



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

Civil Case 1218 of 2001

HASMUKH KHETSHI SHAHPLAINTIFF

V E R S U S

TINGA TRADERS LIMITEDDEFENDANT

R U L I N G

The Plaintiff herein has sought two main orders in his application by **notice of motion dated 10th April, 2008:-**

1. That the Defendant's chairman and its agents, CHARLES ONCHONG'A MAINA and TOM MOSOTI OKONYO, be committed to civil jail for six months.
2. That the Defendant's property be attached and sold.

The application is stated to be brought under **section 5(1) of the Judicature Act, Cap. 8, sections 3A & 63 (e) of the Civil Procedure Act, Cap. 21**, and also under **Order 39, rules 2A & 9 of the Civil Procedure Rules (the Rules)**. **Order 52, rule 4 of the English Supreme Court Rules** is also invoked.

The application is brought upon the grounds that the Defendant and its said agents are in contempt of the **order of this court issued on 28th February, 2008**. By the said order, made *ex parte*, the court (Kariuki, J) granted a temporary injunction in terms of prayer No. 2 of the **chamber summons dated 28th February, 2008**. The order sought in that prayer was:-

“That pending the hearing and determination of this application inter partes and/or further orders of this court, the respondent/landlord be...restrained from levying distress, evicting, harassing, disturbing and/or interfering with the applicant/tenant's quiet enjoyment of the suit premises situated at the first floor of Thiga Building on plot No. 209/525/21, Nairobi.”

The injunction was to remain in place until 12th March, 2008 and was conditional upon the Plaintiff depositing in court as security the sum of KShs. 72,000/00 on or before 4th March, 2008. In default of such deposit the temporary injunction would automatically lapse. The deposit was made on 29th February, 2008.

The present application is supported by the Plaintiff's affidavit sworn on 10th April, 2008. There is a further affidavit sworn by him and filed on 5th May, 2008 in response to the replying affidavit. In addition, there is another affidavit sworn by one MAYUR KHESHI SHAH, the Plaintiff's brother, filed

on 5th May, 2008.

The replying affidavit is sworn by one of the respondents in this application, Charles Onchong'a Maina. The alleged contempt of court is denied.

I have read the affidavits filed in support of and in opposition to the application. I have also considered the written submissions filed on behalf of the parties, including the authorities cited.

Service of the concerned order upon the Defendant is not in dispute. Indeed, at paragraph 3 of the replying affidavit, it is expressly stated that the Defendant's chairman received the order in the presence of its agents, Charles Onchong'a Maina and Tom Mosoti Okonyo. The order served would appear to have had a penal notice endorsed thereon.

What is alleged in the supporting affidavit is as follows:-

- (i) that Charles Onchong'a Maina shouted "unprintable insults" at the Plaintiff on 1st March 2008 at the suit premises;
- (ii) that Charles Onchong'a Maina and Tom Mosoti Okonyo unlawfully attacked and assaulted the Plaintiff's brother, MAYUR SHAH, on 5th March, 2008 at the suit premises when they tried to unlawfully take the keys to the premises; and
- (iii) that the Defendant's agents have continued to disobey the court order by repeatedly abusing, embarrassing and/or disturbing the Plaintiff's peace, and have vowed to eject him from the suit premises any time irrespective of the existence of court orders.

The court order of 28th February, 2008 restrained the Defendant from:-

- levying distress against the Plaintiff; or
- evicting the Plaintiff from the premises; or
- harassing, disturbing or otherwise interfering with the Plaintiff's quiet enjoyment of the suit premises

pending disposal of the application *inter partes*.

There is no complaint that distress has been levied against the Plaintiff, or that he has been evicted from the suit premises. The complaint is that he was harassed, disturbed or otherwise interfered with in his quiet enjoyment of the suit premises contrary to the order of 28th February, 2008.

I have already set out the specific complaints of the Plaintiff as they appear in the supporting affidavit. Apart from the Plaintiff's say-so, there is no evidence that the Defendant's agents tried to forcibly take away from either the Plaintiff or his brother the keys to the premises. The Plaintiff's brother, MAYUR KHESHI SHAH, does not mention such a thing in his brief affidavit sworn and filed on 5th May, 2008. I do not believe that there was such incident.

If indeed Charles Onchong'a Maina shouted "unprintable insults" to the Plaintiff at the suit premises on 1st March, 2008, that would appear to have been conduct threatening a breach of the peace, and ought to have been reported to the police. It does not constitute disobedience of the order of the court of 28th February, 2008.

The Plaintiff has also complained that the Defendant's agents have continued to disobey the court order by repeatedly abusing, embarrassing and/or disturbing his peace. No particulars are given for this complaint. It is not a serious complaint.

Regarding the alleged assault upon the Plaintiff's brother, the incident was reported to the police who investigated the matter and criminally charged both Charles Onchong'a Maina and Tom Mosoti Okonyo with assault causing actual bodily harm contrary to a provision of the **Penal Code, Cap. 63**. The result of the charge has not been disclosed. Given that the said two gentlemen have counter-alleged that they were the ones who were assaulted and that they complained to the police, the mere fact that they were charged is not sufficient evidence that they assaulted the Plaintiff's brother, or that the alleged assault constituted a disobedience of the court order. There is also the risk of double jeopardy.

Having considered all matters placed before the court, I am not satisfied that it has been established to the required standard that the Defendant or its agents have been in disobedience of the order of the court of 28th February, 2008. The application is without merit. It is hereby dismissed with costs. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MAY, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 22ND DAY OF MAY, 2009