



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

Civil Case 812 of 2009

PHERIS WANJIRU PLAINTIFF

VERSUS

KHUZEIMA MOHSIN MAMUJEE

BETH NJERI MUGIRA DEFENDANTS

RULING

The Plaintiff's case is that by a lease for five and six months commencing on 1st May, 2006, she was the 1st Defendant's tenant at Stall No.2 at Mamujee Free Market exhibition at L.R. No.209/693/1693, Ronald Ngala Street, Nairobi. The monthly rent was Kshs.15,000/=, and she paid to the 1st Defendant at the commencement of the tenancy a sum of Kshs.320,000/= by way of rent paid in advance. On 16th October, 2009, the 1st Defendant sent auctioneers who unlawfully evicted her from the suit premises and took away goods worth over Kshs.150,000/=, and then installed the 2nd Defendant as a tenant. She therefore prays for judgment against the 1st Defendant for a mandatory injunction reinstating her to the premises; an injunction restraining the 1st Defendant from disposing of the attached goods and the said goods be returned to her or for value thereof. She also prays for judgment against the 2nd Defendant to relinquish the suit premises to the Plaintiff.

By an application by Chamber Summons dated 3rd November, 2009, and taken out under **Order XXXIX Rules 1, 2 and 9 of the Civil Procedure** Rules and all the enabling provisions of the law, and filed simultaneously with the plaint, the Plaintiff seeks from the Court the following orders –

1. ***That the attached goods unlawfully seized be released and given back to the Plaintiff/Applicant.***
2. ***That a mandatory injunction do issue requiring reinstatement of the Plaintiff/Applicant forthwith to Stall No.2 situated at Mamujee Free Market exhibition referred to hereinabove.***
3. ***That the Respondents be restrained from interfering with the Plaintiff's possession and quiet enjoyment of the suit premises and the 2nd Defendant be evicted forthwith.***
4. ***That the attached goods along with the files and business records of the Plaintiff unlawfully seized be released and given back to the Plaintiff/Applicant forthwith.***
5. ***That rent be paid through the Honourable Court.***
6. ***That costs be in the cause.***

The application is supported by the annexed affidavit of Pheris

Wanjiru, the Plaintiff herein, and is based on the grounds that –

- (a) ***There is an agreement of lease for five years and six months dated 1st May, 2006, which has not expired.***

- (b) *No rent is owed to the Respondents.*
- (c) *The Defendant has committed a breach of the agreement dated 1st May, 2006 between the parties to the detriment of the Plaintiff.*
- (d) *The 2nd Defendant has induced the breach by paying to the 1st Defendant a goodwill of Kshs.100,000/= and rent of Kshs.80,000/= with a view to profit and to oust the Plaintiff.*
- (e) *Unless the Plaintiff is reinstated and the 2nd Defendant is evicted and possession given back to the Plaintiff, the Plaintiff will continue to suffer irreparable loss and this will render this application nugatory.*
- (f) *The Plaintiff will suffer irreparable damages and loss if the Defendants are not restrained from their illegal conduct.*

At the oral canvassing of the application, Mr. Owuor appeared for the Applicant while Mr. Adala appeared for the Respondent. After considering their respective submissions in the context of the pleadings, I find that the main issues to be determined are whether there was a lease agreement between the Plaintiff and the 1st Defendant; whether there was a breach of the conditions laid out in the lease; and if so, the respective rights and/or obligations of the parties.

Paragraph 10 of the supporting affidavit sworn by the Plaintiff states that the Landlord received a sum of Kshs.20,000/= allegedly being rent for October, 2009, and a further Kshs.60,000/= “allegedly for three months’ rent deposit from the 4th Defendant” (*sic*). The record shows that there is no 4th Defendant in this suit and that those sums were paid by the 2nd Defendant.

In paragraph 12 of the supporting affidavit, the Plaintiff avers that she paid goodwill in the sum Kshs.320,000/=. There is a world of difference between rent and goodwill in respect of business premises. Generally, deposit for rent is refundable at the end of the tenancy but payment for goodwill is not refundable. And whereas in this paragraph the Plaintiff alleges to have paid the above sum for goodwill, in paragraph 7 of the plaint she said that she paid the same sum by way of rent in advance. It would have helped matters if a copy of the receipt against which the payment was made had been availed but, sadly, that was not done. The Plaintiff’s affidavit evidence on this issue remains contradictory.

