



**REPUBLIC OF KENYA**

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

**ENVIRONMENTAL AND LAND DIVISION**

**ELC CIVIL SUIT NO. 85 OF 2013**

**FLYING DOCTORS SOCIETY OF AFRICA..... APPLICANT**

**Suing through Eunice Kiereini and John Mramba being the**

**Chairperson and Vice Chairperson respectively**

**VERSUS**

**AFRICAN MEDICAL AND RESEARCH..... RESPONDENT**

**FOUNDANTION (AMREF)**

**RULING**

The Applicant on 26<sup>th</sup> September 2013 filed a Notice of Motion stated to be made under section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Acts, Cap 301 of the Laws of Kenya and principally sought the following orders:

1. That pending the hearing and determination of this application and the reference an order do issue restraining the Landlord/Respondent its servants or agents from in any manner taking possession of harassing, intimidating, terminating, purporting to terminate and/or in other manner interfering with the Tenant's occupation of approximately 1240 Square feet on the first floor of **AMREF** House and approximately 150 square feet o the Ground floor of Michael woods clinical and Research Centre within the same compound (“**the premises**”).
2. That an order be issued staying the Landlords/Respondent's Notices dated 25<sup>th</sup> June 2013 and 24<sup>th</sup> September 2013 pending the hearing and determination of this application and the reference.
3. That further and in the alternative the Tribunal be pleased to declare the Landlord's/Respondent's Termination Notices dated 25<sup>th</sup> June 2013 and 24<sup>th</sup> September 2013 as unlawful and therefore null and void.

The applicant's application is supported on the grounds that appear on the body of the application and on the annexed affidavit of **Eunice Kiereini** sworn on 26<sup>th</sup> September 2013. It is the applicant's contention that their relationship with the Respondent is that of a tenant and Landlord and that theirs is a controlled tenancy falling under the provisions of the Landlord and Tenant Act, cap, 301 of the Laws of Kenya. The Applicant's claim to have occupied the suit premises for over the last 40 years during which period they have committed financial resources totaling over **US\$ 10,000,000.00** to facilitate their occupation of the premises and to enable them to render their services to the members and the public.

The applicants state by a contract dated 23<sup>rd</sup> May 2005 the applicant and the Respondent documented various aspects of their relationship as relates to the services and obligations regarding the funding of the Respondent and the provision of air ambulance services to members of the Applicant. The Applicant however contends that this contract did not relate to and/or concern occupation of the suit premises by the Applicant. The Applicant avers that the contract dated 23<sup>rd</sup> May 2005 was merely an agreement made at “**arms length**” between the parties to appropriately define the roles and obligations between the parties for their better functioning interse and that the contract neither created a licence and/or tenancy agreement. The Applicant indeed avers before entering the contract they had operated in the suit premises for well over 30 years without any form of written agreement respecting the applicants occupation of the premises.

The applicants state that the Respondent by a letter/notice of 25<sup>th</sup> June 2013 the Respondent terminated the contract dated 23<sup>rd</sup> May 2005 and through the same letter/notice purported to give notice to the Applicants to vacate the suit premises on or before 30<sup>th</sup> September 2013. The Applicants vide a letter dated 3<sup>rd</sup> July 2013 annexed and marked “**EK8**” to the replying affidavit by **Eunice Kiereini** responded to the said notice stating “**We are not aware of a license Agreement regarding our tenancy. The only agreement we are aware of is the “Arms length Agreement” between AMREF and FDSA.**”

**Kindly send us a copy of the license of the premises”.**

The applicant avers that the Respondent persisted with its threat to evict the Applicant as attested by the Respondent’s letter of 24<sup>th</sup> September 2013 in which the Respondent reiterated that the Applicant was required to vacate the suit premises on or before 30<sup>th</sup> September 2013. This provoked the instant suit as the Applicant contends that they are in occupation of the suit premises as protected tenants and that the termination of the contract dated 25<sup>th</sup> June 2013 and the letter of 24<sup>th</sup> September 2013 were not notices as contemplated under the provisions of Cap 301 that govern controlled tenancies as the one existing between the Applicant and the Respondent. The Applicant therefore contends the Respondents purported notices of 25<sup>th</sup> June 2013 and 24<sup>th</sup> September 2013 are illegal and null and void and of no legal consequence.

**Dr. Teguest Guerma**, Director General of the Respondent filed a replying affidavit sworn on 9<sup>th</sup> October 2013 in opposition. The Respondent through the replying affidavit denied there was ever a landlord and tenant relationship between the parties or that the Applicant has ever paid rent for use of the suit premises and contended the Applicants occupation of the Respondent’s premises was purely contractual based on the functions and objectives of the applicant as set out in the constitution. The Respondent denies they had any obligation in law to issue the Applicant Notice under the provisions of the Landlord and Tenant (shops, Hotels and catering Establishments) Act since there was no rent dispute or tenancy in issue. The Respondent states that the relationship with the Applicant was created by mutual agreement emanating from the objectives of the Applicant.

