



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Civil Case 46 of 2004**

**CATHERINE NJERI WAWERU.....PLAINTIFF**

**VERSUS**

**TERESIAH N. NGURE.....DEFENDANT**

**RULING**

On 23<sup>rd</sup> February 2004 the plaintiff filed this Originating Summons claiming that she went into partnership with the defendant to run a business known as Cheers Classic Café Mai-Mahiu. She contributed Kshs.194,000/-. On 3<sup>rd</sup> September 2003 the defendant unceremoniously dismissed her from the partnership. She therefore sought for the dissolution of the partnership and the taking of accounts.

On learning that the defendant had won a green card and was due to travel to the U.S.A. she has today filed an application under **Order 39 Rule 2** and **Order 38 Rules 1 & 2** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act** and sought an injunction to restraint he defendant from the leaving the country or alternatively to direct the defendant to provide security for the due performance of the decree that may be obtained in this case.

Arguing the application, Mrs Gatei for the applicant submitted that if the defendant leaves the country the plaintiff will be left with no remedy for her claim. She said the reason why the suit has not been prosecuted is because there have been negotiations between the parties to settle the matter. She therefore urged me to either issue the injunction or direct the defendant to deposit in court a sum of Kshs.120,000/- being the plaintiff's share of the partnership.

As the defendant is due to fly out of the country today at 8.00 pm, I directed the court clerk to call his counsel to react to the application. Mr. Mutonyi for the defendant appeared and strongly opposed the application. While confirming that his client has indeed won a green card and he is flying out this evening, he submitted that in the circumstances she is not in any way evading the settlement of the plaintiff's claim in this suit. He said the question of providing security under **Order 38 Rules 1 & 2** of the **Civil Procedure Rules** does not therefore arise. He also submitted that this court has no jurisdiction to grant the injunction sought under **Order 39 Rule 2** of the **Civil Procedure Rules**. In any case, he concluded, the plaintiff is guilty of laches having not prosecuted her claim for over seven years. He dismissed her contention that the reason for delay was because of the negotiations between the parties to settle the matter. If they were such negotiations he said as counsel for the defendant he should have known.

I have considered these submissions and read this file. I agree with Mr. Mutonyi that the defendant did no apply for a green card to run away fro the plaintiff's claim in this suit. So the question of providing security under **Order 38 Rules 1 & 2** of the **Civil Procedure Rules** does not therefore arise. I also agree with him that this court has no jurisdiction to grant the injunction sought under **Order 39 Rule 2** of the **Civil Procedure Rules**. Besides that, the plaintiff has been indolent. She has not prosecuted her claim since February 2004. I reject her contention that the reason for delay is because there were negotiations between the parties to settle the matter as there is no evidence of such negotiations. The plaintiff also knew more then two weeks ago that the defendant had won a green card and was due to travel to the U.S.A. any time. She sat back and decided to bring this application hardly six hours before the defendant was due to fly out. The court cannot countenance such indolence. To accede to her application will not only cause the defendant terrible inconvenience but also financial loss as he had already bought the air tickets. All this aside, I agree with Mr. Mutonyi that the plaintiff's claim is too small to cause the defendant not to return to Kenya. For these reasons I dismiss the application with costs.

DATED and DELIVERED this 16<sup>th</sup> day of June, 2010.

**D. K. MARAGA**

**JUDGE.**