



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 112 OF 2013**

**SIMON W. MACHARIA.....PLAINTIFF**

**-VERSUS-**

**JOHN MWANIKI.....DEFENDANT**

**RULING**

1. The application is brought by way of Notice of Motion dated the 4th December, 2013 under the provisions of **Order 40** of the **Civil Procedure Rules (2010)** and **Section 3A** of the **Civil Procedure Act** and all other enabling provisions of the law.
2. The Applicant seeks the following orders:
  - i. **The Respondent by himself, his servants and or agents be and is hereby restrained from leasing, alienating, disposing, transferring or in any other way from dealing with the Applicant's shop within LR.NO.NAVIASHA MUNICIPALITY BLOCK 144/517 until the hearing and determination of this application.**
  - ii. **The Respondent by himself, his servants and/or agents be and is hereby restrained from leasing, alienating, disposing, transferring or in any other way from dealing or interfering with the Applicant's shop within LR.NO.NAVIASHA MUNICIPALITY BLOCK 144/517 until the hearing and determination of the suit hereof.**
  - iii. **This Honourable court be pleased to issue a mandatory injunction to compel the Respondent by himself, his servant or agents to re-open the wines and spirits shop operated by the Applicant within the premises known as NAIVASHA MUNICIPLAITY BLOCK 144/517 and give him free access, possession and reinstate the Applicant therein as a tenant.**
  - iv. **Costs of this application be provided for.**
3. The Applicant relies on the grounds on the face of the application and on supporting Affidavit made by SIMON W. MACHARIA the Applicant, herein and is dated the 4th December, 2013.
4. The date for hearing of the application was fixed in Court by both parties, but neither the Respondent nor his advocate were present at the hearing thereof. The submissions by counsel for the Applicant therefore are unchallenged and uncontroverted.

**THE APPLICANT'S SUBMISSIONS**

5. The Applicant was a tenant of the Respondent since 1976 and was a monthly controlled tenant.
6. Pursuant to conclusion of Business Premises Rent Tribunal proceedings, rent was increased and

- rent arrears arose therefrom. The Applicant made attempts to pay off the arrears leaving a balance of Kshs.204,845/= which was demanded by the Respondent leading to the locking up of the premises with the Applicant's stock therein.
7. That if the Applicant had breached the terms of the tenancy by not paying rent, the recourse the Respondent was to levy distress for rent or initiate proceedings for eviction.
  8. The Applicant did not surrender the premises nor abandon them but rather was locked out.
  9. Counsel for the Applicant cited the case of **Kamau Mucuha V. Ripples Limited**, where the High Court reinstated a controlled tenant who had been locked out of the premises. Reliance was also placed on the celebrated case of **Giella V. Cassman Brown & Company Limited**, (1973) E.A 358. Counsel contended that the Applicant had made out a *prima facie* case on the issue of dispossession and had been out of possession since 1st July, 2013 creating a loss that was irreparable and could not be compensated by way of damages.
  10. The Applicant prays for orders of a mandatory injunction and that the premises be re-opened and the Applicant be granted access and costs be provided for.

### **ISSUES FOR DETERMINATION**

11. Upon taking into consideration the submissions made by Counsel for the Applicant, I find the following issues for determination:
  - i. Whether the Applicant is entitled to an order of mandatory injunction at an interlocutory stage.
  - ii. Costs

### **ANALYSIS:**

12. The principles and threshold for granting of an injunction as set down in the renowned case of **Giella V. Cassman Brown** (supra) are found to be applicable in this matter.
13. The principles are that the applicant must make out a *prima facie* case that has a probability of success; there must be irreparable loss and compensation by way of damages would not be adequate.
14. The Applicant has satisfied the first principle in that he has demonstrated that he was a tenant in possession of the subject property and has been dispossessed of the premises and has therefore made out a *prima facie* case.
15. There is also the issue of loss of goodwill which this court is of the view is an irreparable loss that may not be adequately compensated by way of damages.
16. Be that as it may, the threshold of **Giella V. Cassman Brown** (supra) may have been satisfied but there exists an additional and higher threshold that must also be satisfied before an interlocutory mandatory injunction is granted.
17. This additional threshold is set down by Ringera, J in **Showind Industries V. Guardian Bank Limited & Another** [2002] 1EA 284 that:

**“.....an Interlocutory Mandatory Injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of a court of equity or his equity has been defeated by laches.....”**

18. In this instance, the interlocutory mandatory injunction sought would be for the premises to be opened up and the Applicant to be granted possession and free access, thereto.
19. The Applicant herein must therefore demonstrate to this court that his case is very clear, very strong and straight forward.
20. To my mind, this is not the case, as there was a dispute between the parties that originated in the Business Premises Rent Tribunal. The rent was increased pursuant to an order from the Tribunal. The Applicant's averments are that the rental increase led to rental arrears which then led to default and then to dispossession.
21. The order from the Tribunal was not annexed to the Applicant's application for the court to peruse

- so as to establish whether there was a payment plan and/or a “***default clause.***” in the form of an order for distress or even eviction.
22. Further, there were allegations that the Applicant abandoned the premises whereas it is the Applicant's contention that he was locked out and the premises allocated to another tenant.
23. This court observes that the Applicant's case is not clear, strong and straight forward and there exist substantial issues that need to be addressed and determined at a full hearing.
24. It is also trite law that an interim mandatory injunction ought to be granted sparingly and it ought not be granted particularly where its effect shall bring the litigation to an end.
25. There is also the issue of “***laches***”. The Applicant states that he was dispossessed on the 1st July, 2013 and this court notes that the Application herein was filed on the 5th December, 2013 which translates to a delay of approximately six (6) months which delay is found to be inordinate.
26. Bearing in mind that the remedy sought by the Applicant is an equitable one and the maxim of equity states that:

**“equity aids the vigilant, not those who slumber on their rights.”**

The Applicant herein is found to be guilty of “*laches*” and has not preferred any satisfactory explanation for the delay. Therefore the remedy sought is defeated by his unexplained “*laches*”

### **FINDINGS**

27. This court finds that this is not a suitable case entitling the Applicant to an interim mandatory injunction as sought.

### **CONCLUSION**

28. The application for mandatory injunction is hereby disallowed. But the injunction previously granted restraining Respondent from allocating premises to another tenant to remain in place till suit is heard and determined.
29. Costs shall be in the cause.

It is so ordered.

**Dated, Signed and Delivered at Nakuru this 17th day of September, 2014**

**A. MSHILA**

**JUDGE**