



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

Civil Case 605 of 2009

KENT LIBISO.....1ST PLAINTIFF
ITRONIX LTD.....2ND PLAINTIFF

VERSUS

CIRKON TRUST CO. LTD.....1ST DEFENDANT

BEAUFORT INVESTMENTS LIMITED.....2ND DEFENDANT

RULING

1. By a suit filed by the Plaintiffs on 19th August 2009, they sought for an order of injunction restraining the Defendants from evicting alienating, demolishing or interfering with the Plaintiff's quiet possession of **LR No 1/811 KILIMANI NAIROBI**. They also sought for a declaration that the purported sale and transfer of the suit premises to the 2nd Defendant in July 2009 is fraudulent, and blatant breach of the order issued HCCC No. 319 of 2008. Finally they prayed for an order directing the Registrar of Titles to cancel any entry of transfer of the suit premises to the 2nd Defendant.
2. Simultaneously with the filing of this suit, the Plaintiffs filed a Chamber Summons under the provisions of Order 39 seeking for a temporary order of injunction to restrain the Defendants from evicting, alienating, damaging or interfering with the Plaintiff's quiet possession of the suit premises until the determination of this suit as well as HCCC No. 319 of 2008. In HCCC NO 319 OF 2008, that suit which is still pending determination is against the same parties except the 2nd Defendant, was Samuel **Mugo Wangai t/a Sannex Enterprises** and in this suit, the 2nd Defendant is **Beaufort Investment Ltd**.
3. By a ruling delivered by Khaminwa J, on 27th November 2008, the application was allowed in terms of prayer no 3 in the following terms;

“That the 1st Respondent by itself, its agent the 2nd Defendant and/or its any other agents and/or servants be restrained by way of injunction from evicting and/or interfering with the applicants quiet possession of the suit premise [L.R. No. 1/811 – Kilimani – Nairobi] in whatsoever manner pending the hearing and final determination of the instant suit.

That the costs of this application be paid to the Applicants.”

The Plaintiffs are complaining that they have been in peaceful occupation of the suit premises, paying rent and trying to conclude the sale agreement. As a matter of caution, they registered a caveat over the suit premises to safeguard their purchaser's interest. However on

16th August 2009, the 1st Plaintiff was called from church as there was invasion of his premises by a gang of about 30 goons who descended on the property and knocked down the perimeter wall. Apparently they broke into the property on the basis of a letter written by the directors of the 1st Defendant instructing them to destroy the suit premises although no copy of the letter was left.

4. The Plaintiff sought the help of police from Kilimani police station who challenged the gang leader to produce an order letter authorizing them to evict the Plaintiff, but they ran away after the discussions at the police station that is when the Plaintiff was shown documents purportedly transferring the suit premises to the 2nd Defendant. The Plaintiff contends that there was an order stopping any dealings with the suit premises and the transfer if any was effected fraudulently.

5. Counsel submitted that 1st defendant had no power to sell the suit premises in the face of a sale agreement between the Plaintiff and the 1st Defendant which was never rescinded. Secondly, the 2nd Defendant is not an innocent purchaser for value without notice of the Plaintiff's interest because there was a court order. Moreover the 2nd Defendant is mere creation of the 1st Defendant, this is discernable from the fact that the registered offices of the 2nd Defendant is in the same premises as the 1st Defendant and the directors are the same. The 2nd Defendant was incorporated in January 2009 by the same Advocate who is acting for the 1st Defendant therefore the 2nd Defendant is merely contrived to perpetuate a fraudulent transfer so as to defeat the ends of justice.

6. While this application was pending the Plaintiff filed yet another Chamber Summons dated 9th February 2010 which seeks principally for the same orders and a further order compelling the return by the 2nd Defendant of the Plaintiff's goods attached by ELAN TRADERS from the suit premises on 8th February 2010. The said properties were attached purportedly to recover outstanding rent due to the 2nd Defendant.