In paragraph 14 of the supporting affidavit, the Plaintiff deposes that on a without prejudice basis, she presented to the Landlord a cheque for Kshs.23,000/= by way of advance payment of rent for the month of October, 2009. This statement cannot be true. If this payment was for advance rent for October, 2009, it should have been paid before the commencement of that month. However, a copy of the cheque attached to the affidavit shows that the cheque was dated 19th October, 2009, which falls in a second half of the month. It is also significant that by that date, the 2nd Defendant had already paid her rent, goodwill and deposit for stall No.2 on 17th October, 2009. The Plaintiff must have been in rent arrears for the month of October, 2009, and that was why her cheque was dated 19th October, 2009 after realizing that a new tenant had moved into the tenancy premises. She is therefore not being forthright with the Court.

Secondly on the same point, it is on record that the monthly rent was Kshs.15,000/=. If so, a question arises as to why the Plaintiff had to pay Kshs.23,000/= by way of advance rent for the month of October. Why would she want to do so? The better explanation lies with ground 14.3 of the Grounds of Opposition filed by the Defendants on 11th November, 2009, stating that the Plaintiff was purporting to pay rent in arrears for Kshs.23,000/= being the rent for September, 2009, and rent for sixteen days up to and including her last day of occupation of the premises.

From the above synopsis, I find that the Plaintiff was in arrears of rent for the month of September and the first half of the month of October, 2009. Failure to pay rent is one of the worst breaches of a lease that a tenant can commit. Clause 14 of the Agreement for Lease signed between the parties on 1st May, 2006, so far as is relevant to the payment of rent reads as follows –

“If at any time all or any part of the rent is in arrears for 7 days ... the Landlord through his authorized representatives and/or agents may re-enter upon the stall or any part of it in the name of the whole and thereupon the lease shall be determined ...”

The rent for September and October, 2009, was already in arrears for more than 7 months when the Plaintiff purported to pay it on 19th October, 2009, and in terms of the lease, the Landlord was entitled to terminate that lease. Surprisingly, even after referring to that lease in the plaint and in the supporting affidavit, and also as one of the grounds upon which the application is based, the Plaintiff has also purported to deny the very existence of that lease.

In paragraph 4 of the supporting affidavit, the Plaintiff swears that **“By a written agreement of a lease of a stall No.2 on L.R. No. 209/693/1693 dated 1st May, 2006, for a period of 5 years and six months I became a lawful tenant of the 1st Defendant occupying L.R. No. 209/693/1693, Ronald Ngala Street”**. This affidavit was sworn on 3rd November, 2009. Yet on 28th October, 2009, the Plaintiff’s

Advocate had written to the Defendants' Advocates as follows –

“Dear Sir

RE: ALLEGED LEASE AGREEMENT DATED 1ST MAY 2006 B.P.R.T. NO.938/09 PHERIS WANJIRU MUGUGU – OUR CLIENT

It has been brought to our attention that the copy of lease submitted to the Hon. Tribunal is a fabrication and the alleged endorsements on it allegedly executed by our client is an act of forgery.

We are instructed by our client that she never signed the said lease, or any lease, with Khuzeima Mohsin Mamujee/Zainabu Mamujee t/a Mamujee Free Market exhibition.

Our client saw a copy of the said lease yesterday afternoon (27.10.09) for the first time and was shocked to learn that a fraudulent document was submitted in court to secure orders adverse to her interests.

She immediately did lodge a complaint with the Police i.e., O.B. No. 61 of 27th October, 2009 at Kamukunji Police Station for necessary action by the police.

She is greatly aggrieved and distressed by the actions of your clients. She opines that the fabrication, submission and use of said document, as if it were genuine, is a part of the scheme hatched by your clients to fraudulently deprive her of her rights and also dispose of her electronic goods worth over Kshs.150,000/=

It is obvious in our client's view that the issue is/was not rent since she had no outstanding rent and that if at all it was the issue, she had already drawn a bankers cheque in favour of landlord for payment of October, 2009 rent in advance ...”.

