



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

Civil Case 354 of 2007

CHARLES NJOROGE PLAINTIFF

VERSUS

IBRAHIM NYAOGA

t/a GRABO HAIR & BEAUTY SALON DEFENDANT

RULING

Charles Njoroge (*hereinafter referred to as the Plaintiff*) has come to this court under **Order XXXIX Rule 1, 2A (1) (2) 3 (1) (2) (3)** of the Civil Procedure Rules, **Section 3A** and **Section 63(c) & (e)** of the Civil Procedure Act seeking an order directing Ibrahim Nyaoga T/a Grabo Hair & Beauty Salon (*hereinafter referred to as the defendant*) to allow the plaintiff to enter the defendant's business premises situated at Commerce House, Ground floor, to pick his business equipments namely, mirrors, flat irons, DVD machines, benches, picture frames, hair products, towels, sockets and plugs and anything belonging to the applicant which is in the possession of the defendant.

The application is supported by grounds stated on the body of the application and a supporting affidavit sworn by Charles Njoroge. Briefly, the plaintiff contends that he entered into an agreement with the defendant who had leased premises on Commerce House, that the defendant would sub-let a part of the premises on Commerce House in which the business of Grabo Hair and Beauty Salon is being carried on. It was agreed that both parties would share the premises and use the defendant's business name. The terms of the agreement included: the plaintiff being employed by the defendant as a manager for three and a half (3½) years, and the plaintiff paying Kshs.60,000/= every month as rent. Pursuant to that agreement, the defendant acquired the necessary certificates from the City Council of Nairobi, and has been occupying and carrying on business in the premises.

However, the defendant has now served a notice on the plaintiff purporting to terminate his tenancy as well as his services as a manager on the grounds that the plaintiff has been in breach of the agreement. The plaintiff denies having breached any terms of the agreement. He maintains that he has invested a lot of money in the business and would suffer loss and damages if the respondent is not barred from harassing him. The plaintiff also maintains that his business equipment is still in the premises and the defendant is using them to carry out the business. Further, the plaintiff contends that he carried out renovations on the premises which has cost him a lot of money. The plaintiff states that he has been regularly paying his share of the rent.

The plaintiff has exhibited a copy of the agreement dated **16th March, 2007**, signed between him and the defendant. He has also exhibited a copy of a business permit from the City Council and documents for payment of money into the defendant's account at the Bank of Baroda as well as cash sale receipts for various articles.

The defendant has filed a replying affidavit admitting having entered into a written agreement with the plaintiff but denying that there was any understanding that the defendant would sub-let the business premises to the plaintiff, or that they were to share the premises under the defendant's business name. The defendant maintained that in accordance with the agreement, the plaintiff was to work for the defendant as a manager and to pay the defendant's account a standing fee of Kshs.60,000/= per month earning his commission from anything above the aforesaid payment, after paying all the workers. The defendant maintained he is the one who applied for the business license from the City Council of Nairobi, and that the application was made long before the plaintiff was employed.

The defendant further maintained that the plaintiff's services as manager were terminated for gross misconduct, theft, assault and misuse of the defendant's business for personal aggrandizement. The defendant denied that the items claimed by the plaintiff belonged to the plaintiff, contending that at the time the plaintiff was employed, he found all the tools for the salon business already in place.

He maintained that the plaintiff has not bought any equipments or products in the name of the business. The defendant maintains that the only item in the business premises belonging to the plaintiff was a DVD machine. The defendant maintained that he renovated the business premises using his own resources after purchasing the business from one Grace Odhiambo.

In support of the application, the advocate for the plaintiff submitted that the defendant has acted contrary to the sub-tenancy agreement and that there was no prima facie evidence of the allegations of fraud or misconduct made in the replying affidavit.

For the defendant, it was submitted that the plaintiff has not met the conditions for granting a mandatory injunction. Counsel for the defendant relied on **Hasbury's Laws of England Vol.24 Para.946 – 950** and **Giella vs. Cassman Brown Co. Ltd (1973) EA 58**. It was further submitted, that the plaintiff's seeks to collect specific items whose value can be ascertained. The plaintiff has not, therefore, shown that he is likely to suffer such serious loss that damages cannot be an adequate remedy. It was submitted that the plaintiff has been guilty of material disclosure as the agreement produced shows that he was only an employee and not a sub-tenant. It was maintained that the plaintiff's services were lawfully terminated. It was contended that the items sought by the plaintiff were articles of trade used by the defendant and that the defendant was likely to suffer loss if the goods are released. The court was urged to find that the plaintiff has not come to this court with clean hands, and was not therefore entitled to the remedy of injunction.

I have carefully considered the application, the affidavit in support, and in reply, the annexures thereto, and the submissions of counsels. It is evident that the plaintiff is seeking an order which is in the nature of a mandatory injunction.

In the case of Bell Maison Ltd vs. Yaya Towers Ltd, **Nairobi HCCC No.2225 of 1992**, Bosire J, in considering the remedy of mandatory injunction at interlocutory states:

“Although there is no provision under Civil Procedure Act and Rules empowering the court to grant mandatory injunctions at interlocutory stage, courts in this country have often granted the remedy. The despina pontikos case is a case in point. The Court of Appeal for East Africa did uphold a High Court decision which granted and mandatory injunction.”

Thus, the remedy of a mandatory injunction is indeed available. However, an applicant for such a remedy must not only satisfy the general principles for granting an order of injunction (as stated in **Giella vs. Cassman Brown & Co. Ltd (1973) EA 58**, but must also satisfy the court that there are exceptional circumstances that would justify the granting of such an order. The case of **Kenya Breweries Ltd vs. Okeyo [2002] 1 EA 109** is a case in point.

In this case, the Plaintiff's course of action is based on the agreement entered into between him and the

defendant. Both the plaintiff and the defendant exhibited a copy of the same agreement, and it is evident from the agreement that the plaintiff was employed as a manager of the salon. There is no mention in the agreement of any sub-tenancy agreement as was alleged by the plaintiff.

It is evident that the dispute between the parties is really the termination of the contract. Assuming that the plaintiff was to prove his allegations in that regard, damages could be an adequate remedy. Regarding the items subject of the prayer for a mandatory injunction, the agreement did not provide for the plaintiff to bring to or use his property in the salon, nor did it provide for the plaintiff doing any renovations. Moreover, the items are ordinary articles whose value can easily be ascertained. I find that the plaintiff has failed to satisfy this court, that he will suffer irreparable loss or that there are special circumstances justifying the granting of an order of mandatory injunction. I therefore, find no merit in his application and dismiss the same.

Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered on this 12th day of March, 2008.

H. M. OKWENGU

JUDGE