



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

Civil Case 117 of 2009

YOUNG UNITED DRYCLEANERS LIMITED..... PLAINTIFF

VERSUS

BUFFET PARK LTD1ST DEFENDANT/RESPONDENT

P.N. MBURU t/a

VIRMIR AUCTIONEERS2ND DEFENDANT/RESPONDENT

RULING

The Plaintiff filed a Chamber Summons under certificate of urgency on 11th March, 2009. The Application was brought under Order XXXIX Rules 2, 2A, 5, 7 and 9 of the Civil Procedure Rules, Sections 25, 63 (c) and (e) and Section 3A of the Civil Procedure Act, Section 5 of the Judicature Act Cap 8 and Section 120 of the Evidence Act. The application was supported by the Affidavit of **Joshua Ochieng**, the General Manager of the Plaintiff/Applicant dated 11th March, 2009, and a supplementary affidavit dated 24th April, 2009.

The Defendants in answer to the application filed a replying affidavit dated 15th April, 2009, sworn by one Obadia Ndegwa Nderitu, the managing Director of the 1st defendant.

The applicant is a tenant and in the 1st Defendant's building known as L.R.37/366/1 situate at Nairobi West, Langata, Nairobi. A dispute arose between the Plaintiff and the 1st Defendant when the 1st Defendant's lawyers served the Plaintiff with a quit notice on or about the 11th September, 2007. From about the month of December, 2007 or thereabout the 1st defendant refused to accept rent from the Plaintiff. The Plaintiff thereafter filed a reference at the Business Premises Tribunal being case No.795 of 2007. The Business premises Tribunal made orders on 8th of January, 2008, which orders were extended severally. The said orders inter alia restrained the Respondent/Defendant or its servants and/or agents from harassing the tenant (Plaintiff/Applicant) and gave leave for the Plaintiff/Applicant to pay rent at the tribunal. Later the parties filed consent to vary the mode of payment of the rent, whereupon rent was to be paid to the Respondent's Advocates.

In the Chamber Summons the applicant has sought 8 prayers:

- 1. That this application be certified as urgent and be heard exparte in the first instance.**
- 2. That this Honourable Court do grant leave to the Plaintiff/Applicant to initiate contempt of**

Court proceedings against the Managing Director of the 1st Defendant and the 2nd Defendant.

3. That this Honourable Court be pleased to issue orders of injunction restraining the Defendants/Respondents by themselves, their servants, agents or any one acting under them from levying distress or carrying away the proclaimed goods pending hearing and determination of this application or until further orders of this Honourable Court.

4. That the Honourable Court do order the OCPD Langata Police Division do assist in the enforcement of the Orders granted by the Court and ensure compliance.

5. That this Honourable Court be pleased to issue orders of injunction restraining the Defendant/Respondents by themselves, their servants, agents or any one acting under them from levying distress or carrying away the proclaimed goods pending hearing and determination of this suit or until further orders of the Honourable Court.

6. That the Managing Director of the 1st Defendant and the 2nd Defendant be detained in prison for contempt of court orders for a period of six (6) months or for such period as this Honourable Court shall deem necessary for being in disobedience of the Orders given at the Business Premises Rent Tribunal on 8th January, 2008 and on 13th November, 2008 extended indefinitely.

7. That this Honourable Court be pleased to make such orders as may be fit to attain the ends of justice and to safe guard and protect the sanctity and dignity of this Honourable Court.

8. That the costs of this application be borne by the Defendant/Respondent.HH

In the affidavit of *Joshua Ochieng* the applicant depones that he has paid rent up and including the date of filing the application. That at the time of filing this application the reference before the tribunal was still pending. It was confirmed to court by both counsels that, as at 20th April, 2009, when the reference came up for hearing the Respondent consented to the same.

That on the 24th February, 2009 the 1st Defendant through the 2nd Defendant proclaimed the Plaintiff's goods at the suit premises, despite indication by the Plaintiff's advocates, that no rent was due and owing. The goods were to be sold 14 days from the date of proclamation, the 26th February, 2009.

The Respondents have objected to the orders sought through a Replying Affidavit sworn by one *Obadia Ndegwa Nderitu* sworn on 15th April, 2008. The Respondents deny being in contempt of the order issued by the Business Premises Rent Tribunal. They argue that the Plaintiff did not comply with the court order, and were in arrears and therefore the Defendants lawfully proceeded to levy distress. The defendants further argue that the applicant has come to court with unclean hands, being in arrears of rent. The defendants also submitted that this court has no jurisdiction over the matter.

The 1st Defendant maintains that there is an outstanding arrears of **Kshs.40, 000/=** whereas the applicant stated that all rent including for May, 2009 has been paid.

It is obvious to the court that the parties are not in agreement on the an issue of rent. The court has also been advised that there is a matter pending at the Milimani Court regarding a second notice issued by the 1st defendant to the plaintiff on the 30th May, 2008. The Plaintiff denies having received a notice from the Defendant on the alleged date or all.

Based on the facts before the court and guided by the principles set out in **Giella v. Cassman Brown & Co. Ltd (973) EA at 358**. I am convinced that the Applicant has shown a *prima facie* case with probability of success; I am also convinced that any interference with the applicant's business is likely to cause the Applicant irreparable loss and damage. I decline to give orders as prayed in 2 and 6 of the Chamber Summons. There appears to be confusion as to whether rent has been paid in full, this situation

may have prompted the action of the 1st defendant.

I do allow prayer 3 of the Chamber Summons pending further orders of this court on conditions that the Plaintiff continues to pay rent promptly.

Costs in the cause.

DATED and **DELIVERED** at Nairobi this 13th day of May, 2009

ABIDA Ali- ARONI

JUDGE