



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NUMBER 337 OF 2010

**ROBERT MUTHAMA MUTUKU.....PLAINTIFF/
APPLICANT**

VERSUS

**KYANZAVI FARMERS COMPANY LIMITED.....DEFENDANT/
RESPONDENT**

R U L I N G

A Chamber Summons dated 29th June, 2010 was filed on 5th July 2010 by M/s Owaga Associates Advocates for the plaintiff/applicant **ROBERT MUTHAMA MUTUKU**. The respondent, who is the defendant in the case, is **KYANZAVI FARMERS COMPANY LIMITED**. The application was filed under Order 39 Rule 1, 2, 2A, 3 and 9 of the Civil Procedure Rules and section 3A and 63(e) of the Civil Procedure Act (Cap 21 Laws of Kenya). The application has 5 prayers, two of which have been spent as follows: -

1. *(spent)*

2. *(spent)*

3. ***THAT a temporary injunction do issue restraining the Defendant/Respondent by itself, it's servants, agents, employees and/or workers and anybody claiming through it, or under it, from levying distress, attaching, carting away, selling and/or alienating the plaintiffs/applicant's goods in Wei Wei Shopping Square on the ground floor of Agriculture House situated on L. R. No. 209/4285 along Harambee Avenue in Nairobi, pending the hearing and determination of this suit.***

4. ***THAT the honourable court do grant any other order and/or relief it deems fit to grant.***

5. ***THAT costs be provided for.***

The application has grounds on the face of the Chamber Summons. It was filed with a supporting affidavit sworn by the applicant on 29th June 2010.

The grounds of the application are that the plaintiff/applicant runs a business in Agriculture House known as Wei Wei Shopping Square; that the plaintiff has been a tenant at a monthly rent of Kshs.184,206/-; that the defendant had instructed M/s Transfield Auctioneers Ltd to levy distress for non-existence arrears of rent and had refused to receive rent for May and June 2010 of Ksh.368,416/-; that the plaintiff was now claiming an unjustifiable amount of rent of Ksh.3,203,038/-; and that the plaintiff had instructed the auctioneers to proclaim the plaintiff/applicant's goods on 21st June 2010; and that if the orders of injunction were not granted, the plaintiff will suffer great loss. The applicant also filed a supplementary affidavit sworn by himself on 23rd July 2010. The applicant/plaintiff also filed written submissions. In the said written submissions, it was contended that the applicant was a tenant of the respondent and that the amount of rent allegedly outstanding was a fabricated figure as there were no arrears of rent of Ksh.4,308,174/- as alleged. It was contended that the documents relied upon, per the replying affidavit of the respondent sworn by **JAMES MUEMA MUIYA**, were questionable documents and did not give an accurate picture of the amounts in issue. It was contended that the applicant had demonstrated a prima facie case with probability of success and that the application should therefore be granted to protect the applicant from further interference by the respondent. Reliance was placed on the case of **PARVI HOLDINGS LTD Vs NAIROBI CITY COUNCIL** – HCCC No. 708 of 2005.

The application is opposed and an affidavit sworn on 16th July 2010 by **JAMES MUEMA MUIYA** was filed. It was deposed in the said affidavit that the deponent was the Chairman of the Board of Directors of the respondent; that the applicant owed arrears of rent of Kshs.3,203,038/- as at June 2010; that in 2008 the applicant attempted to stop the respondent from recovering outstanding rent by moving to court in suit No. 6877 of 2008; and that the applicant only made some cheques after the court refused to grant orders in its favour; that the subject lease had in any case expired in February 2010 and the tenancy had never been renewed; and that the plaintiffs/applicant's suit herein was a non-starter, bad in law and abuse of the process of the court and must fail.

The respondents filed written submissions on 8th September, 2010 through their counsel J M Mutua & Company. It was submitted that the applicant had not established the threshold test in the case of **GEILLA Vs CASSMAN BROWN LTD** (1973) EA 358. It was contended that the applicant had not demonstrated a prima facie case with probability of success. It was counsel's contention that rent was payable quarterly in advance, and the applicant had not shown that he paid the rent nor that he did not accumulate arrears. The applicant had also not demonstrated that he paid the rent deposit as required in the terms of the lease. It was contended that the payment through cheques made by the applicant were only meant to cover outstanding rent arrears upto December, 2009.

Secondly, it was contended that the circumstances of this case were such that the applicant would be adequately compensated by way of damages. Therefore the interlocutory injunction requested should not be granted. It was lastly, contended that the continued occupation of the premises by the applicant was causing a lot of losses and inconvenience to the respondent, as statutory dues had now become due for settlement.

On the hearing date Mr. Owaga for the applicant and Mr. Mutua for the respondent addressed the court.

I wish to observe at the outset that before this ruling was written, parties counsel agreed that an amount of Kshs.368,416/- deposited by the applicant in court be released to the respondent. The said amount was released on or about 7th October 2010.

I have considered the application, documents filed, the submissions on both sides and the authorities cited. This is an application for an interlocutory injunction. The parameters to be applied by the court in such cases were clearly spelt out in the case of **GEILLA VS CASSMAN BROWN & CO. LTD** (1973) EA 358. In that case the Court of Appeal for East Africa held as follows: -

i)

ii)

iii)

iv) an applicant must show a prima facie case with probability of success.

v) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

vi) where the court is in doubt, it will decide the application on the balance of convenience.

Having considered the facts placed before me, it is apparent that there is a dispute on arrears of rent for a particular period of the lease. Consequently, the respondent sent auctioneers to levy distress. Each side has its own story. The versions of the two parties are subject to proof. That proof can only be established through tendering of evidence. At this interlocutory stage, I am not in a position to state conclusively as to which side is stating the true position, or whether none of them is doing so. In my view the issue of whether indeed there are arrears of rent needs to go for proof, and the applicant might be right or not right. In those circumstances, I find that the applicant has demonstrated a prima facie case with probability of success.

Will the applicant suffer irreparable loss if the interlocutory injunction is not granted? There is no dispute that the applicant has been in the premises as a business tenant. In my view, the disruption caused by distress will result in irreparable injury that cannot adequately be compensated in damages. I find that the applicant has satisfied the second test for the grant of orders of an interlocutory injunction.

With my above findings, I do not think that I need to consider the third parameter for the grant of injunctive orders, as it would only come into play if I was in doubt about the first two considerations.

For the above reasons, the application will succeed.

Consequently, I allow the application and grant prayer 3, provided that the applicant pays and continues paying all rents falling due from the date of the challenged levy of distress. Costs in the cause.

Dated and delivered at Nairobi 23rd day of November 2010.

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GEORGE DULU

JUDGE

In the presence of

Mr. Wanga for applicant

Mrs. Mutua for respondent

Catherine Muendo – court clerk