



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPELA NO. 12 OF 2011

JOSEPH NYAGU.....APPLICANT

VERSUS

ISAAC K. TOWETT.....RESPONDENT

RULING

Before me are two applications for determination. On 28/1/2011 the applicant, Joseph Nyaga filed the Notice of Motion of the same date seeking:-

- 1. An order of stay of the orders made on 26/1/2011 restraining the appellant/respondent from alienating, using, occupying and/or in any other way dealing with the premises located at NAKURU MUNICIPALITY BLOCK 4/30.***
- 2. That pending the hearing and determination of this application, this court be pleased to issue a temporary injunction restraining the respondent from damaging, wasting, or evicting the applicant or whatsoever interfering with appellant's use, business situated in NAKURU MUNICIPALITY BLOCK 4/30.***
- 3. That pending the hearing and determination of the application the respondent be restrained from damaging, wasting, or evicting the applicant from the suit property.***
- 4. That pending the hearing and determination of the appellant's appeal there be a temporary injunction restraining the respondent from damaging, wasting, or evicting the applicant or whatsoever interfering with appellant's business situated in NAKURU MUNICIPALITY BLOCK 4/30.***

The grounds upon which the application was brought are found on the face of the application and affidavit of the applicant, Joseph Nyagu. The applicant contends that he has been a tenant of the respondent in the suit premises since 2004 which was initially an open space on which he constructed the business premises. The respondent filed a suit (CMCC No. 28/2011) against the applicant seeking a declaration (JN1) accompanied by an application for injunction to restrain him from using the premises (JNII). The court granted the said orders thus locking the plaintiff out of the premises (JNIII). The applicant sought to have the said order set aside vide an application (JNWIV) and on 21/1/2011 the court ordered both applications for injunction and setting aside to be heard together. They were heard on 24/1/2011 and the court delivered its ruling on 26/1/2011 granting an order of injunction evicting the appellant. The appellant was given 2 days to vacate the premises (JNV). Being dissatisfied with the said order, the applicant preferred this appeal. It is the applicant's contention that he had obtained restraining orders against the respondent from the Business Premises Tribunal in case No. 22/2010 and no notice of eviction had been served on him by the tribunal. He contends that he will suffer prejudice if the order of injunction is not granted. Mr. Kibet, counsel for the applicant urged that the applicant's goods are still in

the premises. He relied on the case of **OTIENO V OUGO (1987)KLR** where the Court of Appeal held that the object of an injunction is to preserve the subject matter.

When the applicant approached the court on 28/1/2011 under certificate of urgency on the application dated 28/1/2011, the court considered it and granted ex parte orders of temporary stay of the orders of the lower court that purported to evict the applicant from the premises and an injunction to restrain the respondent from evicting the applicant from the suit premises (prayers 2 & 3). Those orders prompted the respondent to file the application dated 1/2/2011 seeking to discharge or set aside the ex parte orders made on 28/1/2011. The applications dated 28/1/2011 and 1/2/2011 were ordered to be heard together. In the respondent's Notice of Motion, he contended that the orders issued by the lower court were not eviction orders, that the respondent had taken possession of the premises on 15/1/2010, that the applicant had entered on 17/1/2010, that the tenancy was illegal and the applicant was not paying rent. The application was also supported by the affidavit of the respondent dated 1/2/2011 and another replying affidavit dated 3/2/2011. The respondent deposed that he entered into a lease agreement with the owner of the property on 1/7/07 for 3 years with rents increasing each year. The lease was renewed on 1/7/08 on new terms till 2013 and it was a term of the lease that he should not sublet. He had found the applicant on the premises and allowed him time at a rent of Kshs.5,000/- but the applicant had not paid by September 2010. The respondent claims to have paid the full rent for the premises of Kshs.3.6 million till 2013 and wants to reap full benefits of the tenancy. That the applicant is not disserving of the interim orders granted by the court and that is why the respondent sought to have them discharged.

The principles for grant of temporary injunction are well settled in the case of **GIELLA V CASSMAN BROWN (1973)EA**, that the applicant has to demonstrate that he has a prima facie case with reasonable probability of success, that if the order of injunction is not granted, he stands to suffer damage or loss that may not be adequately compensated and if the court is in doubt, then it will decide on a balance of convenience. The same principles were considered in **NJENGA V NJENGA** (supra).

The order of the trial court made on 26/1/2011, the subject of this appeal was to the effect that the applicant was restrained from entering, using or occupying or in any other way dealing with the suit property and was given 2 days to vacate. That order was in effect evicting the applicant from the premises. At that time the applicant was in possession. Though he was locked out on 15/1/2011, the respondent does admit that he forcibly re-entered the premises on 17/1/2011. The fact then is that the applicant is in possession of the premises.

This is an application for injunction pending an appeal. The applicant claims to be still in possession of the disputed premises because the motor vehicle parts, accessories, seat covers and the tools of trade are still there. He was in possession when he was given 2 days by the lower court to remove them vide the order of 26/1/2011 an eviction, which was couched like an injunction. That order is the subject of this appeal. Before that order was made, the applicant claims to have filed a suit at the Business Premises Tribunal that is still pending. That was not denied. The applicant has also raised issue with the notice allegedly issued by the Tribunal upon which the lower court based its decision to summarily deal with the issue of the tenancy. As rightly pointed out by the applicant, an order of injunction is granted to preserve the subject matter pending the hearing and determination of a pending appeal and to safeguard the rights of the applicant and to prevent the appeal from being rendered nugatory – (see **OTIENO V OUGO**). In the instant case, I find that the applicant has demonstrated that he has a prima facie case with a reasonable probability of success. If the order is not granted he will be evicted from the suit premises where he has been carrying on trade since 2004 before he can be heard. It is not for this court to decide at this stage whether the notice from the Business Premises Tribunal was served on the applicant or not. The issue of jurisdiction of the lower court and the notice upon which the decision was based will be considered on appeal. The applicant has also challenged the grant of the order of injunction, whether it met the principles set out in **GIELLA's case** (supra). For all the above reasons, I find that the applicant is deserving of an order of injunction to restrain the respondent from wasting, evicting or interfering with the applicant's business till the appeal is heard. Since the applicant contends that he has been paying rent but the respondent is not acknowledged, it is directed that the rents be paid in this court from this month henceforth till the appeal is heard. The respondent is at liberty to apply for release of the rent from the court. It is further ordered that the applicant do provide security of Kshs.200,000/- to be deposited with

the court within 7 days hereof in default the order of injunction do lapse automatically. Having granted the applicant's prayer for injunction, it follows that the application by the respondent to discharge the temporary order of injunction cannot be granted.

From the foregoing, I decline to grant the respondent's application dated 1/2/2011 and dismiss it with costs. I grant prayer 4 of the application dated 28/1/2011 with costs being in the cause.

DATED and DELIVERED this 25th day of March 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Karanja for the applicant.
Ms. Naija for the respondent.
Kennedy – Court Clerk.