



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MISC. APP. NO. 14 OF 2014

GEORGE EMMANUEL KWICHA

T/A FINISHING POINT CLUB PUB.....APPLICANT

=VERSUS=

MICHAEL SHIDA KAZUNGU.....RESPONDENT

R U L I N G

1. On 18th June, 2014, the Applicant filed a reference in the Business Premises Rent Tribunal (The Tribunal) being Mombasa Tribunal case Number 70 of 2014. In the reference, the Applicant has averred that the Landlord/Respondent has without any colour of right proceeded to lock his business premises being Fishing Point Club; that the Landlord/Respondent has denied him access to the said business premises and that the Landlord has locked up all his stock and tools of trade.
2. On the same day, the Applicant filed in this court a Notice of Motion seeking for the following orders:
 - a. **THAT the Respondent be compelled to re-open the business premises of the Applicant forthwith.**
 - b. **THAT, the Respondent by himself, his servants and or agents be restrained from harassing the Applicant by closing his business premises or threatening to evict the Applicant pending hearing of the complaint filed in the Business Rent Tribunal inter partes.**
3. The grounds supporting the said Application are the same grounds that the Applicant has relied on in his reference at the Tribunal.
4. The Applicant has deponed that he is the proprietor of Finishing Point Club and that he has been engaged in the said business since the year 2013; that although an agreement of lease exists, the same has never been reduced into writing and that on 30th May, 2014, the Respondent locked up his business premises.
5. It is the Applicant's contention that he was not given any notice by the Respondent before the premises were locked up and that the Respondent has continued to harass him.
6. The Respondent filed his Notice of Preliminary Objection and a Replying Affidavit.
7. In the Notice of Preliminary Objection, the Respondent has stated that this court does not have jurisdiction to entertain the claim because the Business Premises Rent Tribunal has been constituted and is in existence.
8. In his Replying Affidavit, the Respondent deponed that he welcomed the Applicant to the suit premises and allowed him to establish and operate a palm wine selling joint since he was jobless.

- However, due to the noise that was generated by the Applicant, the Respondent's other tenants in the property were forced to move out of the premises.
9. The Respondent further deponed that the Applicant has paid to him a sum of Kshs. 6,000 since March 2013 out of Kshs. 135,000 that is due and owing and that the Applicant has not come to this court with clean hands.
 10. The parties' advocates appeared before me and made oral submissions which I have considered.

Analysis and Findings:

11. The Respondent's advocate submitted that this court does not have jurisdiction to entertain this claim. According to counsel, it is the Business Premises Rent Tribunal (the Tribunal) which has jurisdiction to deal with the issues raised by the Applicant.
12. It is not in dispute that the tenancy agreement between the Applicant and the Respondent is not in writing. Indeed, it is not in dispute that the Applicant's case can only be heard and determined by the Tribunal.
13. However, what is before me is the Application for an injunction pending the hearing and determination of the Reference that is now pending before the Tribunal. Indeed, it is the Tribunal that will have to determine whether a tenancy agreement between the Applicant and the Respondent exists, the terms of such an agreement and whether the Respondent is entitled to a notice before the Applicant can lock up the premises.
14. The Landlord and Tenants (Shops, Hotels and Catering Establishment) Act does not give the Tribunal the jurisdiction to grant interim orders of injunction when a matter is pending before it. It is only this court, pursuant to the provisions, of section 13(7) (a) of Environment and Land Court Act that can grant to a party who has filed a Reference at the Tribunal interim orders of injunction (**See R -Vs- Business Premises Rent Tribunal & Another, Exparte Davis Mohr Corporation Limited (2013) e KLR, Frame Ltd. -Vs- Mediterranean Shipping co. (1986) KLR 54: [1986-1989] EA 174, Nashiedas & Co. Ltd. -Vs- Nyali Air Conditioning & Refrigeration Services Ltd. Civil Appeal NO. 205 of 1995**).
15. An Applicant who has filed a Reference in the Tribunal cannot be granted an order of injunction as a matter of course. The Applicant must show that he has a *prima facie* case with chances of success and that unless the injunctive orders are granted, he is likely to suffer irreparable loss that cannot be compensated by way of damages. If the court is in doubt about the two principles, then it is required to decide the Application on a balance of convenience (**See Giella - Vs- Cassman Brown (1973) EA 358 at page 360**).
16. The Respondent has not disputed that it has locked up the premises in which the Applicant was conducting his business. Indeed, that fact is captured candidly in the Respondent's advocate's letter of 4th June 2014 in which the Respondent informed the Applicant that he was proceeding to lock up the premises for non payment of rent arrears amounting to Kshs. 129,000.
17. The Respondent has deponed that the Applicant has only paid him Kshs. 6,000 since March 2013 out of a sum of Kshs. 135,000. This fact has not been denied by the Applicant.
18. Although, *prima facie*, the Applicant was entitled to a notice before the premises were locked up by the Respondent, it behooves the Applicant to show that indeed he has been paying rent to the Respondent regularly to enable a court of equity to grant him the injunctive orders that he is seeking.
19. In the absence of evidence by the Applicant that he has been paying to the Respondent the requisite monthly rent, on the one hand, and in view of the fact that the Applicant was, *prima facie*, entitled to a notice before his premises were closed down by the Respondent on the other hand, I shall allow the Applicant's Application dated 17th June, 2014 on condition that the Applicant deposits in court a sum of Kshs. 129,000 being the amount that the Respondent is claiming as rent arrears pending the hearing and determination of the Reference in Tribunal case number 70 of 2014.
20. Each party shall bear his own costs.

Dated and delivered in Malindi this 4th day of July, 2014.

O. A. Angote

JUDGE