REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 30 OF 2015

FORTHHOTEL LIMITED T/COAST

CAR PARK & AMVESMENT CENTRE.....PLAINTIFF

-VERSUS-

TOURISM FINANCE CORPORATION.....DEFENDANT

RULING

1. The notice of motion dated 24th February 2015 is brought under section 1 A,

1 B and 3 A of the Civil Procedure Act and Order 40 Rule 1, 2, 3, 5 and 9 of the Civil Procedure Rules. In the application, the plaintiff seeks for Orders;

(c) Pending the hearing and determination of the proceedings between the parties in the Business Premises & Rent Tribunal in case No BPRTC No 17 of 2015 and the present suit an Order of injunction do issue restraining the defendant either by themselves, their agents, employees or any other person from offering for sale, selling and or leasing suit property and in any manner interfering with the plaintiff's occupation and use of the tenancy property known as L.R No MSA BLOCK XXV/169, Mombasa County.

(d) Costs of the application be provided for.

2. The application is premised on 14 grounds on the face of it and on the supporting affidavits of Zakayo Kagombe sworn on 24.2.2015 and 30th April 2015. The brief case of the applicant's claim for bringing the application include;

i, That plaintiff is the defendant's tenant in the suit premises

ii, Notice to terminate the tenancy has been served upon the plaintiff who then filed a reference to contest it.

iii, The defendant has put up the suit property for sale.

iv, Eviction without due process is illegal and the defendant has threatened the plaintiff with eviction

v, The plaintiff carries on business in the disputed premises.

iv, The tenancy is protected.

3. The application is opposed by the grounds of opposition that the application is incompetent, misconceived and an abuse of the process of the court. The defendant states further that the application is unmerited and the defendant being a government agency, there lies no protected tenancy. Lastly that the application is a ploy to unjustly deprive the defendant its legal rights as to ownership of the subject property

4. The advocates then filed written submissions which cited several case law for and against the application and which they have asked me to consider in determining the application. The applicant submits that although leases are of times absolutes, at the expiry of the term, parties can either renew it, terminate or get into another form of tenancy. That the applicant has enjoyed exclusive possession and in his view, he became a periodic tenancy as defined under section 60(2) of the Land Act 2012. The applicant continued that since their relationship with the respondent is not penned down, the applicable law is Landlord & Tenant (Shops, Hotels and Catering Establishment) Act Cap 301 which clothes the applicant with protection under section 4(1) and (2).

The respondent was thus required to issue a notice to terminate the tenancy inthe prescribed form under this Act.

5. The applicant submitted further that the letter issued by the respondent dated 10.2.2015 expressing an interest to sell the property did not amount to a proper notice. This lack of proper notice then gives the applicant a good case and therefore his action in filing BPRT case No 17 of 2015. The applicant submitted that it filed this suit because the Tribunal cannot issue injunction Orders and relied in the Case of **Anthony Muli T/A Mutembei Muthoka General Stores VS Kilalani Farmers Co – Op Society Ltd E & L No 467 of 2014.** Further that the Provisions of Cap 301 does not oust the jurisdiction of this court to hear and determine this dispute under article 162 (2) of the Constitution and Section 13 of the E & L Court Act. The applicant annexed 6 other high court decisions to support his prayer for injunction.

6. The applicant submits that it will also suffer irreparable loss if he is evicted unprocedurally as he has been carrying on business in this premises for over 20 years as relocation was not contemplated. Secondly if the orders are not granted then this suit will be rendered nugatory. The applicant concluded that it has demonstrated a prima facie case and the court should grant the Orders in order to preserve the status quo pending the determination of the reference before the tribunal so as not to render its decision an act in vain.

7. The respondent submitted that it is a body co-operate duly established by the Tourism Act. The respondent submits it is the rightful lessee from the Government of Kenya of the property known as Mombasa Island/Block XXV/ 169 for a term of 99 years effective 1.1.1990. It admits leasing this property to the applicant on 6.8.1998 for <u>five years</u> and one month. The lease expired in 2002 and was not renewed but it allowed the applicant to continue using the property to be delivered on demand. In 2012, the respondent resolved through its board to sell this property and therefore proceeded to issue the applicant with notice of the intended sale.

8. The defendant then continued submissions whether there can be a controlled tenancy and whether the court has jurisdiction to entertain the application. It submits that being a state corporation, the provision of Section 2 (1) of Cap 301 does apply to it excluding tenancy between the applicant and itself not being a controlled tenancy. In support of this submission, it cited case of **Eliud Wanyama VS Kenya Plant Health Inspectorate Services (KEPHIS) (2010) eKLR** which quoted the proviso to section 2 (1) of Cap 301. Koome J. (as she then was) also held that Section 12 (4) of Cap 301 gave the Tribunal the Tribunal sufficient powers to make any orders in reference to filing this suit both here and before the tribunal. The respondent contends that this suit and reference before the BPRT are all misconceived, bad in law and abuse of the court process and therefore the application should be dismissed with costs.

