



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 30 OF 2014**

**MOHAMED ALI GULLED.....PLAINTIFF**

**VERSUS**

**OLAD ABDIKHALIQ.....1<sup>ST</sup> DEFENDANT**

**MOHAMED ALI.....2<sup>ND</sup> DEFENDANT**

**ABDIRAHMAN MOHAMED.....3<sup>RD</sup> DEFENDANT**

**RULING**

Coming up before me for determination is two applications, Notices of Motion dated 16<sup>th</sup> January 2014 filed by the Plaintiff/Applicant (the “First Application”) and 29<sup>th</sup> January 2014 filed by the 1<sup>st</sup> Defendant (the “Second Application”).

In the First Application, the Plaintiff seeks for orders of temporary injunction restraining the Defendants from locking shop number A09 within Land Reference Number 36/VII/500 Eastleigh, Nairobi popularly known as Towhid Shopping Complex (hereinafter referred to as the “suit premises”), evicting the Plaintiff or in any way interfering with the Plaintiff’s quiet and peaceful possession, occupation and tenancy on the suit premises pending the hearing and determination of this suit. The First Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Mohamed Ali Guleed, sworn on 16<sup>th</sup> January 2014 in which he averred that since September 2013 he has had quiet possession of the suit premises paying a monthly rent of Kshs. 10,000/- regularly without default as a tenant of the 3<sup>rd</sup> Defendant. He further averred that he is a controlled tenant within the meaning of section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 of the Laws of Kenya. He further averred that he has succeeded in establishing a successful business and goodwill at the suit premises attributable to the heavy financial investment and hard work that he has put in. He added that this quiet and peaceful possession of the suit premises was interrupted on 11<sup>th</sup> January 2014 when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants served him with a letter dated 31<sup>st</sup> December 2013 addressed to one Yussuf Mohamed Ali from the Business Premises Rent Tribunal, Nairobi. He noted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are strangers to him and are not his landlords, adding that the 3<sup>rd</sup> Defendant is the manager of the suit premises. He confirmed that he enquired with the 3<sup>rd</sup> Defendant as to the identity of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants but did not receive any response, thereby leading him to file a complaint at the Business Premises Rent Tribunal No. 16 of 2014. He expressed fear that unless the Defendants and their agents are

not restrained by an order of this court, they would continue to harass, intimidate and threaten him and interfere with his business and remove his goods to his detriment and that of his business.

In the Second Application, the 1<sup>st</sup> Defendant seeks for the orders issued by this court on 17<sup>th</sup> January 2014 to be discharged and for an injunction to be issued restraining the Plaintiff and the 3<sup>rd</sup> Defendant from interfering in any manner whatsoever with the 1<sup>st</sup> Defendant's quiet and peaceful occupation, possession and tenancy of the suit premises until the hearing and determination of this suit and further that a mandatory injunction do issue directing the Plaintiff and the 3<sup>rd</sup> Defendant to restore the status quo existing before the Plaintiff's illegal acts and vacant possession of the suit premises be delivered to the 1<sup>st</sup> Defendant pending the hearing and determination of this suit. The Second Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1<sup>st</sup> Defendant, Olad Abdikhaliz, sworn on 29<sup>th</sup> December 2014 in which he averred that he has been a tenant of the 3<sup>rd</sup> Defendant in the suit premises since January 2008. He stated that the said tenancy was never reduced in writing and he was therefore a protected tenant within the meaning of section 2 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) **Act Cap. 301**. He averred that he paid the 3<sup>rd</sup> Defendant Kshs. 22,000/- as goodwill at the commencement of the tenancy and continued to pay the agreed monthly rent of Kshs. 10,000/-. He further disclosed that his understanding with the 3<sup>rd</sup> Defendant is that the tenancy is for a period of 10 years. He further stated that he has been in occupation of the suit premises together with another lady of Somali origin known to him as Anab as co-tenants in equal shares. He further stated that on or about 15<sup>th</sup> May 2013, his said co-tenant sold her interest in the suit premises to one Yussuf Mohamed Ahmed and they entered into a written agreement to formalize the relationship. He added that he has peacefully had quite possession of the suit premises paying the agreement monthly rent to the 3<sup>rd</sup> Defendant until sometimes towards the end of 2013 when the Plaintiff called him and informed him that Yussuf Mohamed Ahmed had sold his share to him and was henceforth his co-tenant. He further stated that the Plaintiff called him again claiming to have bought the goodwill of the entire suit premises and demanded that he handover possession to him. He further stated that the Plaintiff started to issue criminal threats to him leading him to report the matter at Pangani Police Station vide OB No. 55/3/1/2014. He confirmed having paid the rent for January 2014 to the 3<sup>rd</sup> Defendant. He further added that he was subsequently surprised to receive court process in this suit. He stated further that the Plaintiff misled the court that he has been in possession of the suit premises prior to obtaining the court orders herein. He further stated that upon obtaining the court orders herein, the Plaintiff proceeded to break into the suit premises and gained possession thereof. He further disclosed that prior to the Plaintiff forcibly taking possession of the suit premises, he was negotiating with a tenant who was willing to take up the suit premises. He confirmed that up to last year, they have been letting the suit premises to willing tenants and Yussuf would collect the rent and divide it equally and hand over his share and they had not had any problems. He added that Yussuf is no longer in the country and had apparently left after colluding to dispossess him of the suit premises with the Plaintiff.

