegations that this suit is res judicata and should be dismissed.

The Defendant had indeed filed a Notice of Preliminary Objection on 8<sup>th</sup> May 2014 which was not pursued but the points raised therein have been incorporated in the written submissions. The Defendant has therefore remained on the suit premises which prompted the Plaintiff to file this suit and Notice of Motion.

The said Notice of Motion is contested. The pertinent issues for this court to determine are:

- i. *Whether there is a pending suit in the lower court and BPRT on the same subject matter and between the same parties and whether the said suit has abated.*
- ii. *Whether the Defendant is still a Tenant of the Plaintiff.*
- iii. *Whether the Plaintiff's application is res-judicata.*
- iv. *What orders should the court make.*

The Defendant has submitted that there is a pending suit at Milimani Commercial Court being **CMCC No. 3087 of 2013** which raises similar issues as the application herein. It is indeed not in dispute that the Plaintiff had filed a suit at the lower court seeking for an eviction order. It is also evident that the said suit was dismissed for having abated. Since the said suit abated, there is no suit pending at the lower court. I will be persuaded by the Ruling in **James Gichuru vs Philip Komu Wahome & Another (2013) EKLR** where the court held that:

**“In the instant suit, though the issues and parties are similar to CMCC No. 1924/2011, which was dismissed for having abated, the court in CMCC No. 1924/2011 did not refer to the pleadings and did not hear the matter substantially. The suit in CMCC No. 1924/2011 was dismissed on technicality. Having also taken into account the provision of Article 159 of the Constitution which provides that “in exercising judicial authority, the court and tribunals shall be guided by the following principles:-**

**“Justice shall be administered without undue regard to procedural technicalities”.**

The suit having abated, there is therefore no suit pending at the lower court and the court cannot hold and find that there is a pending suit at the lower court.

The Defendant further alleged that there was a Reference pending at the BPRT: **Reference No. 486/2011**. However, there is no evidence whether the said reference is still active in the Tribunal or not. The court cannot hold with certainty that indeed there is a Reference pending at the Tribunal. The said Reference was filed before the expiry of the Tenancy period. However as at this point, the initial lease agreement expired on 12<sup>th</sup> January 2013. The court therefore holds and finds that the suit at the lower court did abate for failure to take out summons and there is therefore no suit pending at the lower court.

On the second issue of whether the Defendant is still a tenant of the Plaintiff, the court finds as follows; the Plaintiff and tenant had initially entered into a lease agreement which was to run for a period of 5 years and 3 months from 12<sup>th</sup> October 2007. The expiry date of the said leased was on 18<sup>th</sup> January 2013. The tenancy therefore between the Plaintiff and the Defendant running between 1<sup>st</sup> October 2007 and 12<sup>th</sup> January 2013 was therefore not a controlled tenancy. The said tenancy was governed by the provisions of the lease agreement. On Clause No. 14; it was stated that:

**“After the expiry of this lease no new relationship of landlord and tenant shall arise or be capable of arising otherwise than by agreement in writing signed by both parties and duly exchanged”**

The lease herein expired on 1<sup>st</sup> January 2013. The said lease was not renewed as the Plaintiff had declined to allow renewal of the lease. The Defendant applied for the renewal as provided by clause 15 but the Plaintiff declined to renew the said lease.

The Defendant had submitted that the Tenancy that existed was a controlled tenancy. However, from the terms of the lease agreement which was to run for 5 years 3 months, that was not a controlled tenancy but a tenancy governed by the terms of the lease agreement signed by all the parties.

Since the lease was not renewed, the Defendant was therefore supposed to give vacant possession to the Plaintiff. The Defendant did not do so and that prompted the Plaintiff to issue a Notice pursuant to **Section 4 (2)** of *Cap 301*. The Defendant did protest that the said Notice was not issued through the prescribed form and it is therefore illegal.

I have seen the wording of the Notice to terminate or alter the terms of the tenancy. The same are worded as per the prescribed form for the Notice to terminate or alter terms of tenancy provided by *Cap 301*. If the Defendant was not satisfied with the Notice issued to him, he ought to have filed a Reference at the Tribunal which he has not. By a letter dated 8<sup>th</sup> May 2013, the Chairman of the Tribunal confirmed that the Defendant however had not opposed the Notice to terminate the tenancy issued to it on 19<sup>th</sup> February 2013.

The lease agreement had expired on 1<sup>st</sup> January 2013. Even if the lease had converted to controlled tenancy, the Plaintiff gave a Notice to terminate the said tenancy with effect from 19<sup>th</sup> April 2013. The Defendant did not challenge that Notice and therefore the Notice to terminate did take effect on 19<sup>th</sup> April 2013.

