



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 32 of 2007

FREDRICK MUROKI GRIEVE.....PLAINTIFF

VERSUS

PAUL NTHENGE

CHRIS NZIOKA

MARIAN M. NTHENGE

JANE CAROL MUENI.....DEFENDANTS

RULING

1. The application before court is the chamber summons dated 2/04/2007 by which the applicant seeks orders:?
 - (i) **THAT** this application be certified urgent and heard during the current high court vacation.
 - (ii) **THAT** this aforesaid application be heard ex-parte and service thereof be dispensed with in the first instance;
 - (iii) **THAT** the defendants/respondents jointly and severally by themselves, through their servants employees and/or agents be restrained by a temporary injunction from further trespassing on, alienating, renovating, or in any manner, howsoever altering and/or interfering with the Plaintiff/Applicant's ownership of his properties, that is to say ALL THOSE plots of land known as Plots No. 105, 106 and 107 Kithendu market (Sofia) Yatta within Matuu Municipality pending the hearing and determination of this suit;
 - (iv) **THAT** the Defendants/Respondents jointly and severally by themselves, through their servants, employees and/or agents be restrained by a temporary injunction from further interfering with, operating under any guise or form the Plaintiff/Applicant's business therein, **that** is to say MUMU Grey Rock Bar & Restaurant, comprising a bar, restaurant and lodge situated in Kithendu market (Sofia) Yatta on Plots No.105 and 106 and the several shops and rented rooms on Plot No. 67 adjoining the aforesaid premises pending the hearing and determination of this suit.
 - (v) A mandatory injunction reinstating the Plaintiff/Applicant in the premises pending the hearing of this suit;
 - (vi) **THAT** costs of this application be provided for.

The application was brought under the High Court Vacation Rules AND under Order 39 Rules 1, 2, 3 and 9 of the Civil Procedure Rules and SS 3 and 3A of the Civil Procedure Act and all enabling provisions of the law.

2. The application is premised on some eleven (11) grounds found on the face thereof. The applicant says that he is the sole proprietor of the business known as MUMU Grey Rock Bar and Restaurant and a tenant for the last ten (10) years of

several shops and rental houses situated on plot number 105, 106 and 67 at Kithendu Market Sofia Yatta within the Matuu Municipality of Machakos District (hereinafter referred to as the suit premises). He says further that on 13/02/2006, the defendant/respondents without any reasonable excuse threw the applicant out of the suit premises and that as a result of the said unlawful action on the part of the defendants, the applicant suffered and continues to suffer loss. He also says that despite having obtained injunctive orders in Machakos PMCC No.763 of 2005 the 1st and 2nd defendants disobeyed the said orders he had to withdraw the said suit to pave way for the instant suit.

3. The application is also supported by the applicant's sworn affidavit dated 2/04/2007 in which he says that the 1st, 2nd and 3rd defendants herein are the daughters of one Mumbua (now deceased); that sometime in 1991, he and Mumbua jointly bought plot No.78 Kithendu Market from one Joel Matata Muinde, upon which they commenced construction and by 1992, the MUMU Grey Rock Bar & Restaurant was opened. He says that he spent much money, time and effort to construct the suit premises. That when Mumbua died in 1998, he became the sole proprietor of the business which had originally been a partnership between Mumbua and himself under the acronym "**MUMU**" standing for the first two letters of Mumbua's and Muroki's names.

4. The applicant also says that before her death in 1998, Mumbua had named him and the 4th defendant as the administrators of her estate in case of her death and that it was the two of them who applied for and obtained Grant of Letters of Administration Intestate as per the Certificate of Confirmation of Grant marked "**FMG3**". The Certificate of Confirmation of grant was issued on 21/05/1999. He says further that despite some errors in the listing of the properties belonging to Mumbua personally and those that were jointly owned, he continued to operate the business without any hitch until the events of 13/02/2006 when he and his workers were forcibly thrown out of the suit premises. He prays for a mandatory injunction against all the four defendants jointly and severally.

5. The application is opposed. The Replying Affidavit is sworn by Marian Mueni Denes, the 3rd defendant herein. She says that the applicant herein was a mere business Manager of the suit premises and not a partner as alleged. She also says that during Mumbua's long illness with cancer, the applicant altered title documents of the suit premises and that between 1996 and 2005, the applicant single-handedly enjoyed the profits from the business and further that upon Mumbua's death in 1998 the applicant embezzled some of Mumbua's personal properties as were particularly set out in paragraph 11 of Mueni's affidavit. Mueni disputes the applicant's alleged contribution to the construction of the suit premises and says that in fact it was only by a power of Attorney donated by the 4th defendant to the applicant that enabled him to deal with Mumbua's property. According to this Power of Attorney, annexed and marked "**MMD 10**" the applicant got the authority to deal with the estate of **JOSEPHINE MUMBUA MEHLAUF** and in particular:

- To manage all those pieces of land and the estate
- To enter into new lease agreements for periods not exceeding six (6) years
- To collect rent therefrom
- To accept surrender of lease(s) on such terms as he thinks fit
- To transact the bank assets of the deceased provided that no credit(s) shall be obtained from any source without (my) prior consent
- To manage the estate in a proper commercial viable manner

6. It was further provided that each year, the Attorney would give (mandatory) a written statement of all transactions entered into and statement of account of the estate. The Power was revocable upon the donor giving a written notice to that effect and that upon the issuance of such a notice, the Attorney would cease all activities and hand over all relevant documentation to the donor. The power of Attorney was given on 31/03/1999.

7. At the hearing of the application, Miss Mugo entirely relied on the Supporting Affidavit and contended that there were no good grounds for throwing the plaintiff/applicant out of the suit premises. Mr. Mutunda J.M. for the respondents contended that both this application and the entire suit are defective because (i) 1st and 2nd defendants are brothers to the deceased Mumbua while the 3rd defendant is herself deceased; (ii) 4th defendant is daughter of the deceased. Mr. Mutinda argued further that the 4th defendant, as administrator of Mumbua cannot be barred from accessing the deceased's estate.

8. On whether or not the applicant has satisfied the conditions for the granting of an injunction and particularly a mandatory injunction, Mr. Mutinda submitted that the applicant had dismally failed to do so. Referring to annexure "**MMD 3**" annexed to the affidavit sworn in opposition to the application, Mr. Mutinda submitted that the insurance

cover for the suit premises clearly showed that Mumbua was the sole registered owner of the same and that any attempts by the applicant to show that Mumbua transferred the suit premises into the name of the applicant and herself are to say the least, fraudulent. Further Mr. Mutinda submitted that since the applicant was evicted nearly ten years ago it would not be fair to order his reinstatement into the suit premises.

9. The applicant has asked for two orders of injunction: One being a mandatory injunction while the second one is a prohibitory injunction. I shall first deal with the prayer for prohibitory injunction. The principles governing prohibitory injunctions were set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**, and these are that:-

- (i) ***an applicant must show a prima facie case with a probability of success;***
- (ii) ***an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;***
and
- (iii) ***when the court is in doubt, it will decide the application on the balance of convenience.***

10. In the instant case, the plaintiff/applicant avers that he is the sole proprietor of the business known as MUMU Grey Rock Bar & Restaurant built on the suit premises and that he is serving in that capacity as the surviving partner of the said business after Mumbua died. The Certificate of Confirmation of Grant shows that the suit premises were duly registered in the name of the 4th defendant/respondent, though there is evidence of an application having been filed by the applicant seeking Rectification of Grant but there is no evidence by the applicant to show that the said application, dated 8/06/2005 has been prosecuted. If not prosecuted why not? In my view, the applicant's interest in the suit premises is in doubt, and that being the case I do not think that he has a prima case with a probability of success. Secondly, the Certificate of Confirmation of Grant dated 21/05/1999 clearly shows that the 4th defendant was the sole beneficiary of Mumbua's estate. If it is true as alleged by the applicant that some of the suit premises, was his why did he not get part of it when the Grant was confirmed? I am persuaded to believe the averments in the Replying Affidavit that the applicant was merely a Manager of Mumbua's business and that is why he was given a Power of Attorney dated 31/03/1999 by the 4th defendant/respondent.

11. The next issue to determine is whether the applicant has shown that unless the order for prohibitory injunction is granted, he will suffer such loss as is not compensable by damages. My finding is that as a Manager of Mumbua's business there is no damage that he can suffer that cannot be compensated by damages. In any event the Power of Attorney that was donated to him was held by him at the discretion of the 4th defendant/respondent. In any event, the purported transfer of plots 105 and 106 into the joint names of the applicant and Mumbua was a mere application. The applicant has not produced a Proper Partnership document to prove his allegations. I therefore find and hold that there was no such transfer. Even if I were to consider the application on a balance of convenience, I would find that the same tilts in favour of the respondents. For these reasons, the applicant's prayer for a prohibitory injunction must fail.

12. Now I turn to the prayer for a mandatory injunction. In general terms, "***The circumstances in which a mandatory injunction is ordered are those where the infringement of the right has created a state of affairs continuing to damage the plaintiff, and its issuance is part of the restorative jurisdiction of the court (Kuloba, Principles of Injunctions, 77)***". As it were, a mandatory injunction is aimed at rectifying a state of affairs which has been done and continues to inflict injury. In the instant case, the applicant contends that he has been greatly injured in his business and income because of the eviction and that he has also suffered mental anguish and harassment because of the acts of the 1st and 2nd defendants/respondents. My findings in the instant case is that the plaintiff/applicants was a mere employee of the business known as MUMU Grey Rock Bar and Restaurant and Lodging. The owners of the business have taken it over and it would not serve the interests of justice to order that the applicant be returned into the premises to run the business. In the premises I decline to order the reinstatement of the applicant into the suit premises pending the hearing and determination of this suit.

13. In the result, the whole of the applicant's application fails. The same is dismissed with costs to the defendants/respondents.

It is so ordered.

Dated and Delivered at Machakos this 14th day of May 2008.

R.N. SITATI

JUDGE

Delivered by Lenaola J

Delivered in the presence of

No appearance for plaintiff/applicant

Mr. Mutinda for defendants/respondents

I. LENAOLA

JUDGE