



NO. 2933

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 60 OF 2011

SAMWEL NYAPORO.....PLAINTIFF  
VERSUS  
MAGDALINE MORAA MWEBI  
T/A ST.JUDES WHOLESALERS & SUPERMARKET.....1<sup>ST</sup> DEFENDANT  
MICHAEL KARANJA.....2<sup>ND</sup> DEFENDANT

RULING

On 4<sup>th</sup> April, 2011, the plaintiff, **Samwel Nyaporo** lodged this suit against the defendants, **Magdalene Moraa Mwebi** and **Michael Karanja** respectively claiming, a permanent injunction, costs of the suit and any other or further order that this court may deem fit and just to grant.

The facts culminating or leading to the suit were that on or about 17<sup>th</sup> March, 2010, the plaintiff entered into a verbal tenancy agreement with the 1<sup>st</sup> Defendant to rent a business space on the 2<sup>nd</sup> floor, new wing of St. Judes General and Supermarket building. The terms were that he would deposit kshs.50,000/- and thereafter pay monthly rent of kshs.8,000/- . For purposes of his intended business, the plaintiff built and placed fixtures at a total cost of kshs.140,000/- in the business space leased to him as aforesaid. He also bought 2 pool tables, 10 plastic chairs and one used fridge at a total cost of kshs.165,000/- and by October, 2010, the plaintiff's pool game business had commenced with a daily income of kshs.3,000 to 4,000/- daily. However on or about 21<sup>st</sup> February, 2011, the 1<sup>st</sup> defendant in breach of the tenancy agreement aforesaid leased out the same premises to the 2<sup>nd</sup> defendant. The two defendants then attempted to forcefully the plaintiff therefrom. The plaintiff reported the incident to the police but to no avail, hence the suit.

Contemporaneously with the filing of the suit, the plaintiff took out a chamber summons application pursuant to order **40 rule 1** and **2** of the **Civil Procedure Rules** and all other enabling provisions of the law. In the application, the plaintiff sought a temporary injunction against the defendants jointly and severally **"...until the hearing and final determination of this application..."**

The grounds in support of the application and indeed the affidavit in support thereof are along the same time as to what the plaintiff averred in the plaint. Suffice to add that, according to the plaintiff, the defendants had no respect for law and order as they had no court order authorizing them to evict him from the premises but had resorted to the use of unorthodox methods to achieve their goal. The defendants were now holding his two pool tables, 10 plastic chairs and an old fridge and had threatened to take possession of what is left of the plaintiff's business and close the same by force unless stopped by this court.

Upon the application being served on the defendant, only the 2<sup>nd</sup> defendant reacted by filing a replying affidavit signaling his intention to contest the application. Where pertinent he deponed that he was a tenant of the 1<sup>st</sup> defendant in her business premises. He denied having confiscated goods belonging to the plaintiff nor does he hold any other property which is the subject of the suit. That this court had no jurisdiction to entertain this suit as it ought to have been filed in the **Business Premises Rent Tribunal**. Otherwise, the plaintiff had failed to meet the threshold of granting temporary injunction as laid out in the famous case of *Giella v Cassman Brown (1973) E.A.358*.

When the application came up for interpartes hearing before me on 1<sup>st</sup> July, 2011, **Mr. Sagwe** and **Mr. Nyambati**, learned counsel for the plaintiff and 2<sup>nd</sup> defendant respectively agreed to canvass the same by way of written submissions. Subsequently, they filed and exchanged written submissions together with authorities which I have carefully read and considered.

This application is bound to fail as against the 2<sup>nd</sup> defendant on 3 rounds. Firstly, prayer 2 of the application as framed is incapable of being granted. If the court was to grant the same, the court will be acting in vain and courts do not issue orders in vain. From the wording of the prayer, the plaintiff is seeking “...*a temporary order of injunction restraining the respondents by themselves, their agents, employees, servants or any other person acting on their instructions from trespassing into and remaining thereon, damaging or removing property from the plaintiff’s business room or in any way interfering with the business space of the plaintiff/or abusing, harassing and/or intimidating the applicant and/or discussing the conduct of the applicant’s business and or matters touching on the person of Samwel Nyaporo the applicant herein until the hearing and final determination of this application...*” (emphasise provided). As it is, the plaintiff wants the temporary order of injunction to last until the determination of the application. The determination of the application is being made today. So of what use will be to grant the application. Such prayer could only have been entertained and possibly granted at the ex-parte stage of the hearing of the application. It cannot be granted now. A court can only grant a party that which is asked of. The court cannot amend a party’s prayer on its own motion. It must be asked to do so by a party to the suit. Ideally, the prayer should have been that the injunction if granted should last until the hearing and final determination of the suit.

Further, it does appear that even if the order was to be granted, it is incapable of enforcement in the absence of the details of the suit premises in which the plaintiff’s business is situate. It was incumbent upon the plaintiff to give the land reference number on which the suit premises are situate and the details of business space such as the floor and even the door number. In the absence of such details, I cannot see how the order if granted can be enforced.

Secondly, the jurisdiction of this court to entertain the suit is in doubt. Perhaps the suit ought to have been filed in the Business Premises Rent Tribunal as claimed by the defendants. It is not in dispute that the plaintiff was a tenant of the 1<sup>st</sup> defendant in her business premises. Any dispute between a tenant and a landlord with regard to a controlled tenancy can only be dealt with by the **Business Premises Rent Tribunal** established pursuant to the provisions of Landlord and Tenant (shops, Hotels and Catering Establishments) Act. Indeed, **section 12(4)** thereof provide specifically that “... *In addition to any other powers specifically conferred on it by or under this act, a tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit ...*”. In the light of the foregoing, the plaintiff may have a tall order in trying to persuade this court that it has jurisdiction to hear this dispute. It is trite law that a court of competent jurisdiction cannot hear and determine a suit which otherwise ought to have been filed in different forum.

Thirdly, the law on the parameters to be considered by court in applications for interlocutory injunctions is well settled. In **Giella (supra)** the court of appeal for East Africa held that the applicant has firstly, to demonstrate a prima facie case with probability of success. Secondly, the applicant has to demonstrate that he will suffer irreparable loss if the interlocutory injunction order is not granted. Thirdly, if the court is in doubt, then it will decide the matter on the balance of convenience.

In the light of the fact that perhaps, the plaintiff may have filed the suit in a wrong forum, I doubt

whether the plaintiff has a prima facie case capable of success at the plenary hearing. Again from the pleadings, there is nowhere he has demonstrated that he will suffer irreparable loss and or damage such that monetary compensation may not be an adequate remedy. His loss if at all is capable of precise computation. Thus he can be adequately be compensated. Infact in his own plaint he avers in the alternative that “...*if the defendants pay him off the costs of construction, the value of the items they took and initial deposit and loss of business, the plaintiff shall be willing to leave the said premise in peace...*”

The application is dismissed with costs to the 2<sup>nd</sup> defendant.

**Judgment dated, signed and delivered at Kisii** on the 23<sup>rd</sup> day of September, 2011.

**ASIKE – MAKHANDIA**  
**JUDGE**