



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 178 OF 2009**

**RAI PLYWOODS (K) LTD.**

.....  
**PLAINTIFF**

**VERSUS**

**IQBAL SINGH RAI .....**

..... **DEFENDANT**

**T**

**RULING**

The Plaintiff/Applicant is the registered owner of some parcel of land known as **ELDORET MUNICIPALITY/BLOCK 11/24** on part of which is constructed a factory and on other part a residential house. The plaintiff prays in its suit that the defendant be permanently restrained from gaining entry into the plaintiff's factory. The plaintiff was filed on the same day with a Chamber Summons taken out under the provisions of order XXXIX Rules 1 and 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. That Chamber Summons Application seeks a prayer for injunction restraining the defendant, his agent or servant from entering the plaintiff's premises on land parcel Eldoret Municipality/Block 11/24 pending the hearing and determination of the application and later the suit. It is based on the grounds that the defendant is not a director of the plaintiff and is not involved in the management of the plaintiff and he went to the plaintiff's premises on or about 27<sup>th</sup> October, 2009 and tried to gain entry forcefully and so the plaintiff fears that if the defendant gains entry to its premises he will interfere with its management and he is a security threat. That the defendant has no business whatsoever to warrant his entry into the plaintiff's premises. The Affidavit in support of the application was sworn by **PHILIP K. VARGHESE** who described himself as a director of the plaintiff duly authorized to swear the affidavit as he did. He deponed that the defendant was a former director of the plaintiff and that there has developed some bad blood between the defendant and some members of the top management of the plaintiff resulting in some criminal case. He added that the defendant had wrecked havoc on the operations of the plaintiff and paralyzed the same on 27.10.2009 and insulted top management and threatened them as well as threatening to paralyze the operations of the plaintiff and so he is a security threat to the plaintiff and if the order sought is not granted then the defendant will occasion irreparable damage to the plaintiff which damage is incapable of compensation by an award of damages. That the plaintiff's residential home on the suit premises is not a family home but the home of the plaintiff's Chairman and the Managing Director. It is deponed further that the defendant moved out of the plaintiff's premises with his personal belongings after he ceased being director in 2002 and his visits to the premises were suspicious and as he has taken the chairman and the managing director of the

plaintiff to court then the defendant is a real security threat to the peaceful management of the affairs of the plaintiff factory. The deponent of the affidavit in support also swore a further affidavit in which he responds to the defendant's replying Affidavit and reaffirms that the defendant moved out with all his personal belongings upon ceasing to be a director and has all along lived in Nairobi. That the defendant in 1993 had access to the residential house in the premises when he was director alongside his father and three brothers but the defendant lost that privilege on ceasing to be a director and filing a case against the plaintiff, his father and brother and also the criminal case involving the defendant's son about an assault to the managing director's son.

Submitting for the plaintiff learned counsel Mr. G. N. Kitiwa both in the written submissions and orally highlighting of the same before court stated that all the developments on the suit land belong to the plaintiff and the defendant being a mere shareholder had no business accessing the said premises. As for the residential home, his submission was that the same was not a family home but the house of the plaintiff reserved for use by the chairman and managing director none of which the defendant was. He added that the orders sought were not capable of being executed as the residential house in the suit premises was not the defendant's. That any time the defendant has gone to the premises there has been a fight which is a breach of the peace and that is the loss the applicant would suffer if the order sought was not granted and since there is acknowledged criminal activity and the parties not being in good terms the balance of convenience lies with the plaintiff and in granting the order sought. The defendant can always see his mother who lives in the premises when she visits her doctors in Nairobi where the defendant lives.

The defendant swore the Replying Affidavit in opposition to the application. He deposed therein that his only interest in accessing the suit premises was so as to go to his suite in the residential home and to see his mother who lives therein. That contrary to what was stated in the applicant's affidavit and further affidavit the residential home in the suit premises was the family home of the chairman of the plaintiff of which family the defendant was a member and in which home he has lived for the last 30 years. He produced and annexed an affidavit sworn on 3/05/1993 by his father the chairman of the plaintiff in which the chairman confirms that the residential house was a home for his family in which the defendant had a suite. The defendant swore further that he has always had unlimited access to his suite in the home and his personal belongings and those of his family are intact in that suite. Further averments were that the defendant's brother who is now the managing director of the company had directed that the defendant be barred from accessing the home and that is what led to the events of 27.10.2009 but that the defendant did not in anyway interfere with the business or management of the plaintiff and as the gate to the home is also the gate to the factory he only went to the gate to gain access to the home to see his ailing mother and to go to his suite. That he has no intentions whatsoever to interfere with the plaintiff as his only interest is to access the family home.

Learned Counsel Mr. E. Gumbo submitting for the defendant stated, in addition to the written submissions, that the defendant has lived in the residential home in the plaintiff's premises as a member of the family of the plaintiff's chairman for such a long time since his childhood that he had acquired rights under section 30 (g) and 9 (f) of the Registered Land Act. He added that the plaintiff had come to court with unclean hands having withheld material facts from the court and not being candid with the court and thereby disqualified itself of the equitable remedy sought.

