



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 47 of 2007

NAFTALY MEME
PLAINTIFF/APPLICANT

VERSUS

STANELY MWITHIMBU 1ST
DEFENDANT

ISAAC GITONGA RINGERA & ELIPHELET MUGAMBI T/a VIEWLINE AUCTIONEERS.
2ND DEFENDANT

O.C.S. MERU POLICE STATION 3RD
DEFENDANT

RULING

The application before me is by way of Notice of Motion dated 24th May, 2007 for temporary and mandatory injunction. It is premised on the following grounds. That the applicant who occupied certain premises, known as plot No. Meru Municipality/Block 11/173 for 25 years was evicted by the 2nd respondent on the instructions of the 1st respondent using the 3rd respondent to effect such eviction. That the eviction was unlawful as the order upon which it was based was not properly obtained.

As a result, the applicant further avers, he has suffered tremendous loss and continue to so suffer as his stock in trade have been lost and/or destroyed.

That he had not defaulted in the payment of rent. These averments have been denied by the 1st respondent in his replying affidavit dated 5th June, 2007. In particular he has confirmed that for many years the applicant was his tenant in the suit premises.

That the tenancy was protected in terms of Cap.301 of the Laws of Kenya. That the 1st respondent gave notice of termination to the applicant as he needed the premises for his own use. The applicant made a reference to the Tribunal which was dismissed and he was given time within which to vacate the premises.

Being aggrieved by that order, the applicant filed Civil Appeal No.8 of 2006 and simultaneously also filed an application for stay of execution. The application was dismissed. Being dissatisfied again with the dismissal he filed an appeal against the dismissal. There being no order of stay, execution commenced by the 1st respondent extracting the order of the Tribunal and filing the same in the magistrate's court at Meru and thereafter warrants of attachment were issued. The applicant was then evicted from the premises on 18th May, 2007 and the premises handed over to the 1st respondent.

On 29th May, 2007 this court granted temporary order of injunction pending the hearing of this application. I have duly considered the rival arguments in this application as well as authorities cited. I have also called for and perused the subordinate court file No.CMC Misc.29 of 2006 as requested by the applicant's counsel.

The application being for injunctive orders at an interlocutory stage, the court is aware that it has not been called upon at this stage to determine the rights of the parties as that is a preserve of the court that will finally hear the suit herein.

Starting with the prayer for mandatory injunction it will be noted that the law is settled that a mandatory injunction can be issued both at interlocutory stage and at the trial. However, it will be issued at the interlocutory stage only in special circumstances and where the case is clear and the act done is a simple and summary one.

In the case of Kamau Mucuha V the Ripples Ltd. Civil Appl.No.NAI.186/1992 the Court of Appeal made reference to the following passage from the judgment of Mustill, L.J in the celebrated case of Locabil International Finance Ltd V Agro Export (1986) 1ALL ER 901 at Page 906

“The matter before the court is not only an application for a mandatory injunction but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case”

One of the main reliefs sought in the plaint is an order of mandatory injunction to compel the respondent to reinstate the applicant into the suit premises. In seeking such a relief in the present application the applicant is simply jumping the gun.

Clearly from the passage I have set out in the case of Locabil (Supra) such a relief cannot be granted at this stage. The same can only be granted after parties have been heard. That prayer must, therefore, fail.

Turning to the question of prohibitory injunction, again the law has been settled in the case of Giella V Cassman Brown & Co.Ltd(1973) EA 358 that an interlocutory injunction will issue where the applicant has established a *prima facie* case with a probability of success and only where the applicant stands to suffer irreparable loss which cannot be compensated by an award of damages, where the court is in doubt the application will be decided on a balance of convenience.

On the *prima facie* case, there is no dispute that the applicant was evicted from the suit premises. The respondent has averred that after the eviction of the applicant, he (respondent) took possession and is currently using the suit premises. Those averments have not been challenged.

The applicant is seeking orders restraining the respondent from disposing, leasing, or otherwise depriving him possession and occupation of the suit premises when in fact he has been evicted.

Secondly, the applicant contends that the eviction was not effected in accordance with the laid down procedures. I have perused CMC Ms.No.29 of 2006. The order of the Tribunal was duly filed on 18th July, 2006, in which the applicant had been given upto 28th February, 2006 to vacate the suit premises.

On 15th May, 2007 the court issued a decree-or what was headed “Warrant to Give Possession”.

Without going into the merit of the suit, Section 14 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act – Cap.301 allows a party to a dispute in the Tribunal or the Tribunal itself to file a certified copy of the Tribunal's order in the Subordinate Court. Once the order is filed, the same may be enforced as a decree of the court.

The subordinate court has no other role, but to sign the resultant decree. The applicant has not

demonstrated what else the magistrate was required to do. The applicant has failed to establish the existence of a *prima facie*.

On the damages, I come to the conclusion that the applicant's loss, if any, can be quantified and the applicant compensated in damages. Besides, the balance of convenience tilts in favour of the respondent who is now in possession.

The application fails and is dismissed with costs to the respondent.

Dated and delivered at Meru this 12th day of October, 2007.

W. OUKO

JUDGE

12.10.2007

Coram:

W. Ouko, J

Mr. Omayo for Mr. Kioga

Miss Mwangi for Onyabo

C/clerk Marangu

Ruling delivered.

W. OUKO

JUDGE