The Respondent states that the objects of the Applicants are:

- i. **To support the flying doctors services of AMREF in Africa,**
- ii. **To enable members of the Applicant while in Kenya, Uganda, Tanzania, Rwanda and Burundi, or while in any other country in Africa in which the Flying doctors services of AMREF operates, to receive special medical care and transport in an emergency situation.**

The Respondent contends the objectives of the Applicant are directly linked with the services rendered by the Respondent and that the Respondent allowed the Applicant to continually use its premises as they undertook their objectives as per their constitution. The Respondent concedes that the agreement dated 23<sup>rd</sup> May 2005 did not create any tenancy but contends that the Respondent supported the Applicant in terms of office space owing to their objectives as per the constitution and as provided in the agreement between the parties. The Respondent avers that the funds that were received by the Respondent from the Applicants were for services rendered or other objectives and obligations as under the constitution and the

agreement. The Respondent thus avers that once the notice terminating the relationship was issued on 25<sup>th</sup> June 2013 the Applicant was obligated to yield the suit premises in vacant possession.

The parties have filed written submissions as directed by the court. The applicant filed their submissions on 24<sup>th</sup> December 2013 and further submissions in response to the Respondent's submissions on 11<sup>th</sup> February 2014. The Respondent filed their submissions on 27<sup>th</sup> January 2014. The parties have in their respective submissions articulated their rival positions. The Applicant maintaining that the parties are in a controlled tenancy relationship to which the provisions of Cap 301 Laws of Kenya must apply and the Respondent taking the position that the parties over a long period had a mutual arrangement/Agreement that was reduced into a written agreement vide the contract dated 23<sup>rd</sup> May 2005 which set out the full terms of the relationship between the parties. This agreement was terminated by the Respondent on 23<sup>rd</sup> June 2013 resulting in the demand by the Respondent to the Applicant to vacate the suit premises.

The issues that arise are whether the Applicant's occupancy of the suit premises constituted a tenancy relationship that was governed under the Landlord and Tenant Act Cap 301 of the Laws of Kenya and whether the notice by the Respondent dated 25/6/2013 the notice terminating the agreement/contract dated 23<sup>rd</sup> May 2013 was a valid notice to terminate the **"tenancy relationship"**. Secondly there is the issue whether the contractual agreement of 23<sup>rd</sup> May 2005 created a license as contended by the Respondent in their notices of 25<sup>th</sup> June 2013 and 24<sup>th</sup> September 2013.

I have reviewed the pleadings the annexures and the submission by the parties and indeed the principle issue for determination is what the nature of the parties relationship in regard to the occupancy of the suit premises by the Applicant was. It is not disputed that the applicant has been in occupation of the suit premises from way back as 1971 and has been paying their occupancy of the premises through the services they render. From the material placed before the court it does appear that the parties hereto have since the early 1970's operated as partners and have all through collaborated in the provision of services that the applicant is mandated to render under clause 3 of its constitution which is to **"support the flying doctors services in Africa of AMREF and to enable members of the society while in Kenya Uganda, Tanzania, Rwanda and Burundi or while in any other Country in Africa in which the Flying Doctor Service of AMREF operates, to receive special medical care and transport in any emergency situation"**. When AMREF was allocated the head title in regard to **L.R. NO.209/9970** by the Government in 1972 it is apparent the unique services by the Applicant who were even then in occupation of the suit premises were acknowledged as the specific user of **"Flying Doctor Service"** was inbuilt in the special terms under special condition 3 that states:-

**3."The land shall only be used for purposes of an office and training school in connection with the African Medical and Research Foundation and the Flying doctor service".**

In my view this special condition made the Applicant an integral part in the use of this property and that unless the Applicant ceased to carry out its mandate as per its constitution of a **"Flying Doctor Service"** I do not consider that the Respondent could properly and unilaterally purport to terminate the Applicant's use of the suit premises.

I have reviewed the Agreement/contract dated 23<sup>rd</sup> May 2005 and in my view the same did not create a license in favour of the Applicant to use the suit premises as a licensee of the Respondent. The Agreement/Contract in my view sought to better outline and define the parties responsibilities, roles and obligations as each supported the other in the execution of the parties respective mandates under their respective constitutions. The Agreement/contract makes no mention of the use of the suit premises by the Applicant and I fail to appreciate how the Respondent determined the agreement created a license so that it could terminate the license.

