



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Suit 130 of 2009

NATHALAL KARCHANDAS AMLANI.....PLAINTIFF/APPLICANT

VERSUS

AMRISHBHAI MANUBHAI PATELDEFENDANT/RESPONDENT

RULING

By a Plaint dated 17th March, 2009 the Plaintiff filed a suit against the Defendant seeking the following orders:-

- (a) A declaration that the breakage and entry by the Defendant into the business premises of the Plaintiff on LR. No. 2116/16/V is illegal and void ab initio.
- (b) An order that the Defendant do move out of the Plaintiff's business premises and failing which he be forcefully evicted.
- (c) General and exemplary damages against the Defendant for the illegal taking over of the Plaintiff's business premises.
- (d) A mandatory and permanent injunction.
- (e) Costs of the suit.
- (f) Interest.
- (g) Any other relief that this Honourable Court may deem fit to grant.

Simultaneously with the Plaint the Plaintiff brought a Notice of Motion under Certificate of Urgency seeking orders:-

- (a) That this Honourable Court be pleased to issue a mandatory injunction ordering the Defendant to move out of the shop comprised in LRL. NO. 2116/16/V so that the Applicant/Plaintiff can take possession of the same.
- (b) That the OCS Kitale be directed to ensure that the orders issued by this Honourable Court are complied with.
- (c) That costs of this application be provided for.

In support of the application NATHALAL KARSANDAS AMLANI has sworn an affidavit giving grounds. In opposition to the application the Respondent AMRISHBHAI PATEL has filed a replying affidavit on which he relies entirely.

Mr. Kiarie Counsel appearing for the Applicant submitted that the Applicant has been a tenant on the suit premises since 1980 using the premises as a retail shop. The suit land is owned by one MOSES SIMIYU. On 24th January, 2009 the Applicant left the Country for the United Kingdom. He removed all the goods from the premises and kept them in his house. When he came back to the country on 24th March 2009 he found that the Respondent had broken into the premises and started renovating the same and took possession and has refused to move out. While Mr. Samba Counsel

appearing for the Respondent submitted that the Respondent had entered into a valid Lease Agreement with the landlord which was executed on 5th January, 2009. The Respondent in consideration for the Lease Agreement paid the landlord Shs. 420,000/= being rent for the year 2009. The Lease Agreement between the Respondent/Defendant and the landlord relate to LR. NO. 2116/16/V which was the shop that was to become vacant because the Applicant was actually immigrating to the United Kingdom. The issue of whether the Respondent is a trespasser would be established through evidence at the trial.

In this application the Plaintiff is seeking a mandatory injunction. The test to be applied in granting a mandatory injunction was stated in *LOCABAIL INTERNATIONAL VS. AGRO EXPORT* [1986] 1 ALL ER 902 where the Court said:-

“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 easily be remedied or where the Defendant has attempted to steal a march on the Plaintiff. Moreover before granting a mandatory injunction the Court had to sell a higher 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.”

In the instant suit the Defendant says he had entered into a Lease Agreement with the landlord and he has taken possession. And the Plaintiff says the Lease he entered into with landlord had not expired.

The object of the interlocutory injunction is to protect the Plaintiff against injuries by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. I am not persuaded that I ought to exercise my discretion in favour of the Applicant.

Accordingly, I decline to grant the orders sought and dismiss the application with costs to the Respondent.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF OCTOBER, 2009.

J. L. A. OSIEMO

JUDGE