



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 298 OF 2014**

**PATRICK MASAI MAKAU .....PLAINTIFF**

**VERSUS**

**MERCY MBUBA.....DEFENDANT**

**RULING**

**The Application**

The application before this Court for determination is a Notice of Motion dated 13th March 2014 by the Plaintiff seeking the following orders:

1. The Defendant be restrained from evicting the Plaintiff from the Business premises on Plot number 238, 309, 310 & 311, Mlolongo.
2. The Defendant be restrained from denying the Plaintiff, his members of staff and customers free use and access of toilet facilities serving the Plaintiff's business premises on Plot Number 238, 309, 310 & 311, Mlolongo (hereinafter referred to as "the suit premises") and or altering the fundamental terms of his protected tenancy.

The Plaintiff's claim is that the Defendant served a notice to terminate the Plaintiff's tenancy which notice was dated 20/1/2014 and was to take effect on 1/5/2014. Further, that the Plaintiff subsequently wrote to the Defendant and indicated that he did not wish to comply with the said notice and that he intended to file a reference on the same. However, that the defendant has purported to alter fundamental terms of the tenancy, namely has seized toilets serving the said premises, closed them and has denied the plaintiff, his tenants and customers free use, and access to the same.

Furthermore, that the Defendant is instead charging money to any person desiring to use the facilities, which action contravenes the existing express/implied terms of the lease whereby such facilities formed a fundamental term of the lease and can only be altered as provided for under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The Plaintiff also stated that the unwarranted inconvenience to the applicants' customers as adversely affected his business operations.

It is the Plaintiff's averment that he has filed Business Premises Rent Tribunal Case No. 17 of 2014, but unfortunately the Business Premises Rent Tribunal is currently not sitting, and accordingly the Plaintiff is now left exposed and unless this court grants the orders sought, risks being subject to the illegal acts stated above. The Plaintiff in his supporting affidavit sworn on 13th March 2014 explained that he runs a restaurant on the suit premises and that he had been a tenant thereon since March 2003, when he entered into a lease with the Defendant for 10 years which lapses in June 2013, and that he is now a protected tenant under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

## **The Defendant's Response**

The Defendant filed a replying affidavit she swore on 25th March 2014, wherein she stated that the Plaintiff had not demonstrated how he was being evicted illegally, and had confirmed to having been served with a notice to vacate the suit premises. Further, that she was not obliged to provide any of the services complained of by the Plaintiff, and that since the suit premises house a Supermarket, a Chemist, a Dry cleaner, an Auto spares shop, a Petrol Station and is adjacent to a major bus stop, the use of the toilets must be controlled to the general good and sanitary health of the tenants. The Defendant averred that her actions were aimed at maintaining of order and control of the public in the said commercial premises, and was thus not harassment.

## **The Issues and Determination**

The parties were directed to file written submissions on the Plaintiff's application. .M. Mativo Advocate for the Plaintiff filed submissions dated 23/4/2014 wherein counsel submitted that it is undisputed that the Plaintiff is a protected tenant within the meaning of the Landlord as demonstrated by the Defendant's notice served upon the Plaintiff seeking to alter the terms of the tenancy. Therefore, that denying the Plaintiff to use toilet facilities as expressly provided in the lease, the Defendant is acting against the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, which requires that alteration of terms of the tenancy can only be done in accordance the said Act.

Counsel submitted that the Plaintiff had demonstrated that he has a *prima facie* case with chances of success having exhibited that the use of toilet facilities was one of the conveniences enjoyed by tenants. Further that introducing a levy to use the toilets is a new term which can only be effected by following the provisions of the Act.

Counsel submitted the inconvenience caused to the Plaintiff, his staff and customers is of a nature that cannot easily be quantified and will cause loss of customers which will adversely affect the Plaintiff's business. It was further submitted that the balance of convenience demands that the Plaintiff continues to use the toilet facilities as the nature of the business is such that withdrawing the said facilities will expose the business to the risk of shut down by Public Health Officers. Counsel submitted that the Plaintiff continues to pay rent and has observed all the obligations under the tenancy and that since the commencement of the lease, the Plaintiff has been enjoying the convenience of the facilities, thus the injunction will cause no prejudice to the Defendant.

Wanjohi Gachie & Co. Advocates for the Defendant filed submissions dated 13/5/2014 wherein counsel submitted that the issue to be determined is whether the notice to vacate issued to the Plaintiff was valid. It was submitted that the Plaintiff was issued with a proper notice contained valid reasons as to why the Plaintiff ought to vacate. Therefore, that the suit herein is a way of defeating the Defendant's right to own and enjoy her property. It was submitted that the Defendant with the consent of the Plaintiff denied the general public access to the washrooms four years ago on 21/7/2009 and therefore that the Plaintiff was misleading the court in stating that he and his customers had been denied the use of the said facilities. Counsel urged the court to dismiss the application for lack of merit.

## **The Issues and Determination**

I have carefully read and considered the pleadings and arguments made by the parties herein. This Court will proceed to address the primary issue for determination, which is whether the Plaintiff has met the threshold for the grant of the temporary and mandatory injunctions he seeks. 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.

The required threshold for the grant of a mandatory injunction is that an Applicant has to in addition to showing a *prima facie* case, show special circumstances that make his a clear case where the matter ought to be decided at once. These requirements were stated by the Court of Appeal in Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215 as follows:

**“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

It is my finding in this regard that the Plaintiff has not established a *prima facie* case, as he has not provided evidence of the terms of his tenancy with the Defendant entitling him to the services he claims he has been denied or the terms alleged to have been infringed. The notice of eviction he relies on has also since been overtaken by events as it expired on 1<sup>st</sup> May 2014.

The Plaintiff claims that he had an initial lease with the Defendant for 10 years which expired in June 2013 and whose terms he claims are being altered by the Defendant without following the provisions of the law. He however did not bring any evidence of the said lease or of its terms.

I also note that the Defendant has given an explanation as to why they have introduced conditions in the access to certain services by the Plaintiff's which in my view appear to be reasonable, and the Plaintiff has not shown how such conditions detract from the terms and conditions to be implied in tenancies that have not been reduced into writing that are found in the Schedule to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

Lastly, the position now is that the Business Premises Rent Tribunal is operational, and the Plaintiff should pursue clarification as to the status and terms of his tenancy in the said Tribunal as provided by section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

The prayers sought in the Plaintiff's Notice of Motion dated 30<sup>th</sup> August 2013 is accordingly denied, and the costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

**Dated, signed and delivered in open court at Nairobi this 17<sup>th</sup> day of November , 2014.**

**P. NYAMWEYA**

**JUDGE**