



**ANNE WAMBUI MURAYA T/A OFF ROAD**

**BAR & RESTAURANT.....APPELLANT/APPLICANT**

**VERSUS**

**ASSOCIATED ELECTRICALS AND**

**HARDWARE SUPPLIES LIMITED.....RESPONDENT**

**RULING**

By notice of Motion dated 8th October 2010 brought under Order XLI Rule 4 (6) and Order L Rule 1 of the Civil Procedure Rules the Appellant prays for the following orders:

**This Honourable court be pleased to issue an order compelling the respondent to reinstate forthwith, Anne Wambui Muraya T/A Off Road Bar & Restaurant, the Appellant/applicant herein, to the demised premises on Plot No. MSA/Block XVI/135/M1 pending hearing and final determination of this appeal.**

The application is supported by the affidavit of the Appellant dated 8th October 2010. She states that she was compelled to make this application following the respondent's action of throwing out her tools of trade including stock in business from the premises where she was operating form as a tenant. She states that this incident took place on 4<sup>th</sup> October 2010 and was conducted by M/S Jerreby Auctioneers in the company of rowdy youth armed with crude weapons.

The Applicant avers that when she questioned what was going on she was shown warrants issued on 21.6.2010 ordering eviction of LSMAF Enterprises. She states that although she had at one time run a business in the name and style of "LSMAF" Enterprises the same has become defunct almost three years ago. She avers that the order given did not call for eviction of "Off Road Bar & Restaurant" but the handing over of portions which were purportedly sublet to M.S Jomwamu car décor, Safaricom Mpesa and LSMAF Enterprises. She further states that the Respondent was very much aware that the only Appellant's business that remained operative was Off Road Bar & Restaurant and even issued tenancy notice to increase rent during the pendency of the Appeal. She states that the respondent also received her rent for August and September 2010.

The application is opposed through the replying affidavit dated 26<sup>th</sup> October 2010 of Shailesh Hira one of the directors of the Respondent. He states that the Honourable Court does not have jurisdiction to issue mandatory injunction orders in an appeal where the appeal did not have a prayer for injunction.

He states that the applicant stated the tribunal proceedings that she occupied the premises as LSMAF Enterprises and she has not shown any evidence that LSMAF Enterprises is defunct. That the eviction order was issued for entire premises including LSMAF which was the one operating the bar business. That the applicant told the tribunal that she had changed her business name from "Off Road Bar and Restaurant" to LSMAF and the two were one and the same.

The Respondent avers that the applicants application is misconceived and geared to endure the landlord does not use its property and prays that the application be dismissed with costs.

In reply to the replying affidavit by the Respondent above the applicant has filed a supplementary affidavit. She states that she did not change the name of "Off Road Bar and Restaurant" to LSMAF Enterprises and they existed as different entities. She has annexed the business name certificate for the two businesses.

Parties have also filed their submissions which mostly adopts the matters contained in the affidavits of the respective parties.

I have carefully considered the application and the grounds both in support and in opposition by the parties.

The main contention of the applicant is that the eviction order issued by the tribunal was directed at "LSMAF" Enterprises and not "Off Road Bar & Restaurant".

From the judgment of the tribunal the court states that the applicant was the registered owner of "LSMAF" Enterprises and that she did not part with possession of the premises but changed business name from "Off Road Bar Enterprises to "LSMAF".

From the typed proceedings submitted by the applicant with are not signed nor dated the tribunal determined that the tenant was in breach of her agreement by subletting. It directed that the tenant vacates the part known as "LSMAF" on 12.7.2010. Also terminated was the part occupied by Jomwamu and Safaricom shop.

The issues raised are not clear cut and need further interrogation.

The court at this stage is called upon to determine whether in the circumstances a mandatory injunction for reinstatement can be given to the applicant as prayed in her application.

In the case of **Rift Valley Agricultural Contractors Ltd Vs. Githae & co Accounts & Another** [2005] eKLR

The court quoted the decision in **Kenya Breweries Ltd & Another Vs. Washington Okeyo Civil Appeal No. 332 of 2000 NRB** (unreported) where the court stated

**"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However if the case is clear and which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the defendant attempts to steal a march on the plaintiff... then mandatory injunction will be granted on interlocutory application"**

The threshold required for grant of mandatory injunction high in that it is court needs to have a high degree of assurance that orders granted were rightly granted at the trial.

In this case if the orders the applicant prayed for are given then it is tantamount to summary disposal of the appeal.

I hereby dismiss the Notice of Motion application dated 8<sup>th</sup> October 2010. Costs shall be in the cause of the Appeal.

**DATED AND SIGNED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JULY 2012**

**M.K IBRAHIM**

**JUDGE**

**DATED AND DELIVERED AT MOMBASA ON THIS 21<sup>ST</sup> DAY OF AUGUST 2012**

**J.W. MWERA**

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**JUDGE**

In the presence of : Both sides represented