In response to the Second Application, the Plaintiff filed his Replying Affidavit sworn on 7<sup>th</sup> February 2014, in which he denied the purported tenancy of the 1<sup>st</sup> Defendant in the suit premises and instead averred that he is the tenant of the suit premises. He denied any awareness of an agreement between the 1<sup>st</sup> and 3<sup>rd</sup> Defendants and instead stated that he has been paying the monthly rent for the suit premises to the 3<sup>rd</sup> Defendant without default and further that he has been transacting business in the suit premises. He denied any knowledge of the alleged co-tenant known as Anab and instead stated that Yussuf Mohamed Ahmed had a sub-lease agreement with the landlord of Towhid Shopping Complex, a copy of which he annexed. He averred that he entered into an agreement with the said Yussuf Mohamed Ahmed for the sale of the suit premises in the presence of the 3<sup>rd</sup> Defendant. He annexed the agreement dated 10<sup>th</sup> September 2013. He further averred that he has been in possession of the suit premises since 10<sup>th</sup> September 2013 when he signed the agreement. He denied any awareness of any arrangement between the 1<sup>st</sup> Defendant and the said Yussuf Mohamed Ahmed. The 1<sup>st</sup> Defendant filed a Supplementary Affidavit sworn on 14<sup>th</sup> February 2014 in response wherein he stated that as he was not in Kenya most of the time, he had entrusted the role of the day to day management of the suit premises to Yussuf Mohamed Ahmed who would liaise with the 1<sup>st</sup> Defendant's relatives who live in Kenya. The 3<sup>rd</sup> Defendant,

Abdirahman Mohamed, also filed his Replying Affidavit sworn on 14<sup>th</sup> February 2014 in response to the Second Application in which he denied the alleged tenancy of the 1<sup>st</sup> Defendant stating that the Plaintiff is the current tenant of the suit premises. He denied knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and stated that they are unlawfully interfering with the suit premises. He confirmed that the Plaintiff has been paying the monthly rent for the suit premises faithfully and is in occupation of the same and is transacting business therein. He denied ever having entered into an agreement with the 1<sup>st</sup> Defendant as alleged and further added that the alleged co-tenant of the 1<sup>st</sup> Defendant known as Anab is a stranger to him and a trespasser. He further denied any knowledge of an agreement between the 1<sup>st</sup> Defendant and Yussuf Mohamed Ahmed, stating that Yussuf Mohamed Ahmed had a sub-lease agreement for the suit premises in his own name. He further added that in his capacity as the manager of Towhid Shopping Complex, he witnessed an agreement between the Plaintiff and the said Yussuf Mohamed Ahmed for the sale of the suit premises to the Plaintiff. He further confirmed that the Plaintiff has been in possession of the suit premises since 10<sup>th</sup> September 2013 when he signed the agreement with Yussuf Mohamed Ahmed. In the circumstances, the 3<sup>rd</sup> Defendant sought for the Second Application to be dismissed with costs.

