



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

**Civil Case 390 of 2009**

**AMATECH COMPUTER SOLUTIONS LTD.....PLAINTIFF**

**VERSUS**

**HEMBY HOLDINGS LIMITED.....1ST DEFENDANT**

**NYALGUNGA TRADERS AUCTIONEERS**

**AND GENERAL MERCHANTS.....2ND DEFENDANT**

**R U L I N G**

Application dated 27/5/09 brought under **Order XXXIX Rule 2 and 9 Civil Procedure Code** and also **Section 3A Civil Procedure Act**. The outstanding prayers are numbered 3 and 4 and 5. Prayer 3 seeks a temporary injunction in favour of the applicant to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants from interfering with the peaceful and quiet enjoyment and possession of the plaintiff in their business premises on ground floor of L.R. 209/568 Bidco Towers, Moi Avenue pending hearing and final determination of this suit.

Prayer 4 seeks temporary injunction to restrain the second defendant from attaching and carrying the applicant's moveable assets in the applicant's aforesaid business premises. The grounds upon which the application is based are set out in the application. The application is supported by affidavit of Innocent Kwambai described as Managing Director of plaintiff company, which shows that the applicant was a sub-tenant of Continel Health Care Ltd. who later terminated their lease with the landlord and vacated leaving the applicant in occupation.

The applicant has been paying rent to the tenant, Regional Institute of Business Management Ltd. However, the applicant came to know that the landlord has instructed second defendant to levy distress on the premises. The applicant states that he is not in arrears of any rent to immediate landlord or head landlord and therefore his goods should not be attached. The respondent has caused an affidavit in reply to be sworn by one Shafiq Taibjee in which it is admitted that the head landlord has issued instructions for the levy of distress against all assets in the building which is registered in the respondent's name. The rent outstanding is in the sum of Kshs.74,158,486/49.

The respondent says it discovered that the property was occupied by several third parties without the consent of the respondent and the plaintiff has no lease for the premises he occupies. The plaintiff is a trespasser.

On consideration of what is stated by both parties, I find there are several issues to be decided if the applicant is a trespasser he is not to be treated as a tenant. Is the plaintiff to pay rent twice? He has already paid for space he occupies and such other questions. These issues can only be resolved at a trial where the parties can be able to cross-examine the witness. I do find that there is a prima facie case to be resolved and at this stage the applicant is entitled to interim orders to protect his assets from unlawfully being wasted and destroyed before his rights are determined. It will be noted that he has been paying rent since July 2007.

The applicant has filed list of authorities:-

**1. Landlord and tenant (Shops, Hotels & Catering Establishment) Act, Cap. 301.**

This **Act** makes provisions for the rights and obligations of landlord and tenant where there is no written tenancy agreement for instance here where the landlord says the applicant is a trespasser.

**2. Giella vs. Cassman Brown & Co. Ltd. [1973] EA, 358**

In which conditions required in order to grant injunction are set down. At this stage it is to be said that the applicant has demonstrated a prima facie case.

**3. Suleiman vs. Amboseli Resort Ltd.,**

Where the court said:-

*“When circumstances give rise to a vital question to be litigated and determined by full trial, the business of court, so far as possible is to secure that any transactional motions do not render nugatory the ultimate end of justice.”*

**4. Films Rover International Ltd. & others vs. Cannon Film Sales Ltd.,**

Where it was held that in granting application, the court was considering whether the injustice suffered by the defendant if the injunction were granted and the plaintiff later failed at the trial was greater than the injustice to the plaintiff if injunction was not granted and he later succeeded at trial.

It is my view that in this case it is the applicant who would suffer greatly if order was not granted.

I therefore allow application and grant the two injunctions sought. The costs shall be paid by defendant to the plaintiff.

Orders accordingly.

**DATED, SIGNED and DELIVERED** at Nairobi this 16<sup>th</sup> day of October 2009.

**JOYCE N. KHAMINWA**

**JUDGE**