



**REPUBLIC OF KENYA**  
**IN TH HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISC. CIVIL APPLICATION NO. 2 OF 2014**  
**FARKHANDAS NURMOHAMED ADBDULKADER.....APPLICANT**  
**-VERSUS-**  
**MOHAMED HASHAM BAKARANI.....1<sup>ST</sup> RESPONDENT**  
**NASSERPURIA MEMON JAMAT.....2<sup>ND</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant, by an Originating Notice of Motion dated 9th January 2014 and filed on 10th January 2014 (“**the Application**”), seeks the following orders:

**a. Spent**

**b. Spent**

**c. That pending the commencement of the sitting of the Business Premises Rent Tribunal, the Respondents, their agents, servants and/or employees be restrained from interfering with the quiet and peaceful occupation as a tenant of the Respondent of the Shop known as Zoya Exclusive Fashion at Nehru Road, Plot Number 16/17/XXXI.**

**d. That the costs of this application be costs in the cause of the Business Premises Rent Tribunal No. 45 of 2013, FARKHANDAS NURMOHAMED ADBDULKADER Vs. MOHAMED HASHAM BAKARANI & NASSERPURIA MEMON JAMAT.**

2. The Application is based on the grounds on its face as well as on the Affidavit of the Applicant sworn on 9th January 2014 and filed alongside the Application.

**The Applicant's Case**

3. The Applicant's case is that she is the Respondents' tenant in the shop known as **Zoya Exclusive Fashion at Nehru Road, Plot Number 16/17/XXXI** (“the suit premises”) and that she is up to date with her rent payments.

4. That on 30th April 2013, the Respondents purported to evict the Applicant by locking the suit

premises. The Applicant, due to the attempted eviction, filed a reference, being, **Business Premises Rent (BPRT) Tribunal No. 45 of 2013 (“the BPRT Case”)** in which an injunction was granted on 16th May 2013 restraining the Respondents from harassing the Applicant. The BPRT Reference is still pending due to absence of the chairperson of the BPRT.

5. On 22nd May 2013, a consent was recorded in the BPRT Case (“the consent”) to the effect that, *inter alia*, the Respondents to unlock and hand over possession of the suit premises to the Applicant; the Applicant to pay to the 2nd Respondent Kshs. 20,000/= per month as mesne profits with effect from 1st May 2013; and that the Applicant to relinquish vacant possession of the suit premises to the 2nd Respondent on or before 31st December 2013 failing which the 2nd Respondent be at liberty to evict the Applicant.

6. On 31st December 2013, the Applicant received a letter from the 2nd Respondent notifying her to vacate the suit premises as per the consent. The Applicant has now filed the present application to restrain the Respondents from evicting her.

7. The Applicant contends that the consent was entered into by her advocates on record in the BPRT Case, M/s Ameli Inyangu & Partners Advocates, without consulting her and without her instructions. As such, the Applicant contends that the consent is not binding on her.

8. The Applicant submits that she will suffer irreparable loss should the Respondents evict her from the suit premises. The applicant avers that she is up to date with her rent payments so the Respondents should be restrained from evicting her.

#### **The Response by the Respondents**

9. The 2nd Respondent filed Grounds of Opposition to the Application on 20th January 2014 as well as Replying Affidavit sworn by **OSMAN YUSUF MITHWANI** on 28th January 2014 and filed on event date.

10. The 2nd Respondent's reply is that the Applicant was illegally let into the suit premises by the 1st Respondent who was the original tenant. The 2nd Respondent submits that the 1st Respondent not only sublet the suit premises to the Applicant without the 2nd Respondent's consent but also that the 1st Respondent agreed to vacate the premises on 2nd April 2013 and so should the Applicant.

11. The 2nd Respondent submits that it has not received any rent from the Applicant. That the Kshs. 20,000/- received from the Applicant every month was received as mesne profit following the consent recorded in the BPRT Case, and not as rent.

12. On the issue of the consent, the 2nd Respondent submits that no fraud, mistake or misrepresentation has been proved on the part of the applicant and as such the application before the BPRT to set the consent aside has no probability of success. The 2nd Respondent also urged that Mr. Adhoch Advocate who had signed the consent on behalf of the Applicants had not sworn an affidavit to state that he did not have instructions and that there was no motive for Mr. Adhouch Advocate to sign the consent order without his client's approval as he would gain nothing from doing so.