7. Both applications were opposed, Counsel for Defendant relied on replying affidavit by **Dr. Wanyoike Gichuhi** sworn on 1st September 2009. A further affidavit sworn on 22nd February 2010, and also a replying affidavit sworn by **Jane Ngonyo Tibi** on 22nd February 2010. The 1st Defendant contends that he was the lawful registered owner of the suit premises. The Plaintiff failed to complete the sale agreement and after completion notices were issued, the Plaintiffs failed to comply or even to pay rent which at the moment amounts to over 1 million. The 1st Defendant sold and transferred the property to the 2nd Defendant. The 2nd Defendant was at liberty to collect rent from the tenants, the 2nd plaintiff was already in arrears after having issued a bouncing cheque.

8. The 2nd Defendant further contends that as the registered proprietor of the suit premises they cannot be denied the exercise of their rights to collect rent. The 2nd defendant had no contract with the Plaintiffs and a contract only affects parties to it, it cannot be enforced against a person who is not a party, even if the contract is made for the benefit or purport to give the third party a right to sue. (See the case of **Agricultural Finance Corporation vs. Lengetia Limited [1985] KLR 765**).

9. This application seeks for an interim order of injunction and the second application seeks for a mandatory order for the return of household goods purportedly distrained by the 2nd Defendant. The principles upon which an order of injunction can be granted are well settled, first the Plaintiffs have to establish a prima facie case with a probability of success. The Court of Appeal has explained in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** what constitutes a prima facie case in the following terms:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

10. A similar application regarding whether the Plaintiff has a prima facie case with a probability of success, was determined in **HCCC No. 319 of 2008** and the court after hearing both sides, issued an order restraining the 1st Defendant from evicting or interfering with the applicant’s quiet possession of the suit premises until the determination of the suit. I have gone through the ruling by my Sister, **Khaminwa J**, and I am satisfied that the issues raised in that application and also in the present one by the same Plaintiffs require an explanation especially the status of the agreement entered into between the Plaintiff and the 1st Defendant over the suit premises.

11. It is evident from the records that the Plaintiffs, have not completed the payment of the purchase price however that did not warrant the kind of high handedness that has been demonstrated on the part of the 1st and 2nd Defendants by trying to forcefully take possession of the suit premises by demolishing the perimeter wall. The law must be followed especially while noting there was an order and a ruling of **Khaminwa J**, the least the 1st Defendant could have done was to apply for the court to rescind the agreement. The 2nd Defendant does not even show a copy of demand notice for rent which was served upon the Plaintiff demanding the arrears of rent.

12. For those reasons I have no difficulty in finding that the Plaintiff’s case meets the threshold set out in the case of **Giela vs. Cassman Brown. I** therefore grant No 2 of the application dated 19th August 2009 subject to the following conditions. As noted above there were arrangements for the Plaintiff to purchase the suit premises and also to pay rent pending the completion? This injunction is subject to the Plaintiff paying the entire rent which is outstanding within seven (7) days and to provide prove of such payment to court. Failure to do so the order of injunction herein shall lapse. This suit should be consolidated with **HCCC No. 319 of 2008** for hearing and determination. Parties should proceed to complete discovery within sixty (60) days after which the matter will be mentioned for purposes of giving an early hearing date.

13. On the second application the Plaintiff is seeking for similar orders of injunction except they are also seeking for a mandatory order of injunction seeking for the return of goods taken away by M/s ELAN TRADERS from the suit premises. It is now a settled principle that an application seeking for a mandatory order of injunction, can only be brought to court as provided for under **Order 50** of the **Civil Procedure Rules** which is by way of a notice of motion. See the persuasive case of **Morris & Co Ltd vs. Kenya Commercial Bank & Another [2003] eKLR Vol.2** Ringera J, (as he then was) held that:

“where the Plaintiff sought both interlocutory prohibitive and mandatory injunctions it was incumbent on him to do so in a motion on notice, for under our procedural law it is established that where a mater partly falls within the scope of a summons in chambers and partly within a motion on notice, the large procedure, namely, the motion, is to be invoked.”

Apart from the fact that this application is filed by way of a Chamber Summons, M/s Élan Traders who are being sought to be compelled to return the goods, are not parties to this suit. Accordingly I decline to give the orders sought in the application dated

9th February 2010.

Cost of the applications shall be in the cause.

RULING READ AND SIGNED ON

7TH MAY, 2010 AT NAIROBI

M. K. KOOME

JUDGE