For the court to grant the orders sought the applicant must satisfy the good old three principles set out in the celebrated case of **GIELLA V.S. CASSMAN BROWN & CO. LTD. (1973) EA 358** which are that an applicant must show a prima facie case with a probability of success, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, and when the court is in doubt it will decide the application on the balance of convenience. That is the beginning point in all applications of this nature. In the instant case the allegations in the plaint are that the defendant "**may interfere with the management of the plaintiff's management and may also be a security threat**" – paragraph 5 thereof. In paragraph 6 it is stated that the plaintiff is not a director of the plaintiff and has no business whatsoever to warrant his entry into the plaintiff's premises and the prayer in paragraph 9 of the plaint is that the defendant be permanently restrained from gaining entry into the plaintiff's factory. The defendant's answer to those allegations was that he has no intention of entering the factory or interfering with its management and his only need to access the premises is so as to go to the residential home. In the

plaintiff's affidavit it was not shown to the court in what manner the defendant had interfered with the management of the plaintiff's factory or indeed his entry into such factory or further in what manner he had become a security risk. None of that was shown. What clearly came out is the fact that siblings have disagreed on one or other issue. Their father and who is the chairman of the plaintiff has not taken sides with any of his warring sons as is depicted by the affidavit he swore on 03/05/93 stating clearly that his only wish was to reconcile his children and that indeed the residential house in question **"has always been set aside for the occupation of my family which includes the accused persons** (defendant, his son) **and the complainants** (the managing director's sons). **In fact the accused persons each have two rooms set aside for themselves and their children and so does Jasbir Rai"**.

He went on to swear that that house had a common sitting room, dinning room, kitchen and television room available for the whole family. It was not shown that that position had since changed. As a matter of fact the same was confirmed by the Deputy Registrar of this Court who was sent to the house by the court when it became apparent that one of the parties herein was not telling the court the whole truth. And it is therefore no wonder that the Chairman of the Plaintiff who is the father of the defendant and the Managing Director whom the defendant says is the person barring the defendant from accessing the home, did not swear the affidavits in support of the application. As already stated above the prayers in the plaint are in no way whatsoever supported by the application and affidavits in support and in those circumstances I do not find that the plaintiff makes out a prima facie case with a probability of success. The plaintiff did not attempt to show what irreparable injury it would suffer if the order sought was not granted and on my part I do not find any such injury in the circumstances of this case. In the premises I need not concern myself with the issue of balance of convenience.

I have gone into the merits of the application for the completeness of record and to show that the application was advised by matters not based on the truth talking of which truth I ought to have disallowed this application on that ground alone – lack of truth or deliberate misleading of the court. That is because once I realized that the applicant's affidavits were not candid and did not fairly state the facts, as I did, then I should, at that point, have downed by tools. That was the principle set out in **R. V. KENSINGTON TAX COMMISSIONERS ex parte PRINCESS EDMOND DE POLIGNAC [1917] IKB 486** in the following words:-

**"where an ex parte application has been made to this court for a rule nisi or other process, if the court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts but stated them in such a way as to mislead the court as to the true facts, the court ought for its own protection and to prevent an abuse of its process to refuse to proceed any further with the determination of the merits. This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived."**

The plaintiff's affidavits did state categorically that the defendant moved out of the home in the suit premises in 2002 and carried his personal effects and therefore he had no business going to the premises. They added further that that home was not a family home and the defendant had no right to access it. Contrast that with the chairman's averment in his affidavit sworn on 3/5/1993 annexure marked ISR.3 – paragraph 11 thereof where he stated **"Being a family house it is not available for the use of only one of my children to the exclusion of others"**, and this Court's Deputy Registrar's report of 21/07/2010 upon her visit to the premises wherein she reports:-

**"The Deputy Registrar High Court was ordered by Justice Mwilu to visit the scene at Raiply premises at Eldoret. The Court proceeded to the scene in the company of Kitiwa Counsel for the plaintiff and Tuiyott Counsel for the Defendant. We went through three (3) gates. The third gate led us to a big posh compound with one big house. The main door was opened by the defendant. On entering inside, we met an old lady who was introduced to us as the Defendant's mother. There were several workers. Inside the house, there is a one common sitting room. There is a side board which contains many trophies and some photographs. The defendant pointed out his photographs and Safari Rally Trophies. There is also a common dinning room and a common**

kitchen. On the far end as you leave the dinning room there are many suites lined up. We were led to the far left whereby the defendant opened the suite which he said was his. Inside was the study cum prayer room. We went through a door to his bedroom. There was a double bed neatly spread on the side. There was his photograph and a photograph of a lady and a child he said she was the wife and his son. He opened the in-built wardrobe where we saw his clothes and personal effects. On coming out of the suite we were led through a long corridor with several suites lined up to another access door which was opened by the defendant and which door one can use to access the suites without going through the main door. The same door is to the far right from the defendant's suite. This is what the court viewed at the scene at Raiply premises at Eldoret.

**G. A. MMASI  
DEPUTY REGISTRAR  
HIGH COURT – ELDORET  
21/7/2010”**

Need I say more?

The application under consideration is fraught with all manner of ills, half truths, outright lies and hearsay averments in affidavits which if the application depended on those averments only I would have struck them out for having been sworn in contravention of Order XVIII rule 3 (i). However the application has no chance of success and consequently the Chamber Summons filed herein on 30.10.2009 is for the above reasons dismissed with costs to the defendant/respondent.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF DECEMBER 2010.**

**P. M. MWILU  
JUDGE**

**In the presence of:-**

Advocate for Plaintiff/Applicant

Advocate for Defendant/Respondent

Andrew Omwenga – Court Clerk

**P. M. MWILU  
JUDGE**