



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Suit 43 of 2008

SAMMY KIPRUTO TONUI PLAINTIFF

VERSUS

JEREMIAH KOECH 1ST DEFENDANT

ANDREW J.A. NGETICH T/A RONBOY ANGENIES LTD 2ND DEFENDANT

RULING

APPLICATION FOR MANDATORY INJUNCTION DATED 12TH AUGUST, 2008

I: Background

1. The relationship between Sammy Kipruto Tonui (*the Plaintiff/applicant herein*) and Jeremiah Koech (*the 1st Respondent/Defendant herein*) is that of tenant/landlord.
2. The applicant had been a tenant in premises Plot No. 41 Silibwet Market since August, 2006 paying a monthly rent of Kshs. 9,000/= per month. The 1st respondent without notice closed the premises, disconnected the electricity and water and removed all the tenants' goods from the premises on the 30th April, 2008.
3. Being a protected tenant, the applicant moved the Business Premises Rent Tribunal that is established under the Landlord and Tenants (shops, Hotel and catering establishment) Act Cap 301 (*Laws of Kenya*) for protection and sought orders from the tribunal in case No. 41/2008 at Nakuru.
4. The tribunal made orders in that case that the 1st defendant be restrained from evicting the Plaintiffs and to reopen the premises. The said tribunal ordered the applicant to deposit rent into the Tribunal Court pending the determination of their case.
5. It is clear at this point that the tribunal had no powers nor jurisdiction to issue injunctive orders, whether temporary or mandatory. The 1st respondent appears to be aware of this and disobeyed the tribunal orders, the same not binding him to perform. The said 1st respondent should have moved the tribunal to set aside the said orders on grounds that the tribunal lacked any jurisdiction to issue the same. Only the High Court may issue orders of injunction against a party in a tribunal case.
6. The 1st respondent boldly proceeded to levy distress and close the tenant's premises. The tenant

came to the High Court and filed suit seeking a mandatory injunction whereby he sued the 1st respondent and the auctioneer from removing his belongings.

7. His application asked for two things, a mandatory injunction and a temporary injunction at the inter parties hearing. The defendant/ respondents took issues of this.

Application dated 12th August, 2008.

8. The Applicant was telling this Court that his livelihood laid in the distressed goods. He had gone to the tribunal for protection but despite this, his goods were duly attached.

9. As stated earlier the defendant No.1/respondent took issue of the said application. First and foremost a temporary injunction cannot be issued in a situation where the act has already been done and thus there is nothing to restrain. If on the other hand the applicant relies on the mandatory injunction he has come in by way of a Chamber Summons instead of a Notice of Motion. The respondent No. 1 relied on various case law to this point and even pointed out that mandatory injunction should not be issued and if it is, it may be so done only in the clearest situation.

10. The 1st respondent is of course correct on this line of jurisprudence and I have perused the various case law relied on by him being Kenya Breweries Ltd v. Okayo (2002) (1) EA 109 and Diamond Trust Bank (K) Ltd V Jaswinder Singh enterprises (1999) 2EA 72 being the factors to be considered on applying for a mandatory injunction.

11. For these reasons the respondent ask I dismiss this application

II: Opinion

12. It is a fact that the applicant went first to the wrong Court to seek injunctive orders. The delay saw his things being levied in distress for rent. The business premises tribunal as stated earlier had no powers to issue an injunction. To my mind the respondent was aware of this and as a result took advantage of the situation and proceeded to levy distress disobeying the tribunal orders.

13. An order of the court, which includes a tribunal if wrong must be obeyed unless set aside. The action the 1st respondent would have done is to set aside the said orders of the court before proceeding with levying distress for rent. Secondly leave to levy distress may have been required from the tribunal.

14. The applicant deposited rent in court. This should have been ascertained by the respondents before levying of distress of rent was undertaken.

15. The applicant relied on several authorities but out of these I would rely on the authority of my brother Ojwag(1) Professor Washington Jalango Okumu

versus

Boffar Ltd

HCC 649/05 (Nairobi)

Being a case similar to this one before the court. The, Hon. Judge held therein that a mandatory injunction do issue and the attached goods and chattels be refunded/returned to the applicant.

16. I find herein that the respondents are not in Court with clean hands. That they failed to follow the “*rule of law*” In achieving their goal of obtaining their rent arrears (*which is denied by the applicant*)

17. Mandatory injunction can only be issued in the clearest term. I hereby find that in this case it must be

so issued.

18. I order that:

18.1 A mandatory injunction do issue compelling the 1 and 2 respondent to unconditionally return the plaintiffs/applicant goods and chattels as outlined in the application

18.2 That the Plaintiff/applicant be restrained to the suit premises including the return of electricity and water pending the hearing of the Business Premises Rent Tribunal case No. 41/08 at Nakuru. This case is stayed till finalization of that case.

19. I award the costs of this case to the plaintiff/applicant.

DATED this 11th day of November, 2008 at Kericho.

M.A. ANG'AWA

JUDGE

Advocates

A.N. Matwere advocate instructed by M/S Matwere & Co. advocates for the Plaintiff/Applicant

J. Wanyonyi advocate instructed by M/S Walter Wanyonyi & Co. advocates for the 1st and 2nd Defendants/Respondents