The letter of 25/6/2013 through which the Respondent avers the contract of 23/5/2005 was terminated in the first paragraph is worded thus-

**"Due to the termination of the contractual agreement between Flying Doctors society of Africa**

**(FDSA) and African Medical and Research Foundation (AMREF) dated 23<sup>rd</sup> May 2005 the terms which are well within your knowledge it has become necessary to terminate the license Agreement that exists between the parties...”**

A reading of this paragraph suggests there had been an earlier termination of the contract dated 23<sup>rd</sup> May 2005 and the letter of 25<sup>th</sup> June 2013 was only concerned with the termination of the license Agreement. Although the Applicants requested to be supplied with a copy of the license Agreement referred to in the letter vide their letter of 3<sup>rd</sup> July 2013 that did not happen. Indeed the applicant vide the affidavit sworn in support of the application by **Eunice Kiereini** at paragraph 9 deposes that the contract of 23<sup>rd</sup> May 2005 was terminated with effect from 16<sup>th</sup> October 2012 and the Applicant continued in occupation of the suit premises and to offer its services as mandated under its constitution. What is the nature of the relationship between 16<sup>th</sup> October 2012 and 25<sup>th</sup> June 2013 between the parties as relates to the occupancy of the premises?

The applicant having been in continuous occupation of the suit premises from the 1970's it is my view that the contract dated 23<sup>rd</sup> May 2005 did not in any manner affect and/or relate to the occupancy of the suit premises. The net effect of the contract of 23<sup>rd</sup> May 2005 was to attempt to ascribe the responsibilities and obligations as between the parties and align them for better service delivery. The contract could not and did not create any license over the occupancy of the suit premises by the Applicant. Although the Respondent makes reference to a license Agreement between the parties no such document has been exhibited. Nowhere in the contract of 23<sup>rd</sup> June 2013 is occupancy of the premises by the Applicant mentioned or referred to.

From whatever angle one looks at this matter the Applicants are in occupation of the suit premises and they have so been over the last 40 years under an unwritten agreement. The applicants render and offer their services as mandated under their constitution and use the suit premises to co-ordinate and give logistical support to their members who are spread in various countries around the region. The applicants and the Respondent's relationship is analogous to a Landlord and Tenant relationship. The Applicants are in occupation of space in the premises owned by the Respondent and they pay fees to the Respondent commensurate to the fees the Applicants are paid by their members/customers for the services they render to them. The space occupied by the Applicants in my view would fit the description of a shop as defined under Cap 301- **“as premises occupied wholly or mainly for purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth”**. **The Applicants render services to their clients/customers for moneys worth operating from these premises and for all intent and purposes the premises are used by the Applicants to effectuate their delivery of services.**

I would therefore for the reason that the tenancy arrangement/agreement between the parties has not been reduced into writing hold that the relationship between the Applicants and the Respondents is a controlled tenancy and that the same falls to be governed under the provisions of Cap 301 of the Laws of Kenya. That being the case I would therefore hold that the Notices of termination served upon the applicants were not in conformity with the provisions of Cap 301 of the Laws of Kenya and are therefore null and void and of no legal effect.

Having held that the relationship between the Applicants and the Respondents is that of a controlled tenancy and no proper Notice of termination was served I am satisfied the Applicants have established they have a prima facie case.

As illustrated by the evidence placed before the court the Applicants and the Respondents have had a relationship since 1971 or thereabouts. The Applicants have not known any other operation base and they have built their name and goodwill from these premises where they have operated from for over the last 40 years. Even though the parties may be experiencing operational difficulties between themselves that cannot be used to render it impractical for the Applicant to meet its objectives under its constitution. It is thus my view that the applicant would suffer damage that would not be compensatable in damages as any disruption of its services could expose its members/customers in need of their evacuation and emergency

services to grave danger and/or even to risk of death by reason of lack of service. Thus I hold that the Applicants have met the threshold for the grant of an injunction as established in the often cited case of **GIELLA –VS- CASSMAN BROWN & CO Ltd (1973) EA 358.**

As regards the preliminary objection taken by the Respondent I would only state that the preliminary objection is not well founded as it was really not on any pure point of law. The preliminary objection indeed called for determination of issues of evidence and facts which were contested by the parties. Since I have made a finding and holding that the relationship between the parties was that of a Landlord and Tenant and that there was no evidence of a license as contended by the Respondent I overrule the preliminary objection.

The upshot is that I find and hold that the Applicants application dated 26<sup>th</sup> September 2013 has merit and I accordingly grant the orders sought by the Applicants in the Notice of Motion in terms of prayers (2) and (3) pending the hearing and determination of **BPRT NO. 631 of 2013** pending before the Tribunal.

I award the costs of the application to the Applicants.

Orders accordingly.

Ruling dated, signed and delivered this...14<sup>th</sup> ...day of...July.....2014.

**J.M. MUTUNGI**

**JUDGE**

**In presence of:**

.....For the Applicant

..... For the Respondent