REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 467 OF 2014

ANTONY MULI T/A MUTEMBEI MATHOKA

GENERAL STORE……...…….PLAINTIFF

VERSUS

KILALANI FARMERS CO-OPERATIVE SOCIETY LTD….. DEFENDANT

RULING

The Applicant's Case

The application before the Court is brought by the Applicant/Tenant by way of a Notice of Motion dated 15th April 2014, pursuant to the provisions of section 4, 12(1)(b) &(m) and 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The Applicant is seeking the following orders:

a. That this Court grants orders for the preservation of *status quo* relating to Machakos Town Block 11/261 pending the hearing and determination of this application and/or Reference.
b. That this Court grants orders restraining the Respondent/Landlord from evicting, levying distress or rent, executing or in any other way interfering with the Applicant's quiet possession in regard to Machakos Town Block 11/261 (hereinafter "the suit premises"), pending the hearing and determination of this application and/or Reference.

The grounds for the application are that the Respondent has inordinately and irregularly purported to increase rent of the suit premises from Kshs.21,000/= to Kshs.300,000/=, that pursuant to the said increase instructed Auctioneers to levy distress for rent on 22nd January, 2014, and that the Applicant thereby risks losing his only source of livelihood. The Applicant also alleges that the exorbitant increase of rent is a plot to forcibly evict him, as he had obtained interim orders restraining the landlord from interfering with his quiet possession in pending references before the Business Premises Tribunal, namely Tribunal Case No. 22 of 2012, Tribunal Case No. 36 of 2012, and Tribunal Case Number 37 of 2012, all of which involve the suit premises.

The Applicant expounded on these grounds in a Supporting Affidavit and Further Affidavit he swore on 15th April 2014 and 30th April 2014 respectively. He states that he operates a business in the suit premises and that he entered into a Tenancy Agreement with the Respondent on the terms of a monthly rent of Kshs Kshs.21,000/= per month, which rent he has never defaulted in paying. The Applicant further stated that on 6th January, 2014, his advocate received a letter dated 20th December 2013 from the Respondent's Advocate informing of an increase of rent to Kshs.300,000/= with effect from 1st January, 2014, which increase he believes to be inordinate and exorbitant. Further, that his Advocates subsequently wrote a letter to the Respondent's Advocates registering his objection to the said increase, and also filed a

Reference with the Business Premises Rent Tribunal.

The Applicant explained that the Respondent's Advocates then wrote a letter to his Advocates dated 7th January 2014 demanding purported arrears from the aforesaid increase and threatening to levy distress for rent, and proceeded to instruct Auctioneers who have issued a proclamation notice. Further, that the said Machete Auctioneers went ahead and levied distress in Machakos, an area where they lack jurisdiction. The Applicant annexed copies of the said letters, of the proclamation notice dated 22nd January, 2014, and of a list of Auctioneers listing their jurisdictions as his evidence in this regard.

The Applicant in his Further Affidavit gave a summary of the various references filed and pending in the Business Premises Rent Tribunal and the interim orders given therein, and averred that this Court has unlimited jurisdiction to hear and determine this application pursuant to Article 165 of the Constitution of Kenya, 2010. Further, that the matter which was dismissed by the subordinate court at Machakos for lack of jurisdiction was Miscellaneous Application number 13 of 2013, and there has never been any similar suit filed in the High Court at Machakos.

The Applicant further averred that his relationship with the Respondent is that of a "Controlled Tenancy" as per the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, and that he has been remitting payment of rent of Kshs.21,000/= and where the payment has not been made directly to the Respondent, the same has been done through the Tribunal. He annexed correspondence on this issue between his and the Respondent's Advocates.

The Respondent's Case

The Respondent opposed the Applicant's application in a Replying Affidavit sworn on 23rd April 2014 by Michael Musyoka, its Chief Executive Officer. The deponent stated that the court lacks statutory and territorial jurisdiction to entertain the Applicant's application as the suit property is situated in Machakos, that an exactly similar suit filed in Machakos High Court was dismissed, and that the Plaintiff is shopping for another forum to raise the same issues.

Further, that there is a duly gazetted and functional Rent Tribunal seized of this matter in which the Applicant has filed identical suits seeking similar prayers, and that he is thus abusing the court process by filing multiplicity of similar suits with the hope that he will get favourable orders in subsequent courts. The deponent attached copies of pleadings in the cases filed by the Applicant in the Business Premises Rent Tribunal.

The deponent stated that the issue in dispute arose out of a tenancy agreement made on or about the year 1999, wherein the Plaintiff agreed to lease and the Respondent agreed to let the suit premises for one year only, and that the said agreement has never been renewed. Further, that the said agreement had a clause that that any party wishing to terminate the tenancy shall give the other party a two-months' notice in writing. He attached a copy of the said Tenancy Agreement.