9. On whether to grant the injunction sort, the respondent submits that the application has failed to meet the threshold set by law. It continued that article 40 of the Constitution entitles it to enjoy and use their

property and to sell the the property by way of public auction to meet their other financial obligations having served the plaintiff sufficient notice. The respondent also referred to Section 24 (a) of the Land Registration Act which observes all rights and privileges as a registered owner. The respondent continued that the applicants' claim to force control of the suit property in the face of the respondent's title documents is a scheme to illegally acquire the land which is an affront to the respondent's right to property. Further that the respondent served notice of 3 months which was sufficient notice and the plaintiff expressed an interest to buy.

10. Lastly on the heading of irreparable loss, the respondent submits that applicant is not likely to suffer damages that cannot be compensated. This is because they never granted the applicant permission for additional/alterations of the subject property and the lease required the applicant to re – instate the premises to their original condition. The respondent submits further that he will suffer irreparable loss if the orders are granted as they will lose income intended to be utilised to avoid risk in contractual obligation with architects in rehabilitation of Utalii House in which 30% has been paid. It urged the court to dismiss the application with costs.

11. Having considered the issues raised in the pleadings and the submissions rendered this court finds the following issues for its determination of the application :-

i, Whether the tenancy relationship between the applicant and respondent was controlled.

ii, Whether the notice issued was sufficient

iii, Whether the application is misconceived and an abuse of the court process.

On the point of controlled tenancy, the applicant submitted that although there there is no lease existing in writing, he has carried on business in the suit premises for over 20 years and therefore the tenancy is protected. The defendants submits other wise on the basis of the proviso to Section 2 (1) of CAP 301.

12. The proviso to Section 2 (1) of Cap 301 reads thus :-

“Provided that no tenancy to which the government, the community ora local authority is a party whether as landlord or as tenant shall be acontrolled tenancy”.

In the plaint, the applicant described the respondent as “a statutory body established under the laws of Kenya offering tourism finance services”. It is within the applicant's knowledge that the respondent is a government corporation. To begin with, the case law cited by the applicant all which were persuasive did not relate to a government body. Secondly, the cases discussed the dispute on rent where either a landlord was levying for rent arrears or rent not agreed between the tenant and the landlord. This dispute relates to a landlord who wants to obtain vacant possession to sell the premises for its desired needs. It is my finding therefore that the tenancy in place was not controlled by operation of the law.

13. The second question is whether the notice issued was sufficient. The notice dated 10th February 2015 was sent to the applicant by registered mail. The process of sale was expected to take at least 3 months from the date of advertisement in the daily newspaper of the Nation or Standard newspaper. The applicant acknowledged the notice and responded through their letter dated 13.2.15 where they complained of the developments they have undertaken on the suit premises valued at Kshs 13 Million as at 2008. The applicant in that letter expressed the intent to buy or go into joint venture with KTDC and looked forward to a positive response. By the content of this notice, the applicant had three months from the date of advertisement to move out or bid for the purchase of the suit premises.

14. The applicant was unhappy with the termination notice thus filed a reference because according to him, it was not given in the form prescribed in Cap 301. I have found in paragraph 12 above that this is not a controlled tenancy hence no format was required to be followed in issuing the notice and the notice cannot be said to be defective. Besides not being served on the format alleged, the applicant has not complained on the duration given as being insufficient. As regards the question of the right vacant

possession, the Court of Appeal has held in the case of **Katsuri Limited Vs Nyeri Wholesalers Limited (2014) eKLR** "that a tenant cannot impose himself on a landlord who decides to take control of his premises". This right is buttressed by the provisions of Section 24 of the Land Registration Act and article 40 of the constitution. In the result I find the notice served upon the applicant was sufficient.

15. The last issue is whether the application is misconceived and an abuse of the court process. The respondent submits it is misconceived because Section 12 (4) of Cap 301 clothes the Business Premises tribunal with jurisdiction to make such orders as are deemed sufficient. I have read the provisions of this section but it does not clearly give the tribunal power to issue injunction. In any event as put by the applicant, such powers cannot oust the jurisdiction of this court as provided under Section 13 of the Environment and Land Court Act. Further there is no similar application pending before the tribunal. For this reason, I do not think the present application is an abuse of the court process.

16. In conclusion, the application fails for the twin reasons that the tenancy is not controlled and sufficient notice was served. There is no evidence before court that a prima facie case is established and or there is irreparable loss likely to be suffered by the applicant. The same is dismissed with costs to the respondent.

Ruling date and delivered this **18th** day of **September, 2015**

A. OMOLLO

JUDGE