



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 509 of 2011

SAMUEL NGUGI NYAMU T/A

SAMS BARBER, BEAUTY & HAIR DRESSING SCHOOL. .... APPELLANT

VERSUS

NJENGI PROPERTIES LIMITED. .... RESPONDENT

*(From the ruling and orders of R A Oganyo Principal Magistrate in Milimani CMCC No. 122 of 2011)*

**J U D G M E N T**

This appeal arises from the Ruling of the lower trial magistrate's court dated 12<sup>th</sup> September, 2011 in an application dated 2<sup>nd</sup> February, 2011 in which the applicant, herein the Appellant, mainly sought the following orders: -

**a) that a temporary injunction restraining the Defendant (herein Respondent), his servants, agents, or assigns from denying the Plaintiff/Applicant access, leasing, trespassing and/or interfering with the applicant/plaintiff's quiet enjoyment, possession and/or dealing with the office space leased to the plaintiff and situated on 2<sup>nd</sup> Floor, suite 227 on L.R. No. 209/1212/2 Uniafric House, Nairobi pending the hearing and final determination of the suit.**

**b) That a mandatory injunction to restore back to original state up to and prior to 26<sup>th</sup> June, 2011 and to return all of the plaintiff's furniture and equipment documents and personal effects of the plaintiff, plaintiff's students and employees, pending the determination of the suit.**

The facts tend to show that by a Lease Agreement dated 9<sup>th</sup> 2007 or thereabout, the Appellant herein became a tenant of the office premises known as Room 227, 2<sup>nd</sup> Floor, Uniafric House, Koinange Street, Nairobi.

The monthly rent is shown as

1. Kshs.35,660.00 for first year.
2. Kshs.43,626.00 for second year.
3. Kshs.47,989.60 for third year.
4. Kshs.52,787.46 for forth year.

5. Kshs.58,066.20 for fifth year.

6. Kshs.63,872.82 for the sixth year.

There is evidence also as contained in the affidavits in support and in opposition, that disagreement arose between the parties, culminating in the ouster of the plaintiff from the said premises by the Defendant or Defendant's agents on or about 26<sup>th</sup> January, 2011. The Respondent alleged default of payment of rent in accordance of the lease signed by the parties as well as wrongful conversion of user of the premises from a school to a hair salon and barbershop.

The application for the injunctions sought was strongly opposed but after an inter partes hearing, the trial lower court which had earlier granted the interim orders ruled that the orders were, not viable or deserved. It set the interim order aside and dismissed the original application seeking for them, thus provoking this appeal.

I have carefully studied the record noting the grounds upon which the original Appellant's application was based, the grounds upon which the Respondent opposed the application and the consideration upon which the trial court finally dismissed the application. I have also carefully considered the many recorded grounds of appeal which can be summarized into only one or two or so grounds. i.e.

**a) that the plaintiff would suffer irreparable or substantial loss not easy to compensate.**

**b) that the plaintiff's pleadings and affidavit evidence did not demonstrate a prima facie case.**

**c) that the balance of convenience lay in favour of granting the injunctions sought and already granted in the interim.**

**d) that upon the evidence on the record there was adequate and compelling evidence to grant mandatory injunctions.**

In going through these records I observe that the trial court at one stage on 28<sup>th</sup> April, 2011, reinstated the interim orders restraining the Respondent from stopping Appellant access into the premises and enjoying possession thereof. That was because the trial court's interim injunctions had been lifted under an intervening application filed and prosecuted by the Respondent. In reinstating the interim orders under an application for review dated 22<sup>nd</sup> February, 2011, the trial magistrate appears to have properly in detail, considered the grounds for reinstatement. She established, on affidavit evidence, that her court's earlier lifting of the interim orders at the instance of the Respondent, had not been informed and did not include full disclosure by the Respondent, that the disputed office space had not in fact, been given in a fresh tenancy, a third party. The court established that although the Appellant had been forcefully evicted on 28<sup>th</sup> January, 2011, no third party in a new tenancy, had physically taken up possession of the same, although the Respondent had informed the court that M/s Mukami Mwangi & Company had taken possession.

