



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 880 of 2009

FREDICO INVESTMENTS LIMITED PLAINTIFF

VERSUS

GRAPHIC INVESTMENTS LIMITEDDEFENDANT

RULING

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The application before the Court is brought by a notice of motion dated 27th January, 2010 and is brought under **Sections 2A, 3A and 63 (a), (b), (c) and (e) of the Civil Procedure Act, and Order L Rule 1 of the Civil Procedure Rules**. Whereas the original application carried prayers for 5 orders, at the hearing of the application, the Applicant's Counsel said he was going to pursue the prayer for order 2 only. That prayer seeks an order –

“That a mandatory injunction be issued compelling the Defendant to repair the property and restore it back to the condition and state it was in prior to the Defendant's action of 4th January, 2010, and thereafter restore the Plaintiff into the premises known as SKY-MART EXHIBITION on L.R. No. 209/1913/1, Nairobi.”

The application is supported by the annexed affidavit of Maria Josephine Nduma and is based on the grounds that –

(a) The honourable court issued an order of injunction against the Defendant in the presence of the Defendant's Director in a ruling by Lady Justice Khaminwa, delivered on 4th January, 2010, but the Defendant has blatantly defied the same.

(b) The Defendant, despite being aware of the injunctive orders of the Court, has illegally and unlawfully evicted the Plaintiff from its business premises hence blatantly ignoring and refusing to obey the said Court order.

(c) *In defiance of the order of injunction, the Defendant on/or about 4th January, 2010 through its Director, Martin Muthama, maliciously damaged the Plaintiff's business premises and thereafter illegally evicted the Plaintiff therefrom.*

(d) *The Plaintiff made a complaint to the police who noted the incident in the Occurrence Book but the police have been unable to take action against the Defendant's said Director as they cannot access the property to take photographic and other evidence necessary to commence a case.*

(e) *That the sanctity of the Court needs to be protected and the Court orders being disobeyed by the Defendant show that the Defendant does not respect the rule of law.*

In a replying affidavit sworn by Martin Muthama, the Defendant's

Managing Director, on 15th March, 2010 and filed in Court on the same date, the deponent avers that the Plaintiff and its tenants voluntarily vacated the premises way before the order of injunction was issued and that upon their vacating their premises, the order of injunction sought had been overtaken by events and the application rendered nugatory. The Plaintiff clearly knew that new tenants were moving in and its vacation of the suit premises was to give way to the new tenants to take possession. It is his contention that the Plaintiff vacated the premises willingly and upon expiration of its lease and it was obvious that the Defendant would lease the premises to another tenant. While he agrees with the Plaintiff in totality that Court orders must be obeyed, he avers that the same cannot operate in a vacuum, or retrospectively, as the Plaintiff had already vacated the suit premises and therefore he denies having disobeyed any order of the Court.

During the oral canvassing of the application, Mr. Thimba appeared for the Plaintiff and Mr. Kivuva appeared for the Defendant. Mr. Thimba submitted that it was not disputed that Khaminwa, J. had enjoined the Defendant from evicting the Plaintiff. However, the Plaintiff was nonetheless evicted contrary to the court order and she did not leave the premises on her own volition as alleged by the Defendant. The tenancy was not terminated in the legal way and since there was a court order prohibiting the eviction of the Plaintiff, such orders should have been obeyed. The allegation by the Defendant that there was now another tenant in the premises is neither here nor there. He therefore applied for the reinstatement of the Applicant into the premises. In support of his submissions, he referred to **GUSII MWALIMU INVESTMENTS CO. LTD. & OTHERS v. MWALIMU HOTEL KISII LTD., Court of Appeal Civil Appeal No. 160 of 1995**, and **KENYA HOTELS LTD. v. KENYA COMMERCIAL BANK LTD. & ANOR., Civil Case No. 8 of 2004**, and reiterated that unless and until the Court order is discharged, it should be obeyed.

On his part, Mr. Kivuva for the Defendant submitted that the application was totally incompetent and ought to be dismissed on two fronts. The first was that there was already an injunction in place and we cannot have an injunction on top of another injunction. Secondly, he contended that the only remedy available to the Plaintiff was to institute contempt of court proceedings against the Defendant but not to seek another injunction. In any case, the injunction sought was of a mandatory nature, and yet there was no prayer for a mandatory injunction in the plaint. Either way, therefore, the application was bound to fail. He urged the Court to disallow it.

In a short reply, Mr. Thimba submitted that there was no law requiring a prayer for a mandatory injunction to be in the

plaint and that the Defendant had admitted that the Court orders were disobeyed. He also submitted that a mandatory injunction can be sought to enforce an interim injunction. He therefore asked the Court to order the reinstatement of the Applicant into the premises as prayed.

