Case Number:	Civil Case 56 of 2015
Date Delivered:	28 Jul 2015
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Roselyne Ekirapa Aburili
Citation:	Dl Koisagat Tea Estate Ltd v Eritrea Othodox Tewhdo Church Ltd [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Plaintiff's suit struck out
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA MILIMANI LAW AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 56 OF 2015

DL KOISAGAT TEA ESTATE LTD ……PLAINTIFF

VERSUS

ERITREA OTHODOX TEWHDO

CHURCH LTD……..……DEFENDANT

RULING

By a Notice of Motion dated 12th February 2015 and filed on 13th March 2015 the plaintiff/applicant D.L. Koisagat Tea Estate Ltd seeks from this court orders injunction restraining the defendant Eritrean Orthodox Tewhado Church its servants, officers employees and or agents from harassing, evicting the plaintiff/ applicant, encroaching into, transferring, alienating and terminating the plaintiffs/applicant's tenancy or lease and or in any way dealing with or interfering with the quiet possession and enjoyment of the applicant/tenant over all that premises erected on land Reference Number 209/6804 pending the hearing and determination of this suit; and that costs be provided for.

The matter was filed under certificate or urgency and the applicant's Notice of Motion was considered exparte in the first instance and an interim temporary injunction issued pending the interpartes mention and subsequent extensions of the said order was made pending hearing and determination of the application.

The application is premised on 15 grounds (a-o), which grounds nonetheless, provide the background to the entire dispute as summarized below.

That on or about the 21st day of November 2013 the applicant and respondent entered into a tenancy agreement in respect of the suit premises for a term of one year ending 21st November 2014 and immediately upon signing of the said agreement the two parties mutually agreed(orally) that the tenancy would be extended for 5 years. On the strength of that mutual agreement, the applicant/tenant carried out refurbishments to the premises which included additional works in the belief that it would enjoy a longer tenancy of 5 years, which renovation and works were inspected and approved by the respondent/landlord. That the tenant spend over Kshs 16,000,000 on the said refurbishment but that the tenant was utterly shocked on 8th September 2014 when the landlord served it with a notice of cessation of the lease on the premises and indicating that it would not renew the tenancy and asking for handing over of the premises upon such expiry of the tenancy agreement, which the tenant protested and filed a Reference in the Business Premises Rent Tribunal case No. 755/2014.

The Tribunal granted interim injunctive orders restraining the landlord from evicting the tenant but could not grant a full injunction hence Notice of Withdrawal of that case was filed and this suit filed herein.

The applicant contends that as at the time of receipt of the Notice of cessation of the tenancy, it had paid rent up to and including February 2015 and that unless the orders of injunction are granted, the applicant will suffer irreparably since it has invested massively in the renovation of the premises upon the representation by the landlord that the lease would be extended for 5 years.

The supporting affidavit is sworn by Johnson E.O Owino on 12th February 2015 which is a replica of the grounds as summarized above, and annexing copy of the lease agreement, letter of cessation, letter of approval of renovation, tribunal's interim orders, notice of withdrawal of tribunal Reference and correspondences between the parties advocates together with plans and bills of quantities for the proposed renovation works.

The application was opposed. The defendant filed grounds of opposition and replying affidavit sworn by Andemichael Hadera Chairman of the defendant church as well as a preliminary objection notice contending that the court herein lacks jurisdiction to hear the application and the suit and that the application offends statutory provisions of the law.

The defendant contends that the application is bad in law and a nullity and that the court was created to arbitrate disputes and not to create contracts between parties; the application is frivolous, vexatious and an abuse of the court process and that members of the defendant who are in excess of 200,000 are suffering as a result of the suit.

The defendants admit entering into a tenancy agreement with the applicant but contend that the said tenancy was for one year and that it lapsed and that the church members wish to use its premises after loosing out on another tenancy wherein they were worshipping vide an eviction following an order in Nairobi HCC 2289 of 2007.

In the defendant's view, the approval to refurbish the premises was subject to the terms and conditions of the tenancy and that the plaintiffs were never assured of any extension of the tenancy on the said premises.

Further, that the plaintiff does not deserve the orders sought as it was notified in writing that there was no intention to renew the agreement and that the allegation that the plaintiffs used Kshs 16 million to refurbish the premises was outrageous.