**Section 10** of *Cap 301* provides as follows:-

**“Where a landlord has served a Notice under Section 4 of this Act on a tenant and the tenant fails to notify the landlord within the appropriate time of his unwillingness to comply with such notice or to refer the matter to a tribunal, then subject to Section 6 of this Act, such Notice shall have effect from the date therein specified to terminate the tenancy or terminate or alter the terms and conditions thereof on the rights or services enjoyed thereunder”.**

The Plaintiff submitted that the Defendant tenancy was terminated on 19<sup>th</sup> April 2013 and therefore he ought to give vacant possession. The Plaintiff relied on the case of **Prashant Sampant vs Fatuma Abgao Mohammed & Another (2004) eKLR**, where the court held that:-

**“... Where no reference was filed on time of operations of Section 10 of the Act terminates the relationship of the landlord and tenant and the jurisdiction of the Business Tribunal is ousted. The landlord is therefore entitled to seek assistance of the ordinary civil court to recover the possession of his premises”.**

I will concur with the above interpretation of the law and hold that indeed the Defendant did not file a Reference at the Tribunal upon receipt of the Notice. The Notice therefore took effect on 19<sup>th</sup> April 2013 and the tenancy stands terminated. The Defendant is not a tenant of the Plaintiff anymore.

The forth issue herein is whether the Plaintiff’s application is res-judicata.

The Defendant submitted that the application herein is res-judicata as the lower court had ruled on the same issue herein. The Defendant relied on **Section 7** of the *Civil Procedure Act* which provides as follows:

**“No court shall try any suit and issue on which the matter directly and substantially on issue has been directly on issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in account competent to any such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”.**

It is evident that the Plaintiff herein had filed a suit at the lower court raising the same issue. The same was dismissed for having abated. The suit was not heard and determined on merit though the same was before a court of competent jurisdiction ... In the case of Sameul Kiiru Gitau vs. John Kamau Gitau HCCC NO. 1249 OF 1998 (1998) KLR, the court held that:-

**“For a matter to be res-judicata it must be one on which the court has previously exercised its judicial mind and has after argument and consideration come to a conclusion on the contested matter and for this reason a matter is said to be heard and finally decided”.**

In the matter which was before the Chief Magistrate, the same was dismissed a Preliminary Objection having abated. The same was not substantially heard and determined. The court cannot therefore hold and find that the matter herein is res-judicata.

Finally, what orders should this court make?

The applicant has sought for a mandatory injunction against the Defendant to deliver vacant possession of **Shop No. 2 on LR. NO. 209/4360/4** pending the hearing and determination of the suit herein.

The orders sought by the Applicant is a mandatory one which is capable of disposing of the matter. The court is alive to the fact that such orders are only granted in very special circumstances. I will rely of the case of Kenya Breweries Ltd and Another vs. Washington O. Okeyo Civil Appeal No. 332 of 2000 IEA 109, where the court held that:

**“A mandatory injunction can be granted on an interlocutory application 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 in which the court thinks it ought to be decided at once or if the act done is 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”.**

**..... See volume 24 Halsbury Laws of England 4<sup>th</sup> Edition paragraph 945.** In the instant case, there is no doubt that the Defendant’s lease did expire and a notice to terminate tenancy was issued. The same became effective on 19<sup>th</sup> April 2013. The Defendant is therefore not a tenant of the Plaintiff and its continued stay on the suit premises amounts to trespass. This is therefore a clear case which ought to be decided at once. The Defendant continued stay and allegation that its tenancy is a controlled tenancy is an attempt to steal a march against the Plaintiff. This is therefore a plain and obvious case and the court finds and holds that a mandatory injunction can be issued.

The Plaintiff did not renew the lease agreement and it gave the Defendant notice to terminate the lease. The Defendant was therefore bound to yield up the premises to the Plaintiff/Landlord. I will be persuaded by the case quoted by the Plaintiff/Applicant: Faircase Development Ltd vs. Margaret Apondi Ototch T/A M. A. Kiosk (2005) eKLR and Kenindia Assurance Co. Ltd. vs. Njenga Muchiri T/A Njenga Muchiri & Co. Advocates (2003) eKLR where it was held that:

**“Hence the Defendant concedes that his tenancy has expired. If that be so, the law as I understand is that the tenant whose interest is determined legally like expiry of the lease then his holding becomes wrongful and is in law trespass for which damages may be recovered in respect of mesne profits”.**

In the instant suit, the Defendant tenancy has legally expired. It is in the suit premises illegally and

therefore its action amounts to trespass. The Plaintiff has therefore established the threshold for grant of injunction and specifically mandatory injunction as set out in the case of **Giella vs Cassman Brown & Co. Ltd. 1973 EA 358.**

Having now considered the instant Notice of Motion and the annexures thereto together with the written submissions, the court finds that the applicant's Notice of Motion dated 28<sup>th</sup> March 2014 is merited. The same is allowed entirely in terms of prayer No. 2. The Plaintiff/ Applicant is also entitled to costs of the application.

It is so ordered.

**Dated, Signed and delivered this 27th day of February 2015.**

**L. GACHERU**

**JUDGE**