Furthermore, the trial court also established that although the Respondent terminated the Tenancy between it and the Appellant, purportedly under the lease Agreement terms, no persuasive prima facie evidence had been produced before the court to that effect to persuade the court that the Plaintiff/Appellant's cause of action had no basis. Nor, according to the trial court observation, had the Respondent produced any court order for eviction or other proper legal eviction orders to show that the eviction of the Appellant prima facie, was lawful. The trial magistrate in the above circumstances, and taking into account that in fact the offices would be vacant during the material time, in which case no innocent third party would suffer, had proceeded to reinstate the restraining and mandatory orders against the Appellant on 22<sup>nd</sup> April, 2011.

I now turn to the original application before the lower court dated 2<sup>nd</sup> February, 2011, from which this appeal arises. I must state from the onset that it was the same trial magistrate who had earlier reinstated

the relevant injunction orders who again dismissed the application. As already stated the trial magistrate had granted the original injunction orders. She later discharged those orders. She then again much later, reinstated the same orders under a review application in which she carefully analyzed the grounds and found the reasons and sufficient for reinstating the interim injunction orders. On what basis, then did the honourable magistrate finally refuse to grant or confirm the same injunction orders?

Her final ruling shows that she tended to accept the Respondent's ground that the Appellant had defaulted in rent payment. She also accepted, prima facie, that the Appellant had had unlawfully changed user of the offices from classrooms to a hair salon and barber salon. The trial magistrate on the above basis had concluded thus in her final ruling: -

***“So in weighing all these in the mirror of injunction principles and mandatory injunction principles I find that by the time the Plaintiffs came to court on 3<sup>rd</sup> February, 2011 they had prior notice to vacate and were indeed removed by the Defendant in exercising his proprietary rights of the suit premises after due notice.”***

It is the finding of this court however, that whether or not notice to terminate tenancy was due and had been properly or otherwise, served was a matter to be proved during the hearing of the suit. Also, whether there was default of rent payment by the Appellant or unlawful change of user of the premises by the Appellant, was also an issue of evidence to be proved during the hearing. At the stage when the trial court made the impugned ruling it had earlier already, reinstated the injunction orders upon very reasonable and valid grounds. Those grounds were not shown to have much changed except probably the fact that the office space had now been physically occupied by a third party. Furthermore, the fact that the discharging of the injunction orders meant that the substratum of the suit was being destroyed, should have persuaded the trial court not to discharge the injunctions.

Be that as it may, there is on the other hand, evidence that the injunction orders for some reason were not implemented. For example the interim mandatory order to reinstate the Appellant into the office premises could but was not executed before a third party physically took possession. It was upon the Appellant to apply to court for execution but no such attempt is shown to have taken place. As a result, this court under a separate application heard by my brother Mwera, J, ordered for a status quo, recognizing that it was perhaps too late to reinstate the appellant into the premises in dispute. He indicated, which position I find reasonable, that what remains convenient and indeed proper remedy for the Appellant, might be the assessment of the loss and the damages caused by the Respondent in forcefully and unlawfully evicting the Appellant who was its tenant.

This court's finding accordingly is that the trial magistrate erred in failing to grant the temporary injunctions sought under the application dated 3<sup>rd</sup> January, 2011. However, because it is a little too late to grant the said orders, the suit below should proceed to a hearing for proof whether: -

**a) There was breach of the Lease Agreement terms by the Plaintiff or not.**

**b) Whether the eviction was lawful or otherwise.**

**c) Whether the Appellant is entitled to the general damages from loss if any, caused by the Defendant during the eviction.**

To the extent above, this appeal is allowed with costs. Orders accordingly.

Dated and delivered at Nairobi this 8th day of March 2013.

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**D A ONYANCHA**  
**JUDGE**