13. On 19th February 2014, Mr. Fred Adhoch Advocate filed an Affidavit sworn on 18th February 2014 in which he depones *inter alia* as follows:

**2. That I have personal conduct of BPRT Case No. 45 of 2013 between FARKHANDAS NURMOHAMED ADBDULKADER vs. MOHAMED HASHAM BAKARANI & NASSERPURIA MEMON JAMAT.**

**3. That I have been shown a Notice of Motion application dated 9th January 2014 filed by Ms Muriu Mungai Advocates together with the supporting affidavit thereof FARKHANDAS NURMOHAMED ADBDULKADER and have understood the contents thereof.**

4. That from the outset, I wish to indicate while conducting the suit I was personally instructed by the said Ms FARKHANDAS NURMOHAMED ADBDULKADER to enter into a consent allowing her to continue staying and doing business in the premises under the name of ZOYA EXCLUSIVE FASHIONS at Nehim Road on Plot No. 16/17/XXXI up to 31st December 2013.

5. That the said instructions were given to me orally by the said Farkhanda when I paid her a visit at her offices at Equity Building off Moi Avenue in the presence of one Haroon Jaweed.

6. That in acknowledgement and being cognisant of the terms of the consent, the applicant gave me post-dated cheques for rent up to December, 2013 knowing very well that she would vacate after that day.

7. That I am now surprised when she states under oath that she never gave me such instructions.

8. That her dispositions are not only utter lies, but dishonest and mischievous aimed at achieving ulterior motives.

9. That I am an Advocate of more than 8 years standing I know that I cannot and would not enter such a consent without instructions.

10. That while conducting this matter, I took instructions verbally and/or through phone and several visitations to the client's offices and noting that our understanding was mutual, I saw no need to convey them in writing. I did orally call the Applicant to explain the consent filed.

14. Since it was filed after the court had received submissions on the Application, the court allowed parties to address it on whether the court should consider the Affidavit of Adhoch Advocate or not. In a ruling delivered on 3rd April 2014, this court ordered that it will consider the affidavit of Adhoch Advocate and granted the Applicant leave to file a further affidavit in response to the affidavit of Adhoch Advocate. In deed before the ruling of 3rd April 2014, on 21st March 2014, the Applicant had already filed a Further Affidavit in response to the affidavit of Adhoch Advocate.

### **The Reply by the Applicant**

15. In her said Further Affidavit, the Applicant depones *inter alia* as follows:

7. That I completely deny that I ever discussed leave alone agreed with Mr. Adhoch that I was to vacate the suit premises by 31.12.13 neither was I informed by Mr. Adhoch either orally, by telephone or in writing that he had recorded a consent to that effect.

### **The Issues**

16. I have carefully studied the Application, the Affidavit in support thereof, the Replying Affidavit, the Affidavit of Fred Adhoch and the Applicant's Further Affidavit. In my view, the main issue for my determination is whether the Plaintiff has met the requisite conditions to warrant the granting of the temporary restraining order (injunction).

### **Analysis**

17. The principles of interlocutory injunction are now well settled. The same were laid down 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.”**

18. The applicant must demonstrate a *prima facie* case with probability of success, satisfy the court that it would suffer irreparable damage which would not be adequately compensated if the court did not grant the injunction and if the court is in doubt, then it should decide the case on a balance of convenience.

**Prima facie Case**

19. Has the Applicant established a *prima facie* case with a probability of success? In other words, has she demonstrated that she has a genuine and arguable case?

a). **The Question as to Subletting**

20. The Applicant seeks an order to restrain the Respondents from interfering with her quiet and peaceful occupation, as a tenant, of the suit premises pending hearing and determination of the BPRT Case. It is not within the jurisdiction of this court to determine the merits of the BPRT Case. However, in order to determine whether the Applicant is entitled to the temporary order of injunction, this court is called upon to determine whether the Applicant has established a *prima facie* case with a probability of success.

21. The Applicant states that she has been a tenant in the suit premises and has been paying rent without fail. The 2nd Respondent denies that the Applicant has been a tenant in the suit premises and asserts that the Applicant was given illegal possession of the suit premises through sub-letting by the 1st Respondent, who was the legally recognised tenant.

22. The Applicant does not deny that she was given possession of the suit premises by the 1st Respondent. In deed in her Notice of Motion Application filed in the BPRT on 9th May 2013, the Applicant averred in the Affidavit in support thereof that she occupied the suit premises with the permission of the 1st Respondent who had allowed her to take over her business known as **Zoya Exclusive Fashion** as a going concern. Even the Reference filed in the BPRT by the Applicant on 9th May 2013 was against the 1st Respondent only who is described therein by the Applicant as her landlord.

23. The Applicant confirmed that she had been paying rent to the 1st Respondent and not the 2nd Respondent. However, in the instant application, the Applicant alleges that she has been paying rent to the 2nd Respondent but the 2nd Respondent denies receiving any rent from the Applicant. The 2nd Respondent contends that it only received mesne profits from the Applicant pursuant to the consent recorded in court.