The parties Advocates canvassed the application by way of oral submissions. The plaintiff/applicant relied wholly on their grounds on the face of the application and affidavit of Johnson E.O Owino, its Director. Mr Wachira counsel for the applicant submitted in line with the said detailed grounds and supporting affidavit emphasizing that the parties had one on one discussions on the issue of renewal of the tenancy before refurbishments were approved albeit there were no minutes of such meetings. Mr Wachira also raised the issue of the capacity of the deponent Mr Hadera since he was not one of the Trustees who manage the church and not members of the committee.

The applicant also relied on the doctrine of equitable estoppel, urging the court to prevent the respondent from taking action that will bring an inequitable result, since it had continued to receive rent.

Counsel submitted that the applicant had met the threshold settled in the case of **Guiella v Casman Brown** for the granting of interlocutory prohibitory injunctions by demonstrating that they have a prima facie case with a probability of success and that it will suffer irreparably if the orders sought are not granted and relied on **Snails Equity 12th Edition paragraph 569-579**, praying for the orders.

In opposition to the applicant's application, Mr Omwenga counsel for the respondent relied on the Grounds of opposition, replying affidavit of Andemichael Hadera and the preliminary objection contending that there was no tenancy relationship between the two disputing parties capable of being enforced or extended and reiterated what was in the replying affidavit that the church required the premises for a place of worship since it had been evicted from an alternative land and that their members had nowhere else to worship from. He denied that there were oral representations made to the applicant that the tenancy would be extended for 5 years and maintained that the landlord had not approved refurbishment subject to the extension promise which was not even reduced into writing. Mr Omwenga submitted that the applicant had not satisfied the conditions in Order 40 Rule 1 of the Civil Procedure Rules that:

1. The property in dispute is under danger of damage, alienation or wastage;

2. The property was being disposed of or removed for the court to grant an injunction.

Further, that there was no evidence that the defendant was breaching any contract for an injunction to issue. Further, that the applicant had not shown any irreparable harm as it had quantified the loss likely to be suffered.

Mr Omwenga further submitted that a mandatory injunction cannot issue to compel the defendant to review the lease as that would be asking the court to rewrite the contract between the parties and that neither can the court order for Notice of termination to be 18 months or even compel the defendant to sell the property to the applicant.

Mr Omwenga also submitted that the applicant's conduct disentitled it to the equitable remedy of injunction since it obtained orders from the tribunal and refused to serve upon the respondent until when they withdrew the complaint and immediately came to this court where they obtained another exparte order which conduct was questionable.

Counsel also submitted that the defendant is a society which cannot sue or be sued in its own name, and relied on Sections 40 and 2 of the Societies Act.

Further, it was submitted on behalf of the defendant respondent that Section 12(2) of the Landlord and Tenant Act (Cap 301) makes provision for repossession of a property and that the tribunal is the one which is vested with jurisdiction to determine that dispute. It was also submitted for the defendant that the applicant had not specified the person who had promised to extend the tenancy and that since it was the Trustees who had signed the tenancy, only Trustees could have been sued and that acceptance of rent does not validate or recreate a lapsed tenancy.

Mr Omwenga also submitted that the doctrine of estoppel was inapplicable as there was nothing to show that the defendant committed itself to renewing the tenancy. For any additional term upon its expiry. The defendants urged this court to dismiss the application by the plaintiff with costs.

In a brief rejoinder, Mr Wachira for the applicant submitted that Cap 301 did not apply to this case and that the applicant could not sue Trustees since the Tenancy was between the church and the applicant and not with Trustees and that the title documents were in the names of the defendant not Trustees. He also submitted that Order 40 of the Civil Procedure Rules was relevant to this case since

they had demonstrated breach of contract.

I have carefully considered the application, grounds depositions in the affidavits and arguments of counsels for the parties in line with the primary suit subject matter of the dispute herein cited.

No doubt, this being an application for an injunction, the applicant must demonstrate that is has a prima facie case with a high probability of success, and that it stands to suffer irreparable loss which cannot be adequately compensated by an award of damages unless the injunction is granted. And if the court is in doubt, then it will decide on a balance of convenience, which principles were clearly set out and settled in the case of GIELLA v. CASSMAN BROWN & CO. LTD[1973] EA 358 at page 360 where Spry J. held that:-

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

The applicant in my view, for it to show that it has a prima facie case with a probability of success, it must prove certain facts and in this case it must prove that:

1. It is a tenant or is entitled to the tenancy of the respondent's premises and that it has established prima facie case with a probability of success.

2. Whether doctrine of equitable estoppel is applicable and whether the applicant shall suffer irreparable harm unless the orders sought are granted.

3. That this court has jurisdiction to hear and determine this suit and therefore the application for injunction.

4. That it has sued the right person.

On the first point, it is not in dispute that the copy of annexed tenancy agreement is very clear that the tenancy was for 1 year ending on 21st November 2014 from 21st November 2013. It cannot therefore, be, in the absence of any evidence to the contrary that there was any tenant/landlord relationship between the parties hereto after 21st November 2014 unless extended by mutual agreement.

It is also clear that on 26th August 2014 before the said tenancy lapsed, the respondent through its advocates, Jackson Omwenga wrote and served the applicant with a notice of cessation of the tenancy in question upon its expiry on 21st November 2014, which was 3 months before expiry of the said tenancy. It cannot, therefore be said that the letter or notice was a shocker since there is no evidence that the applicant had served a similar notice of intention to extend the tenancy beyond the one year period contemplated in the tenancy agreement.

On 9th December 2014, the defendants advocates also wrote another letter to the applicant's advocate intimating that the defendants were not keen to engage in court battles since both parties were bound by the terms and conditions of the tenancy agreement.

It is therefore trite that there is no tenancy relationship subsisting between the disputants herein and therefore Cap 301 is inapplicable in the circumstances, since there was no issue of holding over where the dispute begun before expiry of the tenancy.

On whether the doctrine of equitable estoppel applies in this case, we must appreciate what estoppel and in this case, promissory estoppel is all about. Black's Law Dictionary defines promissory estoppel as:-

"The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promise to rely on the promise and if the promise did actually rely on the promise to his or her detriment."

Promissory estoppel has also been described as having 4 elements or ingredients which the appellant must prove in their claim if they relied on it

a) That there was a promise

b) That the promise was reasonably relied upon

c) That it resulted in legal detriment to the promise

d) That justice requires enforcement of the promise.

In the case of **Benjamin Airo Shiraku – Vs - Fauzia Mohammed HCC 272 of 2011 Justice Havelock** (as he then was) and quite recently retired, citing **Lord Denning** in **Coube – Vs – Coube [1951] 2 KB 215** held that:

"Where one party by his words or conduct made to the other a promise or an assurance which was intended to affect their legal relations and to be acted on accordingly then once the other party has taken him at his work and acted on it, the one who gave the promise or assurance cannot afterwards, be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him.

But he must accept the legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by consideration but only his word."

In other words, if one promises another and the other acts on that promise then the promisor cannot resile.

For the plaintiff applicant to succeed on this issue, they had to prove several facts. Section 107 of the Evidence Act Cap 80 laws of Kenya provides that,

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

Section 108 of the same Act provides that

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

In my humble view, the burden of proving that there was representation and undertaking relied on to its detriment lay on the plaintiff. The plaintiff has to prove that there was representation or promise and that the defendant acted on that promise.

I have perused the applicant's letter dated 26th November 2013 written a few days after signing the tenancy agreement with the defendants, and seeking approval from the defendant to carry out refurbishment and additional works on the plot LR 209/6804 (IR 22167).

In the said request, there is absolutely no mention that with the with the projected improvements, it was expected that the tenancy period would be extended for a further period in order to enable the plaintiff applicants recoup their investment.

I have also perused the approval letter of 30th November 2013 by the defendant, four days later wherein the defendant was clear that the approval for the refurbishment and additional works and design that the defendant did not like were expected to be removed and original design restored at the time of vacating of the property, ***in line with the lease contract agreement***. Again, there is no indication that a new lease agreement or extension of the tenancy was anticipated. The improvements were therefore expected to be temporary in nature, as there is no indication that they were to affect the tenancy period.

The respondent's intentions were further made clear in their letter of 26th August 2014 reminding the applicant that it SHALL NOT renew the tenancy agreement. Albeit on 29th September 2014 the applicant's advocates responded to the letter of 26th August 2014 a month later, expressing shock at the change of heart by the defendant, referring to the meetings held between the representatives of both parties on extension of the tenancy, there is absolutely no indication of the dates, times and places or even the respective representatives of the defendant and plaintiff that met and agreed to the extension of the term of the tenancy agreement or that such meetings were minuted. The said letter also referred to letter of 22nd March 2014 seeking for an amendment to the lease agreement in view of the substantial improvements to the premises costing Kshs 15,000,000 which renovations had allegedly changed the status of the property from residential dwelling house to office space (commercial) property. The said letter stated that.

"In order to abide by Nairobi City County By Laws , we should apply for change of user from the current residential dwelling property to commercial ……"

With utmost respect to the plaintiff applicant, the law mandates that before one embarks on change of user of premises from one approved category to another, approval must be obtained from the relevant local authority and in this case, the City County and physical planning Department of Nairobi.

In the instant case, however, the applicant allegedly and admittedly embarked on an elaborate project of a total makeover and overhaul of a residential building into a commercial premises without any approvals from the City County and was now seeking for amendment of the lease agreement to 6 years or an order to "***comply with the change of user requirements after the fact."***

The said letter also proposes other terms including granting the plaintiff the prior or **"first right of purchase"** the property should the landlord decide to dispose of the property.

Failure to obtain change of user approval is contrary to Section 30 (1) of the Physical Planning Act See **ELC 214/2013 (2013) e KLR Wainaina Kenyanjui & 2 Others v Andrew Nganga** (zoned residential to business commercial). The said provisions enact that: **"No person shall carry out development within the area of a local authority without a development permission granted by local authority."**

From the tenancy agreement itself, it is clear at clause A and B that the same was subject to rules and regulations affecting the premises or the land. Secondly, the premises were a **HOUSE** and therefore it was expected that any change of description to the building had to be done within the existing rules and regulations affecting the premises or the land. Clause 6(e) of the agreement was also clear that upon expiry of the term, the tenant was to deliver up to the landlord the demised premises.

In this case, the applicant declined to deliver up the premises to the respondent. The Local Authority to which the application for approval is made for change of user is required to have regard to the health, amenities and conveniences of the community generally and density of development and land use in the area. Environmental considerations would also be fundamental to any development approval and an Environment Impact Assessment may be required to be provided under Section 36 of the Physical Planning Act. Under Section 58 (1) of EMCA, such approval must be given before commencement of change of user of premises. No advert for change of user. In other words, material change from a house to a commercial property had to receive approval from the City County of Nairobi and not the landlord since even if it was the landlord effecting such changes, it was obliged by law to seek and obtain such approval before embarking on the changes.

It therefore follows that the plaintiff knew or ought to have known that before carrying out any change of user development to the tenanted premises, such approvals had to be obtained, upon which the tenancy agreement would then change from occupation of a housed to commercial property. Section 3 of the Physical planning Act defines development to include the making of any material charge in the use or diversity of any buildings or land. In this case it is (buildings) that were to be altered.

I have examined the proposed bills of quantities attached to the plaintiff's affidavit in support dated November 2013 and the proposed designed plan and I have not seen a single approval from the City County of Nairobi or from the Physical Planning Department. The applicant simply received an "approval" from the landlord to carry out the works. It is however telling that the Bills of Quantities were done in November 2013 and the proposals/designs done in the same month, even before settling into the premises.

I have also examined the plaint dated 12th February 2015 and the prayers thereof are startling. The applicant seeks mandatory orders including compulsive orders for the respondent to vary the lease term to six years, prohibitory injunctions to restrain the respondent from dealing in any way with the demised premises and or interfering with the applicant's quiet enjoyment and possession of the demised premises and or from terminating the tenancy among other demands.

No doubt, the applicant did commit an illegality by altering the premises from residential to commercial property without the requisite approval and intends to use this court to compel the respondent to accede to that illegality. That attempt, in my view, is an abuse of the court process.

Courts of law are designed to enforce contracts between parties and not to re-write contracts between

parties. In this case, this court is unable to phantom an agreement in place, whether written or oral between the parties, in view of the above revelations, that is capable of enforcement and it cannot under any circumstances be used to rewrite contracts for parties.

There being no landlord/tenant relationship, if the applicant wished to occupy or purchase the defendant's premises then it should negotiate that new contract (s) with the defendant/respondent and not seek out the court to compel the defendant to perform what, apparently, has not been agreed upon and to legalize the change of user which I have found to have been illegal in the first instance.

On that point alone, I find that the applicant has not demonstrated that is has any prima facie case with a probability of success.

In **National Bank (K) Ltd v Pipe Plastic Sarkolit (K) Ltd & Another CA 95/99**, the Court of Appeal made it clear that a court of law cannot rewrite a contract between the parties as the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded.

From the pleadings and affidavit on record, there is no allegation or semblance of an allegation of fraud, coercion or undue influence on the part of the respondent. It therefore follows that the purported equitable estopped is a farfetched allegation not backed by any evidence of misconduct by the respondent.

In **CA 282/2004 Waki, Warsame & Gatembu JJA Between Margaret Njeru Muiruri v Bank of Baroda(K) Ltd** the Court of Appeal referring to the **National Bank of Kenya Ltd v Pipe Plastic Sankolit (K) (Supra)** restated the principle that:

" a court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract"

The Court of Appeal also stated at paragraph 36.

" Nevertheless courts have never been shy to interfere with or refuse to enforce contracts with are unconscionable, unfair or oppressive due to the procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to on party and would preclude meaningful choice for the other party…."

The Court of Appeal was also persuaded but the decision by Mwera J (as he then was) in **Housing Finance Company of Kenya Ltd v Njuguna KLR 1176(CCK)** that:

" ***courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they are at liberty to negotiate and even vary the terms as and when they choose. This they must do together with the meeting of the minds. If is appears to a court that one party varied the terms of a contract with another, without the knowledge, consent or otherwise of the other, and the other demonstrates that the contract did not permit such variation, this court will say no to the enforcement of such a contract."***

*A*pplying the above principle to this case, it is clear that there is no tenancy relationship between the parties the same having lapsed on 21st November 2014 and there is also no single communication or representation made by the respondent to the applicant which this court can infer an equitable

estoppel, prima facie . To hold otherwise would be tantamount to compelling the respondent to enter into a forceful marriage with the applicant, which marriage was never intended from the onset.

The Court of Appeal also weighed those principles in the case of **Kenya Commercial Finance Co. Ltd v Ngeny & Another (2002) 1 KLR** where it stated :

" The court will not interfere where parties have contracted on arms length basis. However, by its equitable jurisdiction , this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions thereafter imposes additional terms upon other party. Equity can intervene to relieve that party of such conditions."

What I find in this case is the applicant trying to use the court to impose upon the respondent terms of entitlement to an amendment to the tenancy agreement which had lapsed and to declare first right of entitlement to purchase the premises even when there is nothing demonstrative of the defendant's intention to enter into such kind of terms by the respondent.

On whether this court has jurisdiction to hear and determine this suit and therefore the application, the respondent avers that the matte of the landlord taking possession of premises is governed by Section 12 of the Landlord/Tenant(Hostels, shops and Catering Establishment Act). The applicant on the other hand maintains that it seeks for equitable remedies of injunction which the Tribunal cannot grant as the tribunal is a statutory body.

The ancillary yet important question is was the tenancy herein governed by Cap 301 and Secondly, was there a tenant/landlord relationship capable of being protected as at the time of filing this suit"

The tenancy agreement clause 2 is clear that the tenancy agreement was in respect of a **"HOUSE"** erected on Land Reference 209/6804 Nairobi, and not a shop, hotel or Catering establishment. The BPR Tribunal would therefore only have jurisdiction on tenancies falling under the Act and not houses.

Even assuming that the tenancy fell within Cap 301, the tribunal had no jurisdiction to issue an injunction Cheson J and Simpson J in **Hebtulla properties Ltd (1979) KLR 96** dealing with Section 12 of the Said Act stated:

" Under Section 12 of the L & T (SH & CE) Act, the Tribunal's powers are restricted to the area of its jurisdiction, that is the determination of reference made to it under Section 6. These can be made only by a receiving party that is a tenant who wishes to oppose a notice of termination or alteration of the terms or conditions of this tenancy or a landlord who wishes to oppose a notice by a tenant seeking reassessment of rent or alteration of any terms and conditions of the tenancy. It has power to do all things which it is required to do under the Act. This may be tautological, but it must refer to Section 5(3) and (6) the provisions of which are procedural only, and to the provisions of Section 9, which set out what the tribunal, can do on a reference . In addition to these powers the tribunal has the specific powers contained in paragraph (a) to n of Section 12(1). The expression " all things" being qualified by the words " which it is required or empowered to do by or under the provisions of this Act," no room is left for the application of the ejusdem generis rule……..The specific powers include the powers to make an order for the recovery of possession from a tenants or indeed from any person in occupation. Such an order would be an order made on an application of the land lord.

No corresponding powers is given to have an order on the application of a tenant who has been

forcefully dispossessed by a landlord. The powers specifically conferred can be exercised on a reference, which is defined in Section 2 as a "reference to a tribunal under Section 6 of this Act." In addition, the tribunal may investigate any complaint made by the landlord or tenant.

A clear distinction is made throughout the Act between a "reference" and a "complaint"…. A party to a reference has a right of appeal to the High Court against any determination or order made therein, but the maker of a mere complaint has no such right. The word "complaint" is referable only to minor matters….

……The Act was passed so as to protect tenants of certain premises from eviction and exploitation by the landlords and with that in mind the area of jurisdiction of the tribunal is to hear and determine references .

……It would be erroneous to think that the tribunal has jurisdiction to deal with criminal acts, committed in relation to any tenancy nor is it within its jurisdiction to entertain an action for damages for trespass. These are matters of the courts and the tribunal cannot by way of a complaint to it by a landlord or tenant purports to deal with such matters……..."

On the issue of jurisdiction of the tribunal where a tenancy has come to an end, the Court of Appeal in **Jitendrea Mathurdas Kanabar & 2 Others v Fish & Meat Ltd CA 267/96** held that:

"***once a reference has not been made to the tribunal and the tenancy notice has taken effect, the landlord/tenant relationship comes to an end and there is no longer a controlled tenancy with which a tribunal has no jurisdiction and in those circumstances the landlord has to come to court to enforce his rights."***

In this case, I find that first, the tenancy did not fall under Cap 301 two fold: it was a tenancy involving a House and not premises described under Cap 301 and secondly, even if we were to remotely link that tenancy to Cap 301 then the relationship had come to an end and therefore the provisions of that Act would not apply since the applicability of the Act is a condition precedent to the exercise of jurisdiction by a tribunal.

There must thus be a controlled tenancy in existence, respecting a specific category of premises as defined in Section 2 of Cap 301 to which the provisions of the Act can be made to apply. Outside it, the tribunal has no jurisdiction. It therefore follows that this court has jurisdiction to hear the dispute and determine it fully. **In CA 205/95 Narchidas & Co Ltd vs Nyali Air Conditioning and Refrigeration Services Ltd,** the Court of Appeal held that a controlled tenant confronted with an illegal threat of forcible eviction cannot go to the Business Premises Rent Tribunal established under an Act of Parliament as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. See also **Caledoma Supermarket ltd v KNEC and Tiwi Beach Hotel Ltd v Julian Olrike Stamn.**

The other issue is whether the respondent has the capacity to sue and be sued in its own name, being a society.

The respondent contended that section 40 of the societies Act is clear as to whether the society is an incorporated body and that in this case the respondent was not and that only trustees under Section 2 of the Societies Act could be sued and not the church or its members. In a rejoinder, the applicant contended that the subject premises were registered in the respondent's name and that it is the respondent who signed the tenancy agreement not the trustees hence the respondent is a proper

party with capacity to sue and be sued in its own name.

I have carefully perused the tenancy agreement. It mentions Eritrean Othodox Tewhado Church as the Landlords and in the recital, it is stated that "the landlord is *the beneficial owner* of that entire house…." Obviously, where ownership is beneficial then the matter of registration does not arise.

The signatories to the said agreement are 2 trustees albeit their names are not disclosed. There is also the common seal of the church besides the signatures of trustees. That issue as raised by the respondent's counsel Mr Jackson Omwenga cannot be ignored. This court had occasion to determine it in **HCC 69/2015 (2015) e KLR Football Kenya Federation v Kenya Premier League Ltd & 4 Others** exhaustively on whether a society can sue and be sued in its own name.

It is not disputed that the respondent is a society, and that the deponent of the replying affidavit is chairman of the Church Committee, not a trustee. Although it is contended by the applicant that the tenancy agreement was signed by the members of the church, such contention is not supported by the agreement itself which is before this court.

I have examined the plaint filed on 13th March 2015 and it describes the defendant as a church established under the Societies Act Cap 265(sic) (108)Laws of Kenya .

In the **Football Federation of Kenya vs Kenya Premier League & others** (supra) this court was categorical, applying a plethora of decisions from this jurisdiction and authoritative writings from and without this jurisdiction that in the absence of an enabling stature, an unincorporated association cannot sue and be sued in its own name and that there must be a suable party and a suable party is essential to jurisdiction of the court. The court also cited the decision in **Appex International Ltd & Anglo Leasing &Finance International ltd vs Kenya Anti-Corruption Commission [2012]eKLR citing with approval GOODWILL &TRUST INVESTMENTS LTD &ANOTHERVS WILL &BUSH LTD (SUPREME COURT OF NIGERIA), where the court held:**

"it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it and its judgment will amount to a nullity no matter how well reasoned. "

in **Richanson v Smith & Co. (1882) 21 FLA 336,341**, the court reiterated thus:

***" thus a society is a number of persons taking into themselves a fictitious name, and by that name, protruding themselves into a court of justice. But by this assumed name they cannot appear in a court of justice. They can neither sue nor be sued by it. This is a privilege appertaining to corporate bodies only. To sue and be sued, in their corporate name is one of the greatest privileges granted to corporate bodies. It can only be authorized by statute it is too plain for any argument that the unincorporated societies in their own name cannot be so sued. The right to sue and be sued is a corporate* franchise."**

In **PHAKEY VS WORLD WIDE AGENCIES LTD 1948 815 EACA 1, FREE PENTECOSTAL FELLOWSHIP IN KENYA VS KCB NRB HCC 5116/2002(OS) Bosire J(as he then was) stated:**

"the position in common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 of the CPR. In the instant case, the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so, it lacked the capacity to institute proceedings in its own name."

Further, in **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS MUMO MATEMU & 5 OTHERS[2014]eKLR** the court held that:

"*24] a suit in Court is a 'solemn' process, "owned" solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Act, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it……..."*

In my view, therefore, that preliminary point of law as raised by the Mr Omwenga is not a mere procedural technicality which can be laid to the altar of substantive justice and cured by Article 159(2)(d) of the Constitution and the Oxygen principle enshrined in sections 1A and 1B of the Civil Procedure Act.

No doubt, there is no suable party before this court and therefore no prima facie case with high chances of success can be established against a nonentity party, since a non party ousts the jurisdiction of the court to make any orders against nobody.

Moving onto the issue of whether the applicant shall suffer irreparable damage if the injunction is not granted, the appellant avers that it has spend colossal sums of money in renovating and or refurbishing the premises giving it a new look and to the tune of kshs 16,000,000. I have examined the applicant's annexture JE005 which is headed "proposed refurbishment and new works for DL Group Officers in Kabarnet Lane Nairobi." It is dated November 26th 2013 and stamped by Design Spec Ltd Architects and Interior Designers.

As I have stated before in this ruling, those major or substantial changes to the House, turning it into a Commercial Building were never approved by the City County as required by law. Secondly, what is annexed to these proceedings is nothing more than proposals and estimated costs of each item proposed to be changed or altered to the House. There is absolutely no single evidence by way of a photograph of the old House and new Commercial Premises and or evidence of expenditure by way of payments made towards the works that were proposed in November 2013. This court is therefore unable to find any evidence of any massive alterations or changes or expenditure incurred towards that end to the tune of over 16 million as alleged. The law is clear as to the burden of proof. He who alleges must proof. The applicant must proof that it stands to suffer substantial loss if the order of injunction is not made in its favour and that an award of damages would not be an adequate remedy.

Furthermore, the purported doubtful loss having been quantified in monetary terms, in the absence of any evidence that the respondent assuming it is a suable party is incapable of compensating the applicant in damages, this court holds that the applicant has miserably failed to satisfy this court that it deserves an order of injunction, assuming there was a suable party before the court.

Having clearly found that the applicant has failed to establish a prima facie case with probability of success; and that no irreparable a damage will be suffered that is incapable of being compensated by way of damages; and that indeed there is no suable party before this court, I accordingly proceed and dismiss the applicant's application dated 12th February 2015.

As there is no counterclaim of any suable party in the name of the defendant and no attempt was made in the glare of legal provisions, to amend the plaint and the application, prior to the hearing of the interlocutory application herein, and the defendant having raised the preliminary point of law that the defendant has no capacity to sue and be sued; and this court having agreed with Mr Omwenga on that issue, I find that there is indeed no defendant before this court capable of being prosecuted now and in future and I accordingly strike out the plaintiff's suit as instituted vide the plaint dated 12th February, 2015.

Costs are in the discretion of the court and in any event, to the successful party. Nonetheless, I find that this is a case where I can order that each party bears their own costs as it involves a religious society which has a moral duty to reconcile members of the society. It is a nonprofit making association which has incurred costs yes but in view of the fact that it is not a suable party under the law, I order each party to bear their own costs.

Dated, signed and delivered at Nairobi this 28th day of July 2015.

R.E. ABURILI

JUDGE