He explained that the subject property is a one-storey building and that the ground floor is occupied by the Plaintiff, while the upper floor is unoccupied as it is in a state of disrepair. Further, that the Respondents intend to renovate the entire building, and he attached photographs of the suit premises. The deponent stated that having this realization, the Respondent through its Advocates on 21st November 2012 issued a notice dated 16th November 2012 to terminate the tenancy, which notice was two months more than the contractual two-months' notice, and shows the good faith and consideration on its part. The deponent attached the said notice dated 16th November 2012, the forwarding letter and the Applicant's Advocates acknowledgement of receipt.

That following the resolution, the Respondent drew up the plans for the intended renovations and submitted the same to the Machakos Municipal Council's Planning and Architecture Department for approval, which approval was given on 20th July, 2012. Further, that the intended developments was to be carried out within a period of two years, failure of which the approval would become null and void and

any work carried out thereafter would constitute a contravention of the said Council's building by-laws.

The deponent averred that the Respondent is at risk of losing the approval and breaching its contracts with other parties should the period of construction runs out. He stated that at the moment, the entire construction has stopped since the contractor cannot access the upper floor without interference with the Applicant, and because the debris also falls on the ground floor. Further, that the Respondent has already purchased construction material and identified contractors to carry out the necessary renovations, and has obtained a loan from Co-operative Bank of of Kshs.7,000,0000/- towards the renovation which is valid for only 24 months, which it is currently repaying at a high interest rates and yet it cannot use the suit premises. The deponent attached a copy of a letter from the Cooperative Bank of Kenya to the Respondent dated 12th July 2013 confirming the grant of the loan facility.

The deponent stated that the Respondent is suffering irreparable loss and damage as a result, as it is being unlawfully deprived of its right to renovate its own premises and derive maximum profit. The Respondent urged the Court to issue orders for eviction of the Applicant from the suit premises, or in the alternative to direct the Plaintiff to deposit in court the balance of rent arrears of Kshs.774,000/=. The deponent averred that it is unconscionable on the part of the Applicant to refuse to pay rent at market rates as advised by the Respondent, as the rent of Kshs.21,000/= was agreed upon in the year 1999, and the suit premises are not yielding any money since the costs of lands rates have overtime increased to above the said Kshs.21,000/=.

The Submissions

The parties herein were directed to file written submissions on the Applicant's Notice of Motion. The Applicant's counsel in submissions dated 9th May 2014 argued that the High Court has unlimited jurisdiction to hear this application under Article 165 of the Constitution, even in cases of controlled tenancies as held in **Moses N. Gitonga & Another vs George Gtheca Kinyanjui & Another, (2014) eKLR.** Further, that the notice given by the Respondent for the increase of rent was not proper and was not given in accordance with the provisions of section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, for the reasons that it did not give the required period of notice; did not give the grounds or reasons for the increase; and was only served on the Applicant's Advocate after one month of being given.

The Applicant's Advocate relied on the decision in **Imani & Another vs Hasham Lalji Properties Ltd, 2014 e KLR** and **Mega Fries Ltd vs Mukesh KumAr Velji Salva & 3 Others, 2005 e KLR** in this regard. He also submitted that the court should take judicial notice of the fact that the said increase from Kshs 21,000/= to Kshs 300,000/= was inordinately and excessively high.

The Respondent's counsel filed written submissions dated 12th May 2014 wherein he reiterated the averments made in its replying affidavit, and argued that the Applicant is not entitled to any of the reliefs prayed for in the application.

The Issues and Determination

I have considered the Applicant's application, the pleadings filed by the parties, and the submissions made by the parties' counsel. The first issue for determination is whether this Court has jurisdiction to hear and determine the Applicant's application. It is not disputed by the Respondent that the tenancy entered into with the Applicant is a controlled tenancy as defined by section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

It was noted by the Court of Appeal in **Caledonia Supermarket Ltd v Kenya National Examination Council (2000) EA 352**, which decision was relied upon by Kasango J. in **Moses N. Gitonga & Another vs George Gatheca Kinyanjui & Another, (2014) eKLR** and Odunga J. in **R. vs Business Premises Rent Tribunal & Another ex parte Davies Motor Corporation Limited (2013) e KLR** that the Business Premises Rent Tribunal does not have jurisdiction to grant orders of injunction. The right forum to seek an injunction is therefore in this Court even though there are references filed by the Applicant

pending in the said Tribunal.