24. The annexures which the Applicant claims to be receipts issued by the 2nd Respondent for the monthly rent are not receipts but copies of cheques issued by the Applicant to the Respondent. The cheques are only for the months of September 2013, October 2013, November 2013 and December 2013. The 2nd Respondent explained that the cheques were received on account of mesne profits following the consent recorded in the BPRT. The 2nd Respondent exhibited copies of receipts issued on a without prejudice basis and which clearly indicate that the payments were on account of mesne profits and not rent. In my view, the explanation given by the 2nd Respondent is more plausible and is in fact confirmed by the Applicant's own admission that she had entered into an agreement with the 1st Respondent who was herself a tenant and not the 2nd Respondent who is the owner of the suit premises.

25. The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301 at **section xii of the Schedule** to the Act provides as follows:

**“The leasee shall not transfer, part with possession, or sublet the premises or any part thereof without the consent of the lessor, which consent shall not be unreasonably withheld.”**  
(underlining mine)

26. In the case of **Salambo Investment Limited v. Multi Investment Limited, Mombasa High Court Civil Suit No. 598 of 1996** (unreported), the High Court cited with approval the decision of the Court of Appeal in Jesse Njuguna Mwaura v. Hajrabai Suleman (CA 8/83) in which the Court of Appeal had held as follows:

**“The Landlord and Tenant Act requires the tenant to obtain consent of the landlord before subletting, parting with possession of or transferring the premises or any part thereof. No consent was sought and/or obtained by Githinji. No tenancy by him was in existence and the appellant was not a tenant but a trespasser.”**

27. The 2nd Respondent avers that its consent was not sought and/or obtained before the suit premises were sub-let to the Applicant. The Applicant has not tabled any evidence to counter that contention by the 2nd Respondent. The Applicant may well be regarded as a trespasser. That could explain the 2nd Respondent's decision to receive the monthly payments by the Applicant as mesne profits and not as rent. The High Court in the **Salambo Investment Limited Case (supra)** declined to issue an injunction on the basis that the applicant had wrongfully taken possession of the premises. The situation is similar in this case where the Applicant took possession of the suit premises wrongfully. In my view, on that account alone, I doubt whether the Applicant has established a *prima facie* case with a probability of success to warrant the granting of the restraining order.

***b). The Consent filed in the BPRT Case***

28. The Applicant, at ground 8 of the Application states that she has filed an application in the BPRT to set aside the consent judgment. However, in her Supporting Affidavit at paragraph 6, she avers that the application to set aside the consent judgment is yet to be filed. As it stands, the BPRT Case was substantially compromised by the consent and unless the same is set aside, there seems to be no pending case to be determined. In my view, an order of injunction should not be granted pending determination of an application that is yet to be filed. On this account, it is my view that this court should not exercise its discretion in favour of the Applicant.

29. The Applicant argues that she did not give her advocates instructions to record the consent. Mr. Fred Adhoch, the Advocate who had the conduct of the BPRT Case on behalf of the Applicant has sworn affidavit which I have reproduced above in relevant part and in which he avers that the Applicant gave her oral instructions to record the consent.

30. It is not the duty of this court to determine whether the consent was recorded without the Applicant's instructions as alleged or not. That would be determined by the BPRT once the Applicant has filed her intended application to set aside the consent. However, as already stated, this court is now mandated to consider whether the Applicant has a *prima facie* case with probability of success.

31. The Applicant contends that her advocate, Mr. Adhoch ought to have placed before court evidence that she had given him instructions to record the consent. However, she does not deny that she had given him instructions to act for her in the BPRT Case. She also does not deny that all her previous instructions, including the instructions to file the BPRT Case itself, were given to Mr Adhoch orally or through telephone. The Applicant did not adduce any evidence to show that she had, at any one time, given written instructions to her advocate. In my view, there is a high probability that Mr Adhoch was given oral instructions to record the consent as demonstrated by the parties' previous conduct and dealings.

32. The fact that the Applicant has not to date taken any disciplinary action against her advocate could also be an indication that the Applicant's allegations that she did not give instructions to her advocate could be without basis.

33. That position is further buttressed by the fact that the Applicant does not deny giving her advocate post-dated cheques up to December 2013, in an apparent compliance with the consent order. Additionally Adhoch in his affidavit stated that in furtherance to the consent recorded at BPRT the Applicant issued post dated cheques for payment of mesne profit which the Applicant handed over to Adhoch. Looking at

cheque numbers it is very clear that indeed those cheques may have been issued at the same time. The cheques are for the months September to December 2013 and they are numbers (a) 000302 (b) 000303 (c) 000304 and (d) 000305. The Applicant does not also deny receiving the receipts exhibited by the 2nd Respondent which clearly show that the payments were received on a without prejudice basis and on account of mesne profit rather than rent. If the Applicant was not aware of the consent order until 31st December 2013, she would have rejected the receipts which clearly indicated that her payments were received on a without prejudice basis as mesne profits and not as rent. Further, the BPRT Case was filed on or about the 9th May 2013. Why did it take the Applicant over six months to follow up with her advocate to find out what was happening in the case filed on her behalf?