I am required to determine whether the Plaintiff/Applicant is entitled to an order of temporary injunction which he seeks in the First Application and further whether to discharge the interim orders issued to the Plaintiff and instead grant the 1<sup>st</sup> Defendant the temporary injunction and mandatory injunction against the Plaintiff which he seeks in the Second Application. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

Has the Plaintiff or the 1<sup>st</sup> Defendant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”**

In an interlocutory application, it must be emphasized, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence as in the present case or disputed propositions of law. The Court is, nevertheless, not excluded from expressing a *prima facie* view of the matter. I think that one of the key issues in this matter is the question of who is in possession of the suit premises at the moment and in the time leading up to the filing of this suit together with the First Application. Both the Plaintiff and the 1<sup>st</sup> Defendant claim to be in possession. This scenario is not possible. The view of the 3<sup>rd</sup> Defendant, the manager of Towhid Shopping Complex, is crucial. The 3<sup>rd</sup> Defendant has stated under oath that he does not know the 1<sup>st</sup> Defendant but asserted that the Plaintiff is the one who has been in occupation of the suit premises from 10<sup>th</sup> September 2013 when he bought the suit premises from one Yussuf Mohamed Ahmed, a previous tenant thereof. Copies of the said agreement dated 10<sup>th</sup> September 2013 and the sub-lease of Yussuf Mohamed Ahmed, have both been produced before this court. On his part however, the 1<sup>st</sup> Defendant also claims to be in possession of the suit premises while claiming that the Plaintiff forcibly obtained possession thereof through the interim court order he obtained from this court on 17<sup>th</sup> January 2014. However, the 1<sup>st</sup> Defendant admits that he is not ordinarily resident in Kenya and has been leaving all the day to day

running of the suit premises to the stated Yussuf Mohamed Ahmed with whom he communicates through his relatives who reside in Kenya. Both the 3<sup>rd</sup> Defendant and the Plaintiff have refuted this claim as being false. The truth of this assertion or otherwise is an issue best left to the trial court but for my purposes, and at this interlocutory stage of the proceedings, I find that the Plaintiff has succeeded in showing this court that he has a prima facie case with high chances of success at the main trial but the 1<sup>st</sup> Defendant has not.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

**“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”**

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's rights.

In whose favour the balance of convenience tilts? In light of my preliminary finding that the Plaintiff is the one in possession of the suit premises, I find that the balance of convenience tilts in his favour and he should be allowed to continue to remain in occupation thereof pending the hearing and determination of this suit. In light of the foregoing, I hereby allow the First Application. Costs shall be in the cause.

Further to the above, the 1<sup>st</sup> Defendant sought a mandatory injunction directing the Plaintiff and the 3<sup>rd</sup> Defendant to restore the status quo existing before the Plaintiff's illegal acts and vacant possession of the suit premises be delivered to the 1<sup>st</sup> Defendant pending the hearing and determination of this suit. The leading authority on this issue is the case of **Locabail International versus Agro Export (1986) 1 ALLER 901** wherein it was stated at follows:

**“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once, or where the injunction was directed at simple and summary act which could easily be remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”**

In this particular case and in light of my sentiments set out earlier as to why I have declined to grant a temporary injunction to the 1<sup>st</sup> Defendant, I do not consider this a case in which a mandatory injunction may be rightly granted. Accordingly, I decline to grant the sought after mandatory injunction.

In light of the foregoing, I hereby dismiss the Second Application. Costs shall be in the cause.

**DELIVERED AND SIGNED IN NAIROBI THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2015.**

**MARY M. GITUMBI**

**JUDGE**