In any event the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act does not oust the jurisdiction that this court is granted to hear and determine the dispute herein under Article 162(2) of the Constitution and section 13 of the Environment and Land Act, even though it will defer a matter to the Business Premises Rent Tribunal when it is appropriate to do so.

The second issue is whether the Applicant has established the necessary conditions for the temporary injunction sought to issue. The principles for the grant of an interlocutory injunction are settled and were set out in the case of **Giella – v – Cassman Brown & Co. Ltd. [1973] EA 358.** They are that first, the applicant must show a *prima facie* case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer an irreparable injury which could not adequately be compensated in damages; and thirdly that if the court is in doubt it should decide the application on a balance of convenience.

A determination of the question as to whether the Applicant has demonstrated a *prima facie* case revolves on whether or not the notice for increase of rent by the Respondent is governed by, and if so, was validly issued under section 4 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act. The said section provides as follows:

4. (1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.

(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

(3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.

(4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:

Provided that -

(i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;

(ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;

(iii) the parties to the tenancy may agree in writing to any lesser period of notice.

(5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.

(6) A tenancy notice may be given to the receiving party by delivering it to him personally, or to an adult member of his family, or to any servant residing with him or employed in the premises concerned, or to his employer, or by sending it by prepaid registered post to his last known address,

and any such notice shall be deemed to have been given on the date on which it was so delivered, or on the date of the postal receipt given by a person receiving the letter from the postal authorities, as the case may be.

It is evident from section 4(1),(2) and (4) hereinabove that if the Respondent wants to alter the terms of the tenancy agreement as to the payment of rent it is required to serve the Applicant with at least two months' notice in the prescribed form. The letter dated 20th December 2013 from the Respondent to the Applicant informing of the rent increase only gave a few days' notice, as the rent was to be paid with effect from 1st January 2014. The Applicant has therefore established a *prima facie* case, and the outstanding question remaining to be answered is whether he will suffer irreparable damage which will not be adequately compensated by damages if the orders he seeks are not granted.

I note in this respect that the Respondent had given the Applicant two months' notice of termination of the tenancy on 16th November 2012, which was received by the Applicant's Advocates on 21st November 2012 informing that the tenancy would terminate with effect from 1st February 2013. This termination notice was however given during the pendency of the various References filed by the Applicant in the Business Premises Tribunal. The Respondent has also brought evidence of the expenses it is incurring with respect to the suit premises, arising from approval granted to it for renovation and repayment of a loan facility to undertake the said renovations.

In addition, although the Respondent did not bring any evidence of the basis for the rental increase from Kshs 21,000/- to Kshs 300,000/= and the said increase may therefore be unreasonable, I note that the rent payable of kshs 21,000/= was agreed on between the parties herein on 20th September 1999 when they entered into their tenancy agreement. It would therefore also be unfair to the Respondent and inequitable to allow the Applicant to continue paying the same amount of rent after 15 years, pending the finalization of the dispute herein.

I therefore find that even though the Applicant has established a *prima facie* case, it will not suffer irreparable damage which cannot be compensated by damages, as the Respondent can refund whatever additional rent it will receive from the Applicant over and above the Kshs 21,000/- that it has been previously been paid as the monthly rent. This Court will therefore only allow the Applicant's prayer for an injunction on condition that he pays a reasonable amount of rent for the suit premises. This court is of the view that a reasonable amount can be calculated by factoring a 10% yearly increment in the rent from 1999. In addition, the substratum of this suit is the status of the tenancy agreement between the parties, which needs to be conclusively determined by the Business Premises Rent Tribunal which is now operational.

I accordingly order as follows arising from the foregoing reasons:

1. That this suit be and is hereby stayed pending the hearing and determination of the cases between the parties pending in the Business Premises Rent Tribunal, namely Tribunal Case No. 22 of 2012, Tribunal Case No. 36 of 2012, and Tribunal Case Number 37 of 2012.
2. That pending the hearing and determination of the said cases in the Business Premises Rent Tribunal, the *status quo* to be maintained with respect to the premises known as Machakos Town Block 11/261 shall be that the Respondent/Landlord is restrained from evicting, levying distress or in any other way interfering with the Applicant/Tenant's quiet possession of the said premises, and only on the condition that the Applicant/Tenant shall pay the Respondent/Landlord a monthly rent of Kenya Shillings Ninty Thousand only (Kshs 90,000/=) with effect from the month of July 2014.
3. The parties shall be at liberty to apply.
4. The costs of the Applicant/Tenant's Notice of Motion dated 15th April 2014 shall be in the cause

Dated, signed and delivered in open court at Nairobi this 7th day of July , 2014.

P. NYAMWEYA

JUDGE