



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
Civil Appeal 539 of 2009
LUCY WANJIKU KIRIBA t/a
CYWA RESTAURANT.....TENANT/APPLICANT

VERSUS
COFFEE BOARD OF KENYA.....LANDLORD/RESPONDENT

R U L I N G

1. By a Chamber Summons dated 29th September, 2009, Lucy Wanjiku Kiriba t/a Cywa Restaurant sought an order of injunction restraining Coffee Board of Kenya, hereinafter referred to as the respondent, its agents, servants or employees from evicting or otherwise interfering with the applicant's quiet possession on premises known as Cywa Restaurant situated on LR No. 209/6545, hereinafter referred to as the suit premises, pending the hearing and determination of her appeal, which she has lodged in this Court.

2. The respondent has filed a Notice of Preliminary Objection objecting to the application on the following grounds:

(i) That this Honourable Court has no jurisdiction to hear, entertain and/or determine the matters in question herein by virtue of Section 6 of the Civil Procedure Act (Cap.21 of the Laws of Kenya).

(ii) That the said appeal and application filed by the applicant herein is incompetent, fatally defective, misplaced and bare of any reasonable cause(s), ground(s) or proof to warrant the grant of the orders sought and the same should be struck out.

(iii) That the subject application is riddled with falsehoods, material non-disclosure and deceit and is an

overwhelming display of an attempt to mislead this Honourable Court into granting the reliefs sought.

(iv) That in any event the instant application does not meet the barest conditions set out in *Giella vs. Cassman Brown*, and therefore does not merit the grant of the equitable reliefs sought as it is apparent from the applicant's affidavit that she has approached the court with unclean hands and thus the same is apt for dismissal *Ex-Debito Justitiae*.

(v) That consequently the said application and the appeal are an abuse of this Honourable Court process and that both should be struck out with costs to the respondent.

3. Miss Kamunya who argued the preliminary objection on behalf of the respondent, submitted that there was another suit in the Chief Magistrate's Court at Nairobi being CM's suit No.4258 of 2009 involving the applicant and the respondent, and seeking the same relief as sought herein. It is contended that the current proceedings should be stayed under Section 6 of the Civil Procedure Act or struck out as an abuse of the Court process. It was maintained that the applicant had obtained equitable orders through non disclosure of material facts; and that the applicant has also misled the Court as there was no lease in subsistence nor was there a tenancy/landlord relationship.

4. In response to Miss Kamunya's submissions, Mr. Muli who appeared for the applicant contended that the Preliminary Objection was not based on a pure point of law. Mr. Muli maintained that a pure point of law should be one capable of having the matter before the Court fully determined.

5. It was submitted that the issues being raised by the respondent were issues of fact which ought to have been raised before the Tribunal or before the Milimani Court. It was submitted that this Court being an appellate Court could only look at what was before it. It was submitted that the respondent having failed to file an application for stay of the proceedings in the lower Court under Section 6 of the Civil Procedure Act, he cannot raise the issue at this stage. It was maintained that the issue of disclose is one of facts not law.

6. I have considered the Preliminary Objection. I do note that the objection is not one based on pure law, but is an objection which is dependent on facts which have to be established by the Court.

7. In the circumstances, I overrule the Preliminary Objection and order that the issues raised be argued in response to the application.

Dated and delivered this 20th day of November, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Muli for the appellant

Advocate for the respondent, absent

Eric, court clerk