I have considered the pleadings, the submissions of Counsel and the authorities cited. I note from the Court record that the plaint in this matter was dated and filed in Court on 2nd December, 2009. In that plaint, the plaintiff prayed for orders, *inter alia*, that –

(a) A temporary injunction restraining the Defendants either by themselves, their agents, employees, servants or other persons whatsoever from evicting the Plaintiff from its business premises and/or shutting the Plaintiff's business premises known as SKY-MART EXHIBITION on L.R. No. 209/1913/1, Nairobi.

(b) An order compelling the Defendants to renew the lease on the agreed terms.

(c) A permanent injunction restraining the Defendants either by themselves, their agents, employees, servants or other persons whatsoever from evicting the Plaintiff from its business premises and/or shutting down the Plaintiff's business premises known as SKY-MART EXHIBITION on L.R. 209/1913/1, Nairobi.

(d) General damages for breach of the agreement.

By an application by Chamber Summons of the same date as the plaint, the Plaintiff sought orders of temporary injunction restraining the Defendants from evicting the Plaintiff pending the hearing of the application *inter partes*. They also sought an injunction to similar effect pending the hearing and determination of the suit. After hearing the application *inter partes*, the Court granted an injunction restraining the Respondents from evicting the Plaintiff from its premises and/or shutting down the Plaintiff's business premises stated above. It is this injunction order which the Plaintiff contends was disobeyed by the Defendant and which has precipitated the present application. Issues for determination in the present application are whether the Plaintiff is entitled to a mandatory injunction and if not, what remedies, if any, it is entitled to.

The principles governing a grant of interlocutory mandatory injunctions are the same as those governing other interlocutory injunctions as enunciated in **GIELLA v. CASSMAN BROWN & CO. LTD. [1973] E.A. 358**. However, such injunctions are issued in very special circumstances. The test to be applied is clearly stated in Volume 24 of Halsbury's Laws of England, 4th Edition, at paragraph 848 wherein it is authoritatively stated that –

“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 a case is clear and one which the Court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempted to steal a march on the Plaintiff ... a mandatory injunction will be granted on an interlocutory application.”

The principles propounded in the above quotation were repeated and applied in **LOCABAIL INTERNATIONAL v. AGROEXPORT [1986] All ER 901** in which it was held that –

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

Our jurisdiction has espoused this philosophy in toto.`

The facts of this case are hotly contested. Whereas the Plaintiff states that it was forcibly evicted from the premises, the Defendant’s case is that the Plaintiff and its tenants vacated the premises before the Court order was made in anticipation of some new tenants coming into occupation of the premises. The affidavit evidence on this issue is contradictory and it would be difficult to resolve it without hearing some *viva voce* evidence. In a normal case, the Court should feel a high degree of assurance that at the trial, it will appear that the mandatory interlocutory injunction was rightly granted and this calls for a higher standard than that for a prohibitory injunction. Such a high standard cannot be achieved where the evidence is contradictory and the deponents have not been cross-examined. In view of the contradictory evidence as to how and when the Plaintiff left the premises, and to whom some goods allegedly scattered around the premises belonged, this Court does not feel a high degree of assurance that at the trial it will appear that any mandatory injunction was rightly granted. For that reason, this Court has very considerable doubts as to the propriety of granting a mandatory injunction at this stage. On the contrary, I am tempted to think that an award for damages might well be a more appropriate remedy.

The next main issue raised by Mr. Kivuva was that a mandatory injunction cannot be granted on top of another injunction, and that the remedy for the breach of an interlocutory injunction is not a mandatory injunction but committal for contempt of Court. This view derives support from **Section 63 (e)** of the **Civil Procedure Act** which provides that –

***“In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed –
‘... make such other interlocutory orders as may appear
to the Court to be just and convenient’.”***

Secondly, **Order XXI Rule 28 (1)** states that –

“Where any party against whom a decree for the specific performance of a contract, or for an injunction has been passed, has had an opportunity of obeying the decree, and has wilfully failed to obey it, the decree may be enforced by his detention in prison, or by the attachment of his property, or both.”

In its wisdom, the Plaintiff did not seek this alternative remedy but confined itself exclusively to an interlocutory mandatory injunction. Although it is possible to grant a mandatory injunction in order to enforce compliance with a prohibitory

injunction, every case should be decided on its own facts and circumstances. In the circumstances of this case, I find that the facts are hotly disputed and therefore it may not be suitable to grant a mandatory injunction on the basis of contradictory affidavit evidence.

This application accordingly fails and it hereby dismissed with costs.
It is so ordered.

Dated and delivered at Nairobi this 13th day of May, 2010.

L. NJAGI
JUDGE