



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 1378 OF 2013**

**HENRY GITONGA T/A HOMEBOYS STORE.....1<sup>ST</sup> PLAINTIFF**

**ISAAC MBITI T/A OBAMA CORNER SHOP.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ASHA RAMADHANI.....DEFENDANT**

**RULING**

Following the Plaintiffs' application dated 12/11/2013, this Court on 15/11/2013 granted interim injunction orders against the Defendant from evicting or interfering with the Plaintiffs' peaceful enjoyment of their tenancy on Land Reference No. 36/11/15 or in any other way dealing with the Plaintiff's property and tenancy on the said property. The Plaintiffs now want the said order confirmed pending the determination of the suit. They also want an order that the Defendant be ordered to reinstate the removed veranda canopy on the Plaintiff's shops. The application is premised on grounds that the Defendant illegally removed the veranda canopy from the Plaintiffs' shops and issued a 3 day notice to vacate or in default be forcefully evicted. The Plaintiffs aver that their business is hampered by the Defendant's action and risks to be disrupted by the threatened eviction. Consequently, that they stand to suffer irreparable loss and damage.

The application is supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff wherein he reiterated the contents of the application that he is a tenant of the Defendant paying a monthly rent of Kshs. 15,000/-. The Plaintiff deposed that the Defendant's action of issuing a notice of eviction and removing the canopy over the veranda are in an attempt to circumvent the reference filed at the **Business Premises Rent Tribunal No. 909 of 2012**. Further that the Defendant taking advantage of the absence of the Chairperson of the Tribunal erected an iron sheet wall round his shop with the intention of harassing and forcing him out of the shop. It is his deposition that the Defendant's action has denied access of his customers to the shop which is stocked with perishable items.

The Defendant swore a Replying Affidavit on 22/11/2013 in response to the application. The Defendant referred the court to 3 Notices of sanitation of Business Premises from the Public Health Department of City Council of Nairobi marked "AR1" "AR2" and "AR7" deposing that she had been served with the said notices requiring her to comply within the specified period as stated therein. She deposed that the notices required her to provide, among others: additional toilet facilities for her tenants and their customers; to unblock drainage systems; to repair cracked floors of the entire premises; and to clean and

redecorate the internal and external walls. It is her disposition that she issued all tenants in the premises with a notice to terminate their tenancies to pave way for the repairs as the same are of a nature that they could not be undertaken with the tenants still in occupation. It is deposed that all tenants vacated the premises to pave way for the renovations except the Plaintiffs who filed references at the Tribunal opposing the said termination.

The Defendant deposed that she is desirous to comply with the notices as the building is in a deplorable state and pose a great health hazard to the tenants, their customers and neighbors but that to date she has not. Further that she is aware that she will be personally liable in the event that the premises cause any harm to any person including the Plaintiffs. Additionally, that she risks having the premises demolished by the Council at her costs if she does not comply with the notices. The Defendant deposed that the Plaintiffs had a period of one year since 31/10/2012 when she issued a notice to terminate the tenancy to look for an alternative space for their businesses. Therefore, that the multiplicity of the suits is a scheme to frustrate her from complying with the notices issued by the council. The deponent urged the court to dismiss the application, deposing that the Plaintiffs had not established a prima facie case with chances of success, and that the loss said to be suffered by the Plaintiffs, that is, the perishable items, could adequately be compensated in damages. Further that the balance of convenience tilted in her favour as she risked loss of revenue from the unused shop and being found in breach of the notices hence demolition of her property.

The Defendant swore a Further Affidavit on 14/5/2014 wherein deposed that there was no basis on which the ex-parte orders obtained by the Plaintiff on 13/11/2013 should be sustained or confirmed by the Court on the basis that the Plaintiffs vacated the premises on 28/12/2013. The deponent annexed photographs of the premises showing the empty premises with the newspaper of the said date. The Defendant urged the court to vacate the said orders of injunction.

The application was canvassed by way of written submissions. Nyarangwi & Associates Advocates for the Plaintiffs filed submissions dated 15/9/2014 wherein counsel submitted that the Defendants were still in occupation of the premises. Counsel also deposed that the Plaintiffs had established a prima facie case having demonstrated that the 3 day notice was illegal and the Defendant on her own admission removed the canopy of veranda causing the Plaintiff substantial loss. It was further submitted that the Plaintiffs' business is their source of livelihood and their eviction will have serious repercussions to their day to day living, hence impossible to compensate them with damages. On the limb as to balance of convenience, counsel submitted that: the Plaintiffs are lawful tenants in occupation duly paying rent; the orders granted by this court will deter the council from prosecuting the Defendant for non-compliance with the notices; and that the Plaintiffs are willing to negotiate with the Defendant as to the modalities of the repairs.

Mohammed Muigai & Company Advocates for the Defendant filed submissions dated 22/7/2014. Counsel referred the court to the provisions of **Section 124 of the Public Health Act** and submitted that the Defendant risked having her premises demolished for failing to comply with the notices. Counsel submitted that the existence of four suits is a clear indication that the Plaintiffs were forum-shopping in different fora. Counsel also submitted that the suit herein is res judicata, following a ruling deliver over the same subject matter by the Chief Magistrate's Court. Further submissions made were that the court lacked jurisdiction to entertain the suit in view of the references filed at the BPR Tribunal. As to whether the Plaintiffs had met the threshold to warrant the grant of injunction orders, counsel submitted that they had failed to establish a prima facie case with chances of success, neither had they shown the irreparable loss likely to be suffered that could not be compensated by an award of damages. Lastly, counsel submitted that the balance of convenience tilted in favour of the Defendant who demonstrated that the issuance of the notice to vacate was as a result of the notices of sanitation issued by the council.