Coming from the Plaintiff's Advocates, this was a very unfortunate letter. Even more unfortunate, it was copied not only to the 1st Defendant, but also to the Chairman, Business Premises Tribunal; the Nairobi Collections Services Auctioneers; the Police Commissioner/Kamukunji Police Station; and the Auctioneers' Licensing Board. To demonstrate the worst form of that misfortune, let it suffice to refer to paragraphs 4 and 5 of the plaint which read as follows –

“4. At all material times, the Plaintiff was a tenant at the suit premises in stall No.2 L.R. No. 209/693/1693, Ronald Ngala Street and otherwise known as Mamujee Free Market exhibition ... The Plaintiff will refer to the lease agreement at the hearing.

5. The monthly rent payable is Kshs.15,000/= and there is a lease from the Defendants commencing on the 1st of May, 2006 that for 5 years and six months.”

It is also notable that paragraphs 1 and 2 of the verifying affidavit accompanying the plaint read as follows –

“I Pheris Wanjiru ... do hereby make an oath and state as follows -

1. That I am a Plaintiff herein (sic).

2. That the averments contained in the whole plaint herein are true and correct.”

Assuming that the letter from the Plaintiff's Advocates and written on 28th October, 2009, was written on the Plaintiff's instructions, as ought to have been the case, and that the lease in question was signed in or about May, 2006, and the plaint herein was signed on 3rd November, 2009 while both the verifying affidavit together with the supporting affidavit were both sworn on 3rd November, 2009, which was only five days after the date of the letter from the Plaintiff's Advocate, it is inconceivable that the said lease could have been executed in May, 2006, become fraudulent on 28th October, 2008, and then become valid once again on 3rd November, 2009. The only conclusion I can draw from these inconsistencies is, to say the least, that the Plaintiff is not forthright. A lease cannot be valid and invalid at the same time at the whim of the Plaintiff just to suit her convenience. That earns the Plaintiff's credibility a huge question mark. At the same time, the Court notes that the first ground upon which the application is based is that **“there is an agreement of lease for five years and six months**

dated 1st May, 2006, which has not expired.”

Against the above background, should the Plaintiff be accommodated for the orders sought? The grant of orders of injunction is subject to the Plaintiff satisfying the conditions spelt out in **GIELLA v. CASSMAN BROWN & CO. LTD.** [1973] E.A. 358 wherein Spry, J.A., said at page 360 –

“The conditions for the grant of an interlocutory injunction are now ... well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

Given the aforesaid contradictions by the Plaintiff, I would shy to say that she has demonstrated any case with a probability of success. Secondly, she has quantified her loss thereby suggesting that she can adequately be compensated by an award of damages. And in the context of those two findings, if I was in doubt, I would order the maintenance of the present *status quo*.

One of the prayers sought by the Plaintiff was for a mandatory injunction for her reinstatement into the suit premises. The standard for granting mandatory injunctions is much higher than that for prohibitory injunctions. In Halsburys Laws of England, 4th Edition, Volume 24, at paragraph 848, it is authoritatively stated –

“A mandatory injunction can be granted on an interlocutory application as well as the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the 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 attempts to steal a march on the Plaintiff ... a mandatory injunction will be granted on an interlocutory application.”

These words were cited with approval and applied in **LOCABAIL INTERNATIONAL FINANCE LTD. v. AGROEXPORT & ORS.** [1986] 1 All E.R. 901 where 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 that 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 has 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” (emphasis added).

From these observations, I find that the Plaintiff is consistently inconsistent; has contradicted herself in a Court of Equity in several material particulars; and this casts a very heavy cloud on her credibility. Equally importantly, she has not satisfied the conditions for the grant of the orders sought. And lastly, I would hesitate to grant a mandatory injunction in those circumstances as I do not feel a high degree of assurance that at the trial it will appear that such an injunction had been rightly granted.

Out of these considerations, I therefore hold that the application has no merit and it is hereby dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of July, 2010.

L. NJAGI
JUDGE