



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 3 OF 2008

ZACHARIAH B. SHIMECHERO T/A NEW KAKAMEGA

LAUNDRY & DRY CLEANERS PLAINTIFF/APPLICANT

VERSUS

EBRAHIM AMBWERE DEFENDANT/RESPONDENT

RULING

The **Notice of Motion** dated 24/4/2012 is premised on **Section 3** and **3A** of the **Civil Procedure Act** and **Order 40 rules 1** and **2** of the **Civil Procedure Rules**. The substantive order sought is that a temporary order of injunction do issue against the Respondent, either by himself or his agents, servants or anybody acting on his behalf from interfering, attaching, levying distress upon tampering or in any manner whatsoever interfering with the laundry machine and equipment situate on **LR No. Kakamega/Municipality/Block 11/19** pending the hearing and determination of this suit.

The application is supported by the affidavit of the applicant sworn on 24/4/2012. According to the said affidavit, the applicant entered into an exchange agreement with the Respondent wherein the applicant agreed to transfer his parcel of land in **Kitale** measuring 150 acres to the Respondent in exchange for laundry machines and equipment owned by the Respondent and installed on the Respondent's premises on land parcel No. **Kakamega Municipality/block 11/19**. The applicant's contention is that he transferred the land to the Respondent but the Respondent failed to transfer the laundry machines and equipment to him. According to the applicant, if any of the parties was in breach of the exchange agreement, the parties would return to their respective properties. The applicant's complaint is that the Respondent has instead made him a tenant and is threatening to attach the laundry machines and equipments under the guise of levying distress for rent. The applicant filed a further affidavit on 24/5/2012 in which he raised the issue of whether or not the Respondent is entitled to any rent payments.

The application is opposed. The Respondent, **Ebrahim Ambwere** swore a replying affidavit on 14/5/2012 in opposition to the application. According to the Respondent, the applicant is his tenant in the premises known as **Kakamega/Block/11/19**. That when the Respondent opted to increase the rent from Kshs.30,000/= to Kshs.50,000/= the applicant became problematic and fell into rent arrears. The Respondent then exercised his rights as a landlord to distress for rent.

The Respondent denied having failed to transfer the laundry machines and equipment to the applicant, arguing that he handed over possession of the laundry machines to the applicant. He further added that the ownership of such machines is not registrable. The Respondent's stand is that the applicant is under the obligation to pay rent.

Ms Osodo Advocate appeared for the applicant and **Ms Kidiavai & Company Advocates** appeared for the Respondent.

The application proceeded by way of written submissions. I have duly considered the application, the reply to the same and the submissions of the counsels.

There is no dispute that the parties entered into the exchange agreement. It is also clear from the plaint herein that the 150 acres of land and the laundry machines and equipment which were the subject of the exchange agreement are the subject matter of this suit as per the amended plaint filed herein on 24/4/2008.

It is also apparent from the applicant's further affidavit that the rent dispute is the subject of **Kakamega BPRT Case No. 67 of 2012.**

The attachment of the laundry machines and equipment in a bid to distress for rent could render this suit nugatory in that the subject matter of the suit may be non-existence by the time the case is heard and determined. I would agree with the applicant's counsel that this would amount to irreparable loss to the applicant. The balance of convenience also tilts in favour of the applicant whose case herein is yet to be heard. However, for the avoidance of doubt, this ruling does not in any manner touch on the issue of payment of rent nor does it touch on the landlord's right to employ any other legal method of recovering any rent owed. The application herein rests squarely on the laundry machines and equipment which need to be preserved pending the hearing of this case. With the foregoing, I allow the application with costs in cause.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Kakamega this 18th day of April 2013.

.....

SAID J. CHITEMBWE

JUDGE