Having considered all the pleadings and the written submissions the Court find that; before I delve onto the merits of the application, it is important to address the issue of the jurisdiction of this court in respect to disputes arising out of controlled tenancies. It was submitted for the Defendant that in view of the references filed at the BPR Tribunal by the Plaintiffs, this court lacked jurisdiction to further adjudicate over this matter. Indeed there are two references filed in at the Tribunal in relation to this dispute. The Plaintiffs aver that they sought conservatory orders at the Chief Magistrate's Court at the time the

Tribunal was not in operation. However, that their application was dismissed for want of jurisdiction prompting them to approach this court. The Constitution at **Article 162 (2) and Section 13 of the Environment and Land Act** confers original and unlimited jurisdiction to this court to hear and determine disputes relating to the environment and the use, occupation of and title to land.

This Court's jurisdiction notwithstanding, the Court is cognizant of the existence of the **Landlord and Tenant (Shops, Hotels And Catering Establishments) Cap 301** which makes provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto. The said Act establishes the BPR Tribunal at Section 11 to adjudicate over disputes in respect of controlled tenancies. In view of the provisions of the law hereinabove cited, in what circumstances does this court exercise its original and unlimited jurisdiction? The Tribunal has the specific powers contained in **paragraphs (a) to (n) of section 12(1)**, therefore anything not spelled out to be done by the tribunal is outside its area of jurisdiction. See **Republic v Business Premises Rent Tribunal & another & Exparte Davies Motor Corporation Limited Misc. Appl. No. 67 of 2012 [2013] eKLR**. This Court further associates with the reasoning of Ombwayo J. in the case of **Kanthilal Ramji Bhundia & 2 others v Joseph Waitiki Ndegwa ELC Nyeri Misc. Appl. No. 2, 3 & 8 of 2014 [2014] eKLR**. The essence of the court's finding was that this court can exercise its original jurisdiction in circumstances where:

- a. *the statute is silent on what is to be done in the event of absence of the Tribunal; or*
- b. *the tribunal lacks powers to issues certain order such as injunctions and declarations.*

Having established that this court can entertain an application for injunction, it follows therefore that it must determine whether the Plaintiffs have met the threshold enunciated in **Giella v Cassman Brown & Co. Ltd (1973) EA 358** that first, an applicant must show a prima facie case with the probability of success. Secondly, an interlocutory injunction will not normally be granted unless applicant will suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, where the court is in doubt, it will decide the application on a balance of convenience. From the foregoing, it undisputed that the Plaintiffs are the Defendant's tenants and that the Defendant issue a notice to terminate the tenancy. The dispute according to the Plaintiff is that they were given a 3 day notice to vacate, and the threatened eviction will hamper their businesses. Further that the Defendant's action of bringing down the canopy over the veranda and erecting a iron sheet perimeter fence around the premises amounted to forceful evictions. The Defendant on her part avers that the Notice to Terminate was as a result of Notice of Sanitation of Business Premises from the Public Health Department of the Council. The Defendant contended that the tenants needed to vacate to enable her comply with the said notice, else, risk the demolition of her premises at her costs.

Whether or not to grant an injunction is in the discretion of the Court. The discretion is a free one but must be exercised judicially. I have perused the Plaintiff's documents which comprise of the Notice to Terminate. The same is in a prescribed form as required under Section 4(2) of Cap 301. The notice is dated 31/10/2012 and indicates that the tenancy will be terminated with effect from 31/12/2012. The notice specifies the grounds upon which the requesting party seeks termination and also asks of the recipient to notify the Landlord whether or not he agrees to comply with the notice, in accordance with Section 4(5). The Defendant's supporting documents comprise of photographs showing the deplorable state of the premises and the three notices served upon her for purposes of compliance. There is also a Charge Sheet marked "AR10" demonstrating that the Defendant is already facing charges at the City Court Case No. 1294A of 2013 for failing to comply. From the foregoing, it is evident that the notice issued by the Defendant was sufficient and in accordance with the provisions of Cap 301. In that regard, I find that the Plaintiffs have failed to establish that theirs is a prima facie case with probability of success.

As to whether they are likely to suffer loss, the Plaintiffs averred that they stock fast moving consumer goods which are perishable in nature and any disruption of their business will result to loss. In response, the Defendant stated that the subject matter of the loss, being food items, is quantifiable therefore can adequately be compensated by damages. There also photographs annexed to the Defendant's further affidavit showing that the Plaintiffs had since moved out of the premises. The Plaintiff denied to have

completely moved out stating that they still operate a “Miraa Joint”. The evidence before clearly shows that the Plaintiff no longer operates a shop selling food stuffs and more or less has moved out of the premises. In any event, I am satisfied and I do so find that damages will be an adequate remedy. Having carefully weighed the Plaintiff’s need to operate the business and the Defendant’s need to renovate the building versus the risk of losing its premises, I do find that the balance of convenience tilts in favour of the Defendant.

The upshot is that the Plaintiff’s application for temporary orders of injunction is dismissed. In effect, the orders granted earlier on by this court are henceforth discharged. Each party shall bear their own costs.

It is so ordered.

Dated, signed and delivered this **21<sup>st</sup>** day of **November** 2014

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiffs

.....For the Defendant

.....Court Clerk

**L.N. GACHERU**

**JUDGE**