34. The principles upon which a consent judgment or order may be set aside are now well settled. In the case of **Kenya Commercial Bank Limited v. Benjoh Amalgamated Limited & Another [1998] eKLR**, the Court of Appeal cited with approval the decision of Law JA in Brooke Bond Liebig (T) Limited vs Mallya [1975] E.A 266 on the circumstances under which consent judgment may be set aside as follows:

*“In the case of Brooke Bond Liebig (T) Limited vs Mallya [1975] E.A 266, Law JA, stated the law at p. 269 in these terms:*

**'The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs Kassam (1952), 19 EACA 131, where the following passage from Seton on Judgments and Orders, 7th edition, Vol. 1 p. 124 was approved:**

**'prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.'**”

35. The Applicant has not alleged fraud, collusion or misrepresentation on the part of her advocate. Without reaching a final conclusion on whether the Applicant gave her advocate instructions to record the consent or not, it is my considered view that the Applicant's attack of the consent, on a *prima facie* basis, seems to be laid on a weak foundation especially in light of the sworn affidavit of her own advocate indicating that she had given instructions to record the consent.

### **Irreparable Loss**

36. Has the Applicant demonstrated that she will suffer irreparable loss unless the injunction is granted, **which loss would not be adequately compensated by an award of damages?** The Applicant claims that she will suffer irreparable loss if the eviction is to take place because she is carrying on her business in the suit premises.

37. I have discussed above that the Applicant did not have the right to be in the suit premises in the first place. The 2nd Respondent's consent was not obtained before the suit premises were sublet to the Applicant by the 1st Respondent. The 1st Respondent who sublet the suit premises to the Applicant has since vacated the same. The Landlord and Tenant Act requires the consent of the lessor or landlord or owner to be obtained before subletting. Any person who sublets the premises without the owner's consent is in breach of the provisions of the Landlord and Tenant Act and is therefore acting unlawfully. In my view, the Applicant's actions border on trespass. I do not see how a party who is occupying the premises illegally and without the owner's consent can claim irreparable loss if she is evicted from such premises. In any event, the Applicant has not shown how, if she suffered loss as a result of this court's refusal to grant the restraining order, such loss would not be compensated by damages. The Applicant ought to demonstrate, for instance, that the 2nd Respondent is unable to pay damages should the Applicant's case succeed.

38. The Applicant runs a clothes-selling shop in the suit premises. She took possession of the premises in November 2011 and therefore she had not been in occupation for long as to make it suffer irreparable loss should she relocate elsewhere. Even if she had been in occupation for a long period, there is no evidence that she cannot be compensated by damages should she relocate her business to another premises.

### **Balance of Convenience**

39. The Applicant having failed on the requirements as to *prima facie* case and irreparable loss that cannot be compensated by an award of damages, I have no doubt that the orders should not be granted and therefore it would be superfluous to delve into the balance of convenience requirement.

### **CONCLUSION**

40. A *prima facie* case was defined by the Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** as follows:

**“So what is a prima facie case? I would say that in civil cases it is a case in 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.”**

41. On the material presented to this court, and based on the facts herein, this court cannot conclude that the Applicant's right has been breached because the Applicant apparently gained possession of the suit premises without following the law. In my view, she has not established a case in which this court can conclude that her right has been infringed to warrant an explanation or rebuttal from the 2nd Respondent.

42. Interlocutory injunction is an equitable remedy the grant of which is discretionary upon the court. The Court of Appeal in the **Mrao Ltd Case** (supra) stated as follows:

**“The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial.”**

43. In the case of **Charter House Investment Ltd v Simon K. Sang & 3**

**Others, Eldoret Civil Appeal No. 315 of 20104 [2010] eKLR**, the Court of Appeal stated as follows:

**“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties.”**

44. The court can only exercise its discretion in the Applicant's favour where the Applicant has shown that the facts, materials and circumstances of her case warrant the court's discretion to be so exercised. In the instant case, it appears, on the face of it, that the Applicant did not have authority to be in the suit premises in the first place. Further, on a *prima facie* basis, the Applicant's claim that the consent was recorded without her authority is faced by substantial rebuttal from the Applicant's own advocate. In light of the foregoing, it is my considered view that the Applicant has not laid sufficient basis to warrant this court's discretion to be exercised in her favour. Her application should be declined.

45. In the end, the Application is hereby be dismissed with costs to the 2nd Respondent and the interim orders are hereby discharged.

**DATED and DELIVERED at MOMBASA this 26<sup>TH</sup> day of JUNE, 2014.**

**MARY KASANGO**

**JUDGE**