



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

Civil Appeal 333 of 2008

ANTONY MBUGUA KIMARI..... APPELLANT

VERSUS

LIVINGSTONE MAGANJO KIMARI.....RESPONDENT

R U L I N G

By a chamber summons dated 8th July, 2008, said to be brought under Section 3A, 63e and Order XLI Rule 4 of the Civil Procedure Rules, Antony Mbugua Kimari the appellant herein, seeks orders as follows: -

- (1) That this application be certified urgent and be heard exparte in the first instance and thereafter on a date fixed by the Court.
- (2) that the appellant be and is hereby granted leave to appoint the firm of Agina & Associates Advocate to act for him herein and in the subordinate court instead of Wandugu Mwaura & Co. Advocates.
- (3) That appellant be and is hereby reinstated in the suit premises pending the hearing and determination of this appeal.
- (4) That pending the hearing and determination of this appeal the respondent by himself, agents and or servants be and is hereby restrained from interfering with the appellant's quiet occupation and operating a Bar and Restaurant on Plot No. Gathukeini E0314.
- (5) That the costs of this application be to the appellant.
- (6) That there be such other or further orders as the Honourable Court deems fair and expedient to grant.

Prayers (1) and (2) have already been dealt with, a consent having been signed allowing the firm of Agina and Associates to take over the matter in place of appellant's former advocates. Primarily, the appellant is now pursuing prayer Nos. (3), (4) and (5).

The appellant has filed an appeal against the order of the Senior Principal Magistrate, Kangema Law Court in which the magistrate held that he had no jurisdiction to hear the suit filed by the appellant against the respondent as the matter was a tenancy dispute which should be dealt with by the Business Premises

Rent Tribunal. The appellant contends that the relationship between the appellant and the respondent is that of brothers and not landlord and tenant and that the respondent is a trespasser in the appellant's business. The appellant maintains that he is suffering financial loss due to the seizure of his business by the respondent. He therefore urges the court to order his reinstatement in the suit premises pending the hearing and determination of his appeal. He further urges the court to restrain the respondent, his servant or agent from interfering with the appellants quiet occupation and operations of the bar and restaurant on plot No. Gathukeini E0314.

Livingstone Maganjo Kimari the respondent has filed a replying affidavit in which he contends that he is non-suited as the suit premises i.e. Plot No. 4 Gathukeini is owned by one Florence Wanjiru Kimari. He further contends that the application is omnibus in nature, incompetent, defective and bad in law. It was further maintained that the appellant's advocate was not properly on record as no leave was granted for him to act on behalf of the appellant.

I have carefully considered this application. In effect the orders sought by the appellant are in the nature of an interlocutory mandatory injunction. Such an order can be granted by the court using its inherent jurisdiction. However, as was stated by Ringera J. in *Showind Industries Ltd vs Guardian Bank Ltd & Another (2002) 2 KLR 378*:

“An interlocutory mandatory injunction is granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straightforward. The applicant must also satisfy the court that he has a strong case with a probability of success.”

In this case, neither the appellant's supporting affidavit nor the grounds of opposition reveal any strong case such as to justify the granting of a mandatory interlocutory injunction. It is admitted by the appellant that the suit property is owned by a third party i.e. Florence Wanjiru Kimari. The respondent has produced licence and business permits for the premises which are all in the names of the 3rd party. The appellant has not filed any further affidavit to explain whether he has any better right to the business premises than the 3rd party who owns the property and in whose name the business permit is in. The appellant has therefore not demonstrated that he has a very strong and straightforward appeal as to justify the issuing of an interlocutory mandatory injunction. For these reasons, the chamber summons dated 8th July, 2008 must fail. It is accordingly dismissed with costs.

Dated and delivered this 31st day of July, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Agina for the appellant

